Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT, MNDL-S, FFL

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- a monetary order for compensation for losses or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of double their security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord was assisted by a language advocate they selected and brought to this hearing to assist them with translation during this hearing.

As the landlord confirmed that they received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on January 3, 2019, I find that the landlord was duly served with this package in accordance with section 89 of the *Act.* As the tenant confirmed that they received a copy of the landlord's dispute resolution

hearing package sent by the landlord by registered mail, I find that the tenant was also served with the hearing package in accordance with section 89 of the *Act*. Since the landlord confirmed that they had received a copy of the tenant's written evidence package by registered mail, I find that the tenant's written evidence was served in accordance with section 88 of the *Act*. The landlord and their language advocate testified that the landlord sent the tenant a copy of their written evidence by registered mail on February 27, 2019; this package was subsequently returned to the landlord as unclaimed by the tenant. Although the tenant said that they did not receive the landlord's written evidence package, I find that this package was sent to the correct mailing address. After checking with Canada Post's Online Tracking System, I confirmed that the landlord had sent this written evidence to the tenant as declared during the hearing. Although I accept that the tenant was deemed served with the landlord's written and photographic evidence package on March 4, 2019, the fifth day after its registered mailing, I advised the parties that I could not consider pages 37 to 46 of the one of the landlord's package nor pages 1 to 6 of the other package or an invoice from the landlord's plumber as this evidence was illegible. These pages were of such poor quality that nothing of value could be discerned from the photographs or the invoice.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for losses and damages arising out of this tenancy? Is the tenant entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary award requested? Is the tenant entitled to a monetary award equivalent to double the value of their security deposit as a result of the landlord’s failure to comply with the provisions of section 38 of the *Act*? Are either of the parties entitled to recover their filing fee for this application from the other party?

Background and Evidence

This tenancy began as a one-year fixed term tenancy for an initial term from May 1, 2016 until April 30, 2017. The parties agreed that the tenant signed a second one-year fixed term for a tenancy that was to run from May 1, 2017 until April 30, 2018.

The parties agreed that the landlord's then property manager sent the tenants an emailed request to end this tenancy early and by April 1, 2018, to enable the landlord's son to reside in the rental unit. The parties agreed that no hard copy of this email was

sent to the tenants nor was the notice to end tenancy completed on an approved Residential Tenancy Branch (RTB) form. As the tenants considered themselves to have received a 2 Month Notice to End Tenancy for Landlord's Use of Property (a 2 Month Notice), they sent the landlord's property manager (or the landlord) an email advising that they were intending to vacate the rental unit on April 1, 2018, instead of April 30, 2018, the end date of their fixed term. The parties agreed that the tenants did not issue any written notice to end their tenancy early. The parties agreed that they subsequently entered into an agreement whereby the tenants remained in the rental unit an extra day than they said they were going to, eventually leaving the keys for the landlord to be discovered by the landlord on April 2, 2018.

The tenant's application for a monetary award of $4,400.00 included the following items:

Item	**Amount**
Compensation for their Payment of the Last Month's Rent as a result of having received a Notice to End Tenancy for Landlord's Use of Property	$2,100.00
Return of Double their Security Deposit due to Landlord's Failure to Comply with the Provisions of s. 38 of the *Act* (2 x $1,050.00 = $2,100.00)	2,100.00
Return of Key Fob Deposit	200.00
Total Monetary Order Requested	**$4,400.00**

Although the landlord's application was for a monetary award of $1,642.35, the following items listed in their written evidence was somewhat difficult to follow and totalled $2,057.85:

Item	**Amount**
Tenant's Share of $1,400.00 Painting Costs	$500.00
Unpaid Rent - 1 Day Overholding -April 1, 2018	70.00
Cleaning Blinds	64.50
Cleaning Charges	187.00
Reinstate 2 Blinds	58.00

Repair Microwave	554.25
Plumbing Repairs - June 9, 2017	208.85
Keys Deposit/Replacement	200.00
Reimbursement for Incident of Car Damaging Gate of Strata Garage	215.25
Total Claimed by Landlord (Actual Total of Above Items = $2,057.85)	**$1,642.35**

The parties agreed that a joint move-in condition inspection occurred on May 1, 2016. They also agreed that a joint move-out condition inspection occurred at the end of the tenancy although the landlord said that this inspection happened slightly before the tenancy ended. On both occasions, the tenant gave undisputed sworn testimony that the landlord was represented by the landlord's then property manager. While the landlord testified that a report of both inspections was created, they provided no copy of those inspections as part of their written evidence. The tenant and their occupant who shared the rental unit with them both testified that no reports were ever provided to the tenants and denied that any report was created or signed by them during either of these inspections.

The landlord entered undisputed written evidence and sworn testimony that the tenant had given their written agreement to allow the landlord to retain $429.50 from the security deposit for this tenancy. This amount
was to compensate the landlord for the second, third, fourth and fifth of the items outlined above in the landlord's claim plus a $50.00 allowance for repair and painting of damaged areas noted in the first item in the landlord's claim.

The tenant maintained that they had provided the landlord with their forwarding address a number of times between the end of this tenancy and their application for a return of double their security deposit. At the hearing, the landlord confirmed that they received the tenant's forwarding address before the end of April 2018. They also provided written evidence that they had received the tenant's forwarding address well before the date of their February 12, 2019 application to retain the remainder of the tenant's security deposit.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Analysis- Tenant's Application

The tenant's claim for recovery of the equivalent of one month's rent from the landlord relies on section 51(1) of the *Act*, which reads as follows:

51 (1)*A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or after the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement...*

Section 49(3) of the *Act* provides the statutory authority whereby a landlord may end a tenancy for landlord's use of the property under the following circumstances:

(3)*A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.*

However, section 49 of the *Act* requires that "a notice under this section must comply with section 52 *[form and content of notice to end tenancy]*. Section 52 of the *Act* reads in part as follows:

In order to be effective, a notice to end tenancy must be in writing and must...

(a) be signed and dated by the landlord or tenant giving the notice,
(b) give the address of the rental unit,
(c) state the effective date of the notice,
(d) except for a notice under section 45(1) or (2) [tenant's notice], state the grounds for ending the tenancy, and

(e) when given by a landlord, be in the approved form.

In this case, the parties agreed that the only notification to end this tenancy that either party gave to one another was by way of emails and without any use of the approved RTB form for ending a tenancy pursuant to section 49 of the *Act*. Although no formal notice to end tenancy was given by the landlord or their then property manager to the tenant, the tenant reacted as if one had been given and proceeded to issue their own notice to end the tenancy early, apparently pursuant to section 50(1) of the *Act*. They did so because they had been able to locate alternate accommodation and wished to move there on April 1, 2018, prior to the April 30, 2018 effective date apparently cited in the email they had received from the landlord's then property manager.

Section 50(1) reads in part as follows:

> ***50*** *(1)If a landlord gives a tenant notice to end a periodic tenancy under section 49 [landlord's use of property]..., the tenant may end the tenancy early by*
>
> > *(a)giving the landlord at least 10 days' written notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice, and*
> >
> > *(b)paying the landlord, on the date the tenant's notice is given, the proportion of the rent due to the effective date of the tenant's notice, unless subsection (2) applies.*
>
> *(2)If the tenant paid rent before giving a notice under subsection (1), on receiving the tenant's notice, the landlord must refund any rent paid for a period after the effective date of the tenant's notice.*
>
> *(3)A notice under this section does not affect the tenant's right to compensation under section 51 [tenant's compensation: section 49 notice].*

The lack of proper notification to end this tenancy was further complicated by the fact that the tenant had signed a second one-year fixed term tenancy agreement that was not scheduled to end until April 30, 2018. Thus, in addition to the notice to end of tenancy having been provided to the tenants without the required RTB approved form for doing so, the landlord had no legal right to end this tenancy before April 30, 2018, after having signed a fixed term tenancy agreement with the tenant that did not end until April 30, 2018. For their part, the tenants also had no legal right to end their tenancy

prior to April 30, 2018, nor did they have the legal right to obtain the equivalent of one month's rent from the landlord pursuant to section 50(1) of the *Act*, as this was a fixed term tenancy requiring their payment of rent until the end of their fixed term, April 30, 2018. Compounding the problem was the tenant's inability to vacate the rental unit on March 31, 2018, or April 1, 2018 by 1:00 p.m., as they did not surrender vacant possession until April 2, 2018.

Under these circumstances, I find that neither party adhered to the *Act* with respect to the ending of this tenancy. The tenant agreed that the landlord could keep $70.00 for overholding rent from their security deposit due to their inability to move by the end of the month. For this reason, I find that the sole rental entitlement that either party should have with respect to the end of this tenancy is the $70.00 from the security deposit that the tenant had agreed the landlord was entitled to receive, the equivalent of one day's overholding rent for this tenancy. I find that the informal nature of the sequence of events and the agreement regarding the overholding is more characteristic of a mutual agreement to end this tenancy as opposed to any formal measures having been taken by either party that would otherwise have been difficult to initiate given that the fixed term was not scheduled to expire until April 30, 2018. I dismiss the tenant's application for a monetary award of $2,100.00 for the equivalent of one month's rent as I find that this tenancy did not end as a result of any legal notice to end this tenancy for landlord's use pursuant to section 49 of the *Act*.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. Without a copy of the joint move-in or move-out condition inspection reports presented as evidence by either party, I find the sworn testimony of the tenant and the occupant more credible than that of the landlord with respect to their claim that no reports of these inspections were created nor provided to the tenants.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy.

Section 23 of the *Act* reads in part as follows:

> ***23*** *(4) The landlord must complete a condition inspection report in accordance with the regulations.*

(5) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

Section 24(2) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

24 *(2) The right of a landlord to claim against a security deposit ... for damage to residential property is extinguished if the landlord*

(a) does not comply with section 23 (3) [2 opportunities for inspection]*,*

(b) having complied with section 23 (3), does not participate on either occasion, or

(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...

Sections 35and 36 of the *Act* establish similar provisions regarding a joint move-out condition inspection and the report to be produced by the landlord regarding that inspection.

As noted during the hearing, section 38 of the *Act* requires the landlord to either return all of a tenant's deposit or file for dispute resolution for authorization to retain a deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur or if the landlord applies to retain the deposit within the 15 day time period but the landlord's right to apply to retain the tenant's deposit had already been extinguished, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* equivalent to the value of the deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all of the deposit to offset damages or losses arising out of the tenancy.

In this case, the tenant did give their written agreement to allow the landlord to retain $429.50 of their security deposit; however, did not give their permission to retain the remaining portion of that deposit. I find that the landlord did not apply to keep the remaining portion of the tenant's security within the required 15 days of receiving the tenant's forwarding address and also the landlord's right to retain the deposit had already been extinguished in accordance with section 24(2) and 35(2) of the *Act* due to

the failure to provide the tenant with a copy of inspection reports, even if such reports were created.

I allow the tenant a monetary award of $2,100.00, constituting double the value of the security deposit, less the $429.50, the tenant agreed to allow the landlord to keep to satisfy some of the amounts claimed by the landlord. This results in a monetary award of $1,670.50, pursuant to section 38 of the *Act.*

As there is undisputed testimony and evidence that the landlord has also retained the tenant's $200.00 key deposit, I also issue a monetary award in this amount to the tenant.

As the tenant has been successful in most of their application, I allow them to recover their $100.00 filing fee from the landlord.

Analysis - Landlord's Application

In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

In their written evidence and in their sworn testimony, I found the landlord's evidence was lacking in detail and somewhat difficult to follow, despite the best efforts of their language advocate to assist with this process. For example, most of the landlord's photos were of such poor quality that they were of little assistance to the landlord's position. Much of the landlord's evidence with respect to the painting charge involved an allegation that the tenant was responsible for an infestation of ants within the rental unit. The claim for plumbing repairs relied solely on the landlord's claim that the plumber told them that the tenants were responsible for the damage.

At the hearing the landlord said that the rental unit was painted shortly before the tenancy began. The tenant and the occupant testified that the walls were only slightly damaged during the course of this tenancy, their reason for agreeing to allow the landlord to keep $50.00 from the security deposit for this tenancy instead of the $500.00 claimed by the landlord. The tenant said that the only reason the landlord decided to repaint the premises was because their son was intending to move into the rental unit; they disputed the real need for repainting.

In considering this portion of the landlord's claim, I have taken into account RTB Policy Guideline 40, which establishes that the useful life of an internal paint job in a rental property is four years. This tenancy ended approximately two years after the landlord said the premises were last painted. Without any record of condition inspection reports at the beginning and end of the tenancy and without photographs of a quality that could be useful for the purposes of the landlord's application, I find that the landlord has provided insufficient evidence to demonstrate entitlement to a monetary award for painting, beyond the $50.00 already agreed to by the tenant. I dismiss the remainder of this portion of the landlord's application for reimbursement for painting costs.

The landlord's claim for the repair of the microwave was based on photographs that were of an adequate quality as well as estimates obtained for the repair of the microwave. At the hearing, the landlord testified that the microwave oven was at least 10 years old. Given the age of this microwave, I find that any damage that occurred was to be expected over time as the microwave was quite likely at the end of its useful life. I dismiss this portion of the landlord's application.

At the hearing, I noted that the copy of the plumbing invoice for the June 9, 2017 repair of the toilet in the rental unit referred to in the landlord's written evidence was of such poor quality as to be illegible. The landlord said that since applying for dispute resolution they had obtained a more legible copy from the plumbing company. The landlord's language advocate read into the record of this hearing the wording of the invoice. Although the landlord alleged that the plumber had told them following the June 9, 2017 repair, that the plug in the toilet was attributable to an object being placed in the toilet by the tenants, the invoice contained no such report of the reason for the toilet plug. The tenant testified that the plumbing repairs included in the landlord's claim were not their responsibility as this toilet problem and a sink clog were not attributable to them. As I find the landlord has provided insufficient evidence to demonstrate that a plumbing repair undertaken almost a year before this tenancy ended was attributable to any lack of maintenance or care by the tenant, I dismiss this part of the landlord's application.

At the hearing and in their written evidence, the landlord maintained that the keys provided by the tenant at the end of this tenancy did not open the letter box. The landlord claimed for the locksmith charges to replace the locks on the letter box and for the entrance door to the rental unit. With respect to the landlord's claim for the replacement of the lock to enter the rental unit, section 25(1) of the *Act* clearly establishes that the rekeying of locks at the end of a tenancy to ensure that a new

tenant, in this case the landlord's son, had sole access to the rental unit is the landlord's responsibility. The landlord confirmed that they had access to the rental unit as they used their own key to enter the rental unit after the tenant vacated the premises. I dismiss the landlord's application to recover the cost of rekeying the door of the rental unit.

The tenant testified that they never really used the key for the letter box in the rental unit as they directed all correspondence to their father's house nearby. Since the tenant did not know if the key they left for the letter box worked properly and the landlord gave undisputed sworn testimony that they had provided the tenant with the only key to that letter box at the beginning of this tenancy, I allow the landlord's application to recover the $100.00 rekeying costs.

The landlord provided written evidence regarding an incident in which the occupant's vehicle damaged the parking gate of the garage where cars are parked in this strata building. At one point, the strata company had asked the landlord to absorb the $215.25 in damage to the gate as a tenant or occupant in the landlord's strata unit had caused this damage with their car. Although it took a long time for this matter to be settled with the insurer, ICBC, the occupant gave undisputed sworn testimony that the occupant eventually made arrangements that were satisfactory to the insurer. As the landlord has not absorbed the cost of repairing the damaged gate, I find that the landlord is not entitled to the monetary award they have claimed for this item.

Since the landlord has been unsuccessful in almost all of their application, I make no order allowing them to recover their filing fee from the tenant.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to recover a payment for the landlord's retention of all of their security deposit, less the amount the tenant allowed the landlord to keep, to recover their key fob deposits and their filing fee, less the landlord's costs in having to rekey the letter box:

Item	Amount
Return of Double their Security Deposit due to Landlord's Failure to Comply with the Provisions of s. 38 of the *Act* (2 x $1,050.00 = $2,100.00 - $429.50 = $1,670. 50)	$1,670.50
Return of Key Fob Deposit	200.00
Rekeying of Letter Box	-100.00
Tenant's Filing Fee	100.00
Total Monetary Order	**$1,870.50**

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 12, 2019

Residential Tenancy Branch