Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL, MNDCL, FFL, MNSD, FFT

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). On April 12, 2019, the landlord completed their application for:

- a monetary order for damage to the rental unit or the property and for compensation from the tenant for other money owed pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The landlord subsequently amended the original application on April 18, 2019, adding a breakdown of the details of their monetary claim for $15,345.00, in which they included reference to the requested authorization to retain the tenant's security deposit.

On April 29, 2019, the tenant applied for:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover the 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.

As the tenant confirmed that they received the landlord's 1 Month Notice to End Tenancy for Cause (1 Month Notice) on RTB Form RTB-33, I find that the landlord's 1 Month Notice was duly served to the tenant on January 31, 2019.
As both parties confirmed receipt of one another's dispute resolution hearing packages and written and photographic evidence, I find that both parties were duly served with these packages in accordance with section 88 and 89 of the *Act.*

During the early portions of this hearing, the landlord confirmed that the only loss that they had actually experienced that formed a portion of their claim for a monetary award of $13,000.00 for

damage was for approximately $270.00 in items they had purchased prior to the end of this tenancy. As the landlord's true expenditures and losses regarding the alleged damage were still unknown at this time and were based solely on an estimate received by an environmental consulting firm, the landlord withdrew their application for damage at this time. This portion of the landlord's claim is hereby withdrawn. As indicated at the hearing, the landlord remains at liberty to reapply for damage once the landlord's repair work has been completed and true amounts of losses have been determined, provided that application is filed with the RTB within the time frames established pursuant to the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for other money owed by the tenant to the landlord? Is the tenant entitled to a monetary award equivalent to double the value of their deposits as a result of the landlord's alleged failure to comply with the provisions of section 38 of the *Act*? Are either of the Applicants entitled to recover their filing fees for their applications from the Respondents to their applications?

Background and Evidence

On May 12, 2015, the tenant signed a Residential Tenancy Agreement (the Agreement) with the former owner of this property. The tenant entered into written evidence a partial copy of the Agreement. Monthly rent was set at $1,500.00, payable in advance on the first of each month. The parties agreed that the monthly rent had increased to $1,595.00 by the time this tenancy ended. The tenant paid a $750.00 security deposit on May 12, 2015. During this tenancy, the tenant also paid a $300.00 pet damage deposit, which the landlord has returned to the tenant in its entirety. The parties agreed that the landlord has not returned any portion of the tenant's security deposit.

The current landlord purchased this property from the former owner of this property on or about November 21, 2015.

The tenant entered into written evidence a copy of the 1 Month Notice. Although this Notice used the proper Form RTB-33 for ending a tenancy for cause, the reference to it being a 1 Month Notice for Cause at the top of the 1 Month Notice was missing from the copy provided to the tenant. As such, the tenant believed that the title of this form was a "One Month Notice to End Tenancy for End of Employment", which appears below the title for a One Month Notice to End Tenancy for Cause on the standard Form RTB-33. The parties both agreed that the tenant never worked for the landlord. Although the tenant believed initially that the landlord had used the wrong RTB form for ending this tenancy, the parties agreed at the hearing that the reason stated on the 1 Month Notice identified a reason that would have enabled the landlord to obtain an end to this tenancy for cause. However, the parties also agreed that the tenant never did sign the Mutual Agreement to End Tenancy (the Mutual Agreement), which the landlord signed

on January 31, 2019, and provided to the tenant to sign when the tenant objected to the 1 Month Notice. The parties testified that the tenant's failure to abide by the terms of their Mutual Agreement was the reason for ending the tenancy cited on the 1 Month Notice. The 1 Month Notice required the tenant to vacate the rental unit by May 31, 2019.

The landlord's amended claim for a monetary award of $15,345.00, plus the recovery of the landlord's $100.00 filing fee, included the following items identified in the landlord's Monetary Order Worksheet:

Item	**Amount**
Damage- Removal of Oil Contamination	$13,000.00
Damage Deposit	750.00
1 Month's Loss of Rental Income due to Tenant Moving out 2 Months Early	1,585.00
Less Security Deposit	-375.00
Total of Above Items	**$15,335.00**

At the hearing, the landlord confirmed that there was no mention of the landlord's intention to retain the tenant's security deposit in the original application for dispute resolution, and that the first mention of the landlord's request to keep the security deposit was by way of the Monetary Order Worksheet the landlord attached to the amended application for dispute resolution.

The tenant applied to recover their $750.00 security deposit plus the recovery of their $100.00 filing fee.

At the hearing, the parties agreed that the tenant vacated the rental unit on March 31, 2019. They also agreed that the tenant paid rent for March 2019, but did not pay any rent for April 2019. The parties agreed that the tenant never provided the landlord with anything in writing advising the landlord that the tenant was planning to vacate the rental unit by March 31, 2019, two months prior to the effective date for ending this tenancy identified on both the 1 Month Notice and the Mutual Agreement, the latter of which was not signed by the tenant.

The landlord said that they realized that the tenant was beginning to move items out of the rental unit by the last few weeks in March. The landlord referred to a March 23, 2019 text message that they sent to the tenant asking about the tenant's intentions with respect to vacating the rental unit. The tenant said that once they received the landlord's 1 Month Notice and the Mutual Agreement, they realized that they would have to end their tenancy and find another location to live. The tenant said that by mid-March, the landlord was aware that the tenant was moving by the end of March. The tenant referred to communication with the landlord on March 20, 2019 to that effect.

The landlord gave undisputed sworn testimony that as soon as the tenant surrendered the keys, the landlord began efforts to re-rent the premises to new tenants. The landlord said that they placed advertisements on popular rental websites in early April. The landlord said that they were able to re-rent these premises to a friend on or about April 21, 2019, for a tenancy that began on May 1, 2019. When asked by the tenant's legal counsel as to whether the landlord's friend could have moved in any earlier than May 1, 2019, the landlord replied that it was not possible for the friend to move into the rental unit any earlier than May 1, 2019. As the landlord experienced the loss of $1,595.00 in rent for the month of April 2019, the landlord requested the recovery of this amount from the tenant.

The tenant's legal counsel referred to paragraph 44(1)d) of the *Act*, and correctly noted that both the landlord and the tenant had made errors in the way that this tenancy ended. The tenant's legal counsel also referenced a number of other sections of the *Act* and RTB Policy Guideline 3, in support of their assertion that this tenancy ended on March 31, 2019. Some of these references were relevant, some such as the tenant's legal counsel's reference to overholds, apparently in Policy Guideline 3 appeared to have little bearing to whether the tenant was responsible for the landlord's loss of rent for April 2019. The tenant's legal counsel alleged that, as this was not a fixed term tenancy, the tenant's responsibility for rent for April 2019 was over once the landlord conducted the joint move-out condition inspection with the tenant and accepted the tenant's keys to the rental unit. The tenant's legal counsel maintained that the landlord had "acquiesced" in allowing this month-to-month tenancy end when they agreed to participate in the joint move-out condition inspection of the premises on March 31, 2019.

With respect to the issue of the deposits, the parties agreed that the landlord returned the tenant's $300.00 pet damage deposit within 15 days of receiving the tenant's forwarding address at the time of the joint move-out condition inspection on March 31, 2019.

The parties agreed that the tenant had never given the landlord authorization to retain any portion of the tenant's security deposit, nor had the tenant agreed to waive any right to claim against that deposit.

Analysis - Landlord's Application to Recover Unpaid Rent for April 2019

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. In this case, the onus is on the parties applying for monetary awards to demonstrate that there has

been a contravention of the *Act*, the *Regulation* or the Agreement by the Respondents and that the Applicants have suffered losses for which the Respondents are responsible.

As much of the written evidence supplied by the tenant's legal counsel and the photographic and written evidence of the landlord pertained to the landlord's application for damage, and that part of the landlord's application has been withdrawn, I will focus solely on the two remaining issues before me, unpaid rent for April 2019 and the return of the security deposit.

I should first note that both the landlord and the tenant have been remiss in their responsibilities pursuant to the *Act*. The landlord issued a 1 Month Notice that was likely inadvertently misleading in that the uppermost portion of Form RTB-33 was missing, such that it led to the tenant's confusion as to how this tenancy could be ended for an End to Employment, which never existed. Although neither party chose to enter into written evidence a copy of the second page of the 1 Month Notice, their sworn testimony revealed that the reason identified on the 1 Month Notice for ending this tenancy was the landlord's claim that the tenant had failed to abide by the terms of their Mutual Agreement. This reason too was problematic, as the landlord confirmed the tenant's sworn testimony that the tenant never actually signed the Mutual Agreement. Thus, there is evidence that the Mutual Agreement, was by no means "mutual" since only the landlord signed that document. On the tenant's part, the tenant did not apply to cancel the 1 Month Notice they received. Based on the tenant's sworn testimony, it would appear that the tenant proceeded as if they could move out at any point prior to the effective date of the 1 Month Notice, May 31, 2019, without providing the landlord with written notice to end this tenancy. While the tenancy clearly ended on March 31, 2019, there is undisputed sworn testimony that no written notice to end this tenancy earlier than May 31, 2019 was provided by the tenant and that by even mid-March 2019, the landlord was still unaware that the tenants planned to end their tenancy more than two months before the date cited in the landlord's 1 Month Notice.

Section 47 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the RTB. I find that the tenant has failed to file any application for dispute resolution within the ten days of service granted under section 47(4) of the *Act*. Had they done so, and based on the evidence before me, it is quite likely that the landlord's 1 Month Notice, printed as it was without the proper header referencing it being a 1 Month Notice for Cause, and citing a reason that could not be substantiated based on the absence of a Mutual Agreement signed by both parties, would have been dismissed. However, as the tenant did not apply to cancel the landlord's 1 Month Notice, I find that the tenant is conclusively presumed under section 47(5) of the *Act* to have accepted that the tenancy ended on the effective date of the 1 Month Notice, in this case, May 31, 2019.

I note the following wording of section 50(1) of the *Act* which enables tenants receiving 2 Month Notices to End Tenancy for Landlord's Use of Property (2 Month Notices) the opportunity to

provide their landlords with 10 Days of written notice of their intention to end their tenancy prior to the effective date cited on the 2 Month Notices.

Tenant may end tenancy early following notice under certain sections

> ***50*** *(1) If a landlord gives a tenant notice to end a periodic tenancy under section 49 [landlord's use of property] or 49.1 [landlord's notice: tenant ceases to qualify], 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.*

If the tenants provide this written notice to the landlord, they are not required to pay rent from the date of their written notice to the landlord until the effective date identified by the landlord on the 2 Month Notice. There is no such equivalent provision in section 47 of the *Act* that would allow tenants to avoid the standard notice periods for tenants to provide notice to their landlords as to their intention to end their tenancy.

I found the assertions made by the tenant's legal counsel interesting, particularly the claim that the landlord had somehow acquiesced in allowing this tenancy to end on March 31, 2019, by agreeing to participate in the joint move-out condition inspection that day. With all due respect, I find that the landlord's agreement to participate in a joint move-out condition inspection has nothing to do with whether the landlord was waiving the right to claim for unpaid rent that was to become owing the following day in any type of tenancy, month-to-month or fixed term. This is a feature of the provisions of sections 35 and 36 of the *Act*, which require a landlord to schedule a joint move-out condition inspection. Failure to do so would have exposed the landlord to an application by the tenant for a recovery of double the tenant's security deposit, an issued dealt with below, on other grounds.

Section 45(1) of the *Act* requires a tenant to end a month-to-month (periodic) tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for April 2019, the tenant would have needed to provide their notice to end this tenancy before March 1, 2019. Section 52 of the *Act* requires that a tenant provide this notice in writing.

Section 26(1) of the *Act* establishes that “a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the

tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent."

There is undisputed evidence that the tenant did not pay any rent for April 2019. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises as soon as possible following their receipt of the tenant's keys to the rental unit. In the absence of any written notice to end this tenancy earlier than the May 31, 2019 date cited in the landlord's 1 Month Notice, the landlord would have been reckless in attempting to locate tenants prior to receiving vacant possession of the premises on March 31, 2019, without any form of written notice to end this tenancy from the tenants earlier than the May 31, 2019 date identified in the 1 Month Notice. As the landlord has provided undisputed sworn testimony that they advertised the availability of the rental unit shortly after they obtained possession of the rental unit and were successful in entering into an agreement on April 21, 2019, to re-rent the premises as of May 1, 2019, I am satisfied that the landlord has discharged the duty under section 7(2) of the *Act* to minimize the tenant's exposure to the landlord's loss of rent for April 2019.

In reaching my decision, I can assure the tenant that I have considered RTB Policy Guideline 3, as requested by the tenant's counsel. I find that this Policy Guideline has little meaningful bearing on the matter before me where a tenant has ended a tenancy without providing any written notice to do so.

For the reasons cited above, I allow the landlord's application for a monetary award of $1,595.00, the amount of rent that would have been owed by the tenant for April 2019, had the tenancy continued.

Analysis - Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, as the tenancy ended on the same date as the tenant provided their forwarding address in writing to the landlord, the landlord had 15 days

after March 31, 2019 to take one of the actions outlined above. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant." As there is no evidence that the tenant has given the landlord written authorization at the end of this tenancy to retain any portion of the security deposit for this tenancy, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

In this case, the landlord's original application, filed with the RTB within the allowable 15 day period for seeking authorization to retain the security deposit, made no mention of the landlord's intention to retain the tenant's security deposit. Although the landlord subsequently listed as one of the items in their monetary claim in their Monetary Order Worksheet a reference to their intention to retain the "damage deposit", this reference was only included as part of their amended application on April 18, 2019, more than 15 days after the landlord was required to apply to keep that deposit. I accept that the reference to the "damage deposit" did alert the tenant to the landlord's intention to include a request to keep the tenant's security deposit as part of the landlord's application for a monetary award, I find that this action was not taken within 15 days of March 31, 2019.

The following provisions of RTB Policy Guideline 17 would also seem to be of relevance to the consideration of this application:

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *If the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;*
- *If the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

Based on the evidence before me, I find that the landlord has neither applied for dispute resolution to seek authorization to retain the tenant's security deposit nor returned the tenant's security deposit in full within the required 15 days. The tenant gave sworn oral testimony that they have not waived their rights to obtain a payment pursuant to section 38 of the *Act* owing as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the value of their $750.00 security deposit with interest calculated on the original amount only. No interest is payable.

As both parties have been successful in their applications, both would be entitled to recover these filing fees from one another. Under these circumstances and as these filing fees offset one another, I make no order with respect to the recovery of filing fees.

Conclusion

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover unpaid rent for April 2019, less the value of the equivalent of double the tenant's security deposit for the landlord's contravention of section 38 of the *Act:*

Item	**Amount**
Unpaid Rent Owing for April 2019	$1,595.00
Less Tenant's Entitlement to a Monetary Order for the Return of Double Security Deposit as per section 38 of the Act ($750.00 x 2 = $1,500.00)	-1,500.00
Total Monetary Order	**$95.00**

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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.

The landlord's application for a monetary award for damage is withdrawn, as it is premature. The landlord is at liberty to reapply for a monetary award for damage within the time frames established pursuant to the *Act*.
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: July 19, 2019

Residential Tenancy Branch