Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1125844 BC LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- authorization to obtain a return of double their security and pet damage deposits pursuant to section 38;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

This matter was initially hear on March 26, 2019. The applicant tenants appeared at the hearing but there was no appearance on behalf of the respondent landlord. A decision and order were issued on April 1, 2019 in favour of the applicant tenants. The respondent landlord filed an application for review consideration on April 18, 2019. On April 29, 2019 the landlord's application for review consideration was granted and a new hearing was ordered. In addition, the decision and order issued on April 1, 2019 were suspended pending the new hearing. This hearing dealt with the new hearing ordered on April 29, 2019.

Both parties attended the hearing and had full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions. The landlord acknowledged receipt of the tenant's Notice of Hearing and Application for Dispute Resolution and the tenant acknowledged receipt of the landlord's notice of review hearing. Neither party raised issues of service. I find the parties were served in accordance with the *Act*.

Preliminary Issue: Landlord's request for Adjournment of Hearing

At the outset, the landlord made an application requesting an adjournment of the proceedings because a witness who landlord wanted to call was unavailable. The landlord testified that the proposed witness was flying on the day of the hearing and the witness could not testify during the scheduled hearing time. The tenants were opposed to the landlord's request for an adjournment.

Rule 7.8 of the *Residential Tenancy Branch Rules of Procedure* ("*Rules*") states that an arbitrator may adjourn a hearing. The criteria provided for granting an adjournment, under *Rule* 7.9 are:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and,
- the possible prejudice to each party.

In considering these factors, I find that an adjournment of this hearing is not warranted. I find that the unavailability of the landlord's witness does not substantially affect the landlord's right to be heard since the landlord testified that he is also able to provide the landlord's testimony regarding the circumstances of this tenancy. In addition, the landlord has provided a written statement from the proposed witness which was submitted as evidence. Accordingly, the landlord was able to submit evidence from the proposed witness even without the appearance of that witness.

In addition, I find that a further delay is unfair to the tenants. This matter was initially heard on March 26, 2019 without an appearance by the landlord. The matter was set back for a new hearing today to accommodate the landlord because of his non-appearance at the previous hearing. Both parties have a right to have their residential tenancy disputes resolved in a reasonable time period.

For the forgoing reasons, I deny the landlord's request for an adjournment.

Issue(s) to be Decided

Are the tenants entitled to the return of double their security and pet damage deposit pursuant to section 38 of that *Act*?

Are the tenants entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement to section 67 of that *Act*?

Are the tenants entitled to recover the filing fee for this application from the landlord pursuant to section 72 of that Act?

Background and Evidence

The parties entered into a written fixed term tenancy agreement starting February 15, 2018 and ending February 15, 2019. The monthly rent is $1,650.00 and is payable on the first of each month. The tenant testified that she paid security deposits and pet damage deposits of at least $1,100.00. The tenant testified that believes the deposits were actually higher but she is only claiming $1,100.00. The tenancy agreement stated a security deposit of $825.00 and a pet damage deposit of $275.00.

The tenancy agreement included an addendum which stated, “Tenant is accepting property ‘As is where is’”.

The tenants testified that she complained in writing to the landlord that the dishwasher was not functioning which the landlords did not repair. The landlord testified that the dishwasher was not included in the tenancy agreement and the landlord pointed out that the dishwasher was not explicitly identified as an included service or facility in the tenancy agreement.

The tenants testified that they discovered moisture problems on the lower level of the property in September 2018. The tenant testified that the floor on the lower level was damp with moisture and there was mold, mushrooms and silverfish present. The tenants testified that they verbally complained to the landlord multiple times. The tenants testified that the landlord said that they were unable to make the repairs regarding the moisture and suggested the tenants move out.

The landlord testified that the tenants and the landlord mutually agreed to end the tenancy. The landlord testified that the parties agreed to end the lease and release each other from obligations under the lease and the tenants would be not have to pay rent for

November 2018. The tenants testified that there no was no agreement. Rather, they testified that the landlord asked them to vacate the rental unit.

The parties agreed that the tenants left the rental unit on either November 19 or 21, 2018. The tenants testified that the landlord tried to get the tenants to sign a written mutual end to tenancy form which included release of liability terms. The tenants testified that they refused to sign the mutual end to tenancy.

The tenants testified that the sent they their forwarding address to the landlord on November 29, 2019 by text message. The landlord testified that he did not receive the tenants' text message and he was not aware of the tenants' forwarding address until the landlord received the tenants' evidence from this dispute application. The landlord testified that he did not use this phone number for tenancy issues. Rather, the landlord testified that he used a different phone number for tenancy purposes which was referenced in the tenancy agreement as the landlord's contact information for service. However, the landlord did acknowledge that he did use this phone number some text messages exchanged with the tenants. The image provided of the tenants' text included two text messages sent from the landlord to the tenants. The landlord admitted that he sent those texts.

The landlord testified that there was no mold in the rental unit and the lower level of the property was dry when the tenant's moved out.

The tenants submitted a bylaw enforcement officer's report from November 28, 2018 which stated that there appeared to be water damage to drywall and some black areas on the drywall. The report stated that "it is difficult to say that the black areas on the drywall are mold."

Tenants' Damages

The tenants claimed $15,191.61 in damages, as follows:

Item	Amount
Tenant's vacation pay	$1,173.00
Hiring Movers	$700.00
Truck rental	$277.00
Moving Supplies (boxes, bubbles wrap)	$120.61
Damages for breaking lease (3 month's rent)	$4,950.00
Difference in rent between rental unit and new accommodation ($550.00 x 6 months)	$3,300.00
Loss of use of 1/2 the rental unit (50% reduction of three months' rent)	$2,475.00
Return of double the deposits	$2,200.00
Total	**$15,195.61**

The tenants had originally also sought compensation for food costs related to moving by the tenants withdrew that claim during the hearing.

The tenants sought reimbursement of moving costs, including the hiring of movers, food for people who assisted the tenants in packing and moving, the cost of renting a moving truck, and packing supplies. The tenants provided receipts to support the figures in the table above associated with the claimed moving expenses.

The tenants claim compensation for the time tenants had to take off work to prepare for the move. Tenants testified that they needed to use $1,173.00 in vacation pay to move.

The tenants claim $4,950.00 in damages stemming from the landlord allegedly breaking the lease. They testified that they had three months left on the lease, and, since the landlord broke the lease, it should pay the tenants the equivalent of three month’s rent.

The tenants claim $3,300.00 in damages, representing the difference in monthly rent of $550.00 between the rental unit ($1,650.00), and the tenant’s new accommodation ($2,200.00). The tenants testified that, as a result of the landlord’s breaking the lease, the only accommodation they could find was more expensive.

The tenants claim $2,475.00 in damages for the landlord’s breach of the *Act* for failure to repair or maintain the lower floor of the rental unit. The tenants allege that they were deprived of the use of the lower floor due to the condition it was in for the duration of the tenancy. They seek a retroactive reduction in monthly rent of 50% ($825.00) for three months.

The tenants also claimed $2,200.00 pursuant to section 38 of the *Act*, representing an amount equal to double their security and pet damage deposit, as the landlord has failed to return these deposits to the tenants or make a claim against them as required by the Act.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide sufficient evidence to establish all of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

In this case, the onus is on the tenants to prove entitlement to a claim for a monetary award. The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The tenants has made claims for the following: damages from the landlord's alleged termination of the tenancy agreement; damages for loss of use and enjoyment of the rental unit during the tenancy; and, a demand for a return of double the security deposit. I will address each of these claims separately.

Damages From The Landlord's Alleged Termination Of the Tenancy agreement

I find that the lower level of the rental unit did have moisture mold and mushrooms which was not compliant "….with the health, safety and housing standards required by law" pursuant to section 32 of the *Act*. However, I do not find that the landlords ended the tenancy agreement by failing to maintain such standards. Rather, I find that tenancy ended by the tenants vacating the rental unit.

The manner in which a tenancy can end set forth in section 44(1) of the Act which states:

How a tenancy ends

44 (1)A tenancy ends only if one or more of the following applies:

(a)the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 *[tenant's notice]*;

(i.1) section 45.1 *[tenant's notice: family violence or long-term care]*;

(ii) section 46 *[landlord's notice: non-payment of rent]*;

(iii) section 47 *[landlord's notice: cause]*;

(iv) section 48 *[landlord's notice: end of employment]*;

(v) section 49 *[landlord's notice: landlord's use of property]*;

(vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii) section 50 *[tenant may end tenancy early]*;

(b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended;

(g) the tenancy agreement is a sublease agreement.

According to section 44, a landlord can end a tenancy by giving notice or by an agreement in writing. There was no evidence presented to establish that the landlord gave notice to the tenants to end the tenancy. The tenants testified that the landlord asked the tenants to leave. However, I do not find a verbal request to leave the rental unit to be a notice to end tenancy pursuant to the *Act*. Section 52 of the *Act* mandates multiple form and content requirements for a notice to end tenancy which are stated as follows:

52 In order to be effective, a notice to end a 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,
(d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
(e) when given by a landlord, be in the approved form.

The verbal request from the landlord did not satisfy any of these form and content requirements. I find that the landlord did not end the tenancy pursuant to a notice to end tenancy.

There is conflicting testimony regarding whether the parties had an agreement to end the tenancy. The landlord asserted that there was an agreement to end the tenancy and the tenants denied the existence of an agreement. However, section 44(1)(c) states that a tenancy can only end by agreement if the agreement was in writing. In this matter, it is immaterial whether the parties had a verbal agreement because there was never a written agreement executed by the parties.

In the absence of a notice to end tenancy or a written agreement, I find that the tenancy ended when the tenants vacated the rental unit. As such, I find that the tenants have failed to establish that the landlord has terminated the lease.

Although the tenants could have given notice to end the tenancy pursuant to section 45 if they thought that the landlord had breached a material term of the tenancy agreement by not making necessary repairs, the tenants did not do so. Rather, the tenants simply moved out of the rental unit. As such, the tenants ended the tenancy by their own conduct of vacating the rental unit and the tenant’s have not established that the landlord terminated the tenancy early. Accordingly, I dismiss the tenants’ request for compensation for moving costs and increased rent costs at their new residence.

Damages For Loss Of Use And Enjoyment Of The Rental Unit During The Tenancy

As stated above, I find that the lower level of the rental unit did have moisture mold and mushrooms which was not compliant "…with the health, safety and housing standards required by law" pursuant to section 32 of the *Act*.

I find that the tenants have suffered the loss of use of the lower floor as the result of the landlord's failure to make necessary repairs and maintain the rental unit. Based on the tenants' testimony, I find that the lower level of the rental unit was non-habitable from September to November 2018 and the tenants are entitled to a reduction of the rent paid in the time period pursuant to section 65(1)(f). However, since both parties agreed that no rent was paid in November 2018, a rent reduction is only necessary for September 2018 and October 2018.

I find that a reasonable quantification of the tenants' loss is 25% of their rental unit. Accordingly, I grant the tenants a rent reduction of $825.00 (25% of rent of $1,650.00 for September 2018 and October 2018).

Security and Pet Damage Deposits

Based on the tenancy agreement, I find that tenant paid a security deposit of $825.00 and a pet damage deposit of $275.00. Further, based on the testimony of the parties, I find that the landlord retains the entirety of the security deposit and the pet damage deposit in the combined amount of $1,100.00.

Section 38(1) of the Act states:

> **Return of security deposit and pet damage deposit**
> 38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
> (a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the tenancy ended on November 20, 2018, and that the tenant provided their forwarding address in writing to the landlords on November 29, 2018. Although the landlord denied receipt of the forwarding address, I find that it was reasonable and appropriate for the tenant to communicate with the landlord by text message after the landlord's admitted to have used that phone number with the tenants for tenancy purposes. I find that the tenants were entitled to rely on the phone number voluntarily used by the landlord.

I find that the landlords have not returned the security or pet damage deposits to the tenants within 15 days of receiving their forwarding address.

I find that the landlords have not made an application for dispute resolution claiming against the security or pet damage deposits within 15 days of receiving the forwarding address from the tenants.

Accordingly, I find that they have failed to comply with their obligations under section 38(1) of the Act.

Section 38(6) of the *Act* sets out what is to occur in the event that a landlord fails to return or claim against the security or pet damage deposits within the specified timeframe:

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

The language of section 38(6)(b) is mandatory. As the landlords have failed to comply with section 38(1), I must order that they pay the tenant double the amount of the security and pet damage deposits ($2,200.00).

As the tenants have been partially successful in their application, they are entitled to have their filing fee of $100.00 repaid by the landlord.

In total, I order that the landlord pay the tenants $3,125.00, representing the following:

Loss of use of the lower floor	$825.00
Return of double the deposits	$2,200.00
Filing Fee	$100.00
Total	**$3,125.00**

Conclusion

I grant the tenants a monetary order in the amount of **$3,125.00.** If the landlord fails to comply with this order, the tenants may file the order in the Provincial Court to be enforced as an order 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: June 14, 2019

Residential Tenancy Branch