



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CENTRAL PACIFIC REALTY LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **FFL MNDCL-S MNDL-S**

MNDCT MNSD

Introduction

This hearing dealt with applications by both the landlord and the tenant pursuant to the *Residential Tenancy Act* ("Act").

The landlord applied for:

- Authorization to recover the filing fee for this application from the tenant pursuant to section 72;
- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67; and
- A monetary order for damages to the rental unit and authorization to retain a security deposit pursuant to sections 67 and 38.

The tenant applied for:

- A monetary order for damages or compensation pursuant to section 67; and
- An order for the return of a security deposit or pet damage deposit pursuant to section 38.

Both the tenant and the landlord attended the hearing. The landlord was represented by the property manager TT ("landlord") and the tenant was self represented. As both parties were present, the exchange of documents was confirmed. Both parties acknowledge receipt of one another's application for dispute resolution and evidence. Neither party had an issue with timely exchange of documents.

The hearing process was explained and parties were given an opportunity to ask any questions about the process. The parties were given a full opportunity to present affirmed testimony, make submissions, and to question the other party on the relevant evidence provided in this hearing. While I have turned my mind to all the documentary evidence and testimony, not all details of the parties' respective submissions and/or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

Issue(s) to be Decided

Is the landlord entitled to:

- Authorization to recover the filing fee for this application from the tenant pursuant to section 72;
- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67; and
- A monetary order for damages to the rental unit and authorization to retain a security deposit pursuant to sections 67 and 38.

Is the tenant entitled to:

- Authorization to recover the filing fee for this application from the tenant pursuant to section 72;
- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67; and
- A monetary order for damages to the rental unit and authorization to retain a security deposit pursuant to sections 67 and 38.

Background and Evidence

A copy of the tenancy agreement was provided as evidence. The tenancy began on August 1, 2018. The tenancy agreement indicates that it's a fixed term tenancy for 12 (units not indicated) ending on 30/07/2019 but continuing on a month to month basis or another length of fixed time at the end. Also included and signed by the parties is an addendum that indicates the following:

Early termination. If the tenant terminates the tenancy before the end of the original term, the landlord may, at the landlord's option, treat this tenancy Agreement as being at an end. In such event, one month written notice (1st to 30th) plus the sum of \$600.00 shall be provided by the tenant to the landlord as liquidated damages, and not as a penalty, to cover the administration costs of re-renting the said premises. Such payment shall release the tenant from liability to pay rent for the balance of the term of the agreement.

Rent of \$1,200 was to be paid on the first day of each month, and a security deposit of \$600.00 was collected from the tenant on the date the tenancy agreement was signed on July 15, 2018.

The landlord provided the following testimony. The rental unit is approximately 50 years old and was partially renovated approximately 10 years ago. Kitchen cabinets were approximately 10 years old.

On March 3rd, the tenant sent an email message indicating rent would be late. On March 8th, the tenant sent a further email stating she's been experiencing a rough time with the space as well as affording it. In this email the tenant states

'...I've encountered unexpected expenses, and have been scraping by. For this reason, I feel I should return home and let a more capable tenant replace me. Please keep my damage deposit and I will send the \$250.00 for the early termination of my lease shortly. If it's needed to replace me in a timely manner, I will do my best to pay for the first half of April as well...you can expect my payment shortly. Once again, I'm very sorry about the situation. I will do all I can to cooperate with the transition. Thanks again, and my sincere apologies for the inconveniences.'

On March 15th, she sent a further email indicating she moved out. The landlord provided the email exchanges as evidence. The landlord acknowledges he's received \$600.00 of the \$1,200.00 March rent and seeks the remainder of the March rent of \$600.00.

When she left, the landlord alleges the tenant had removed the kitchen cabinet doors. In his application, the landlord writes the cost to install the cabinet door is approximately \$1,500.00 plus taxes. He testified he contacted many different contractors to replace the doors but ultimately chose a local newspaper publishing company who invoiced him \$1,680.00 for the work. The landlord testified the newspaper publishing company referred a handyman who did the work and the landlord paid the publisher who in turn paid the handyman.

The landlord advertised the rental unit after the tenant moved out. It was advertised at \$1,250.00 per month, \$50.00 more than the tenant was paying because property tax went up and because it was being rented under 'market value' previously. His costs to re-rent the unit included the caretaker's time to show the unit, prepare documents and paperwork, put up advertisements online and put signs on the lawn.

The building manager, WA was called to testify. He testified he tried to contact the tenant to do a condition inspection with him immediately after the tenant moved in. A note was slipped under the tenant's door requesting they do one. He does not have a copy of the note slipped under the tenant's door. He knew the tenant's occupation requires her to be gone for weeks at a time and she was never home. She never responded to his request for a condition inspection. The building manager and the tenant had conflicting schedules preventing them from getting together for the inspection. He did not do a move out inspection with the tenant because he didn't know she planned on moving out. No notice was given to him; he only found out when he saw the tenant's door open and her belongings gone.

The landlord's witness ML provided the same evidence as the landlord that the reason the tenant ended the tenancy was because she could no longer afford the rent. The tenant's allegation that the cupboard doors were falling off is not true as they wouldn't be able to rent it out in that condition. She put a notice on the tenant's door to have a plumber look at the tenant's water heater on March 11th, however acknowledges that

took place after they received the email from the tenant indicating she was moving out of the unit.

The tenant provided the following testimony. When she moved in, the landlord did not seek a condition inspection with her and she disputes the building manager's testimony that she was unavailable for an inspection. Throughout the tenancy, there were issues with the rental unit. The tenant alleges a problem with mice, plumbing issues and heat. The tenant has provided copies of emails between the parties as proof of the repairs not made to the rental unit despite her request they be addressed. The notice of the mice issue email is dated March 12, 2019. The notice of the plumbing issues and heat is dated December 3, 2018. Both were provided as evidence.

She paid for the first half of March rent and provided proof in the form of an e-transfer which the landlord acknowledges receiving. The intention was to use the \$600.00 security deposit for the remainder of the March rent. She acknowledges emailing the landlord saying she would pay an additional \$250.00 for the early termination of her lease, but says the email was only a fragment of the entire email which included more information regarding deficiencies in the rental unit that were not addressed.

After she gave notice, the landlords began showing her rental unit without giving her 24 hours notice of their intent to do so. As evidence, the tenant provided an email from the landlord dated March 13th at 1:35 p.m. asking if the unit could be shown at 2:00 p.m. Despite being advised they couldn't, the landlord did show the unit and sent the tenant an email indicating that when it was shown to prospective tenants, her unit was a mess.

The kitchen cabinet doors were falling off in her rental unit. She acknowledges she removed the doors but stored them under the sink.

Analysis

The landlord seeks compensation as follows:

1. Kitchen cabinet door: \$1,680.00
2. March 1, 2019 rent \$1,200.00 – (reduced to \$600.00 as landlord has received half March rent).
3. Liquidated damages under tenancy agreement - \$600.00.

Analysis - Kitchen Cabinet Doors

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim. The standard of proof is on a balance of probabilities. If the landlord is successful in proving it is more likely than not the facts occurred as claimed, he has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;

3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

Section 14 of the Residential Tenancy Regulations (“Regs”) state: the landlord and tenant must complete a condition inspection described in section 23 or 35 of the *Act* [condition inspections] when the rental unit is empty of the tenant's possessions, unless the parties agree on a different time.

Sections 17 and 18 of the Regs indicate it is the landlord's responsibility to schedule the inspections and provide a copy to the tenant.

Section 21 of the Regs state that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The landlord did not schedule a condition inspection with the tenant. As such, a condition inspection report establishing the condition of the rental unit at commencement is not available. Without the condition inspection report, I cannot determine whether the kitchen doors were in good condition, as the landlord alleges or ‘falling off’ and stored under the sink as the tenant alleges.

As rule 6.6 indicates it's the applicant's burden to prove his version of events is the more likely one to believe, I find the landlord has not proven the cabinet doors were not removed and stored. The tenant's version of storing the cabinets under the sink I find to be the more plausible version of what happened to the kitchen cabinets as it would be irrational to dispose of them and risk having to pay to replace them.

Second, I am not convinced by the landlord's evidence regarding the steps he took to mitigate the damage. The landlord has not provided documentary evidence to show any attempts to locate suitable doors to replace the ones he said went missing. Replacing cabinets in a 50 year old rental unit with extraordinarily expensive new doors when used doors would suffice is not mitigating the landlord's damage. Lastly, the invoice from the newspaper publishing company to find the handyman to do the work, then reimburse the newspaper publishing company as a middleman is also difficult for me to reconcile as proof of the value of the damage lost. For these reasons, I dismiss the landlord's claim for the kitchen door replacement.

Half of March rent

I am satisfied by the evidence that the tenant gave notice to end the tenancy by email on March 8th and moved out of the rental unit on March 15th.

Section 45(2) of the *Act* reads:

(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) **is not earlier than one month after the date the landlord receives the notice,**
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this case, as the tenant gave less than one month notice to end the tenancy, she is liable to pay compensation for one month's rent. As half of that has already been paid and acknowledged by the landlord, the tenant is to pay the remainder of the rent for the month of March. Pursuant to section 67 of the *Act*, I award the landlord **\$600.00**.

Liquidated Damages

Residential Tenancy Branch Policy Guideline PG-4 indicates:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

The tenant was found to have given notice to end the tenancy on March 8th, ending the tenancy on March 15th. When the tenant signed the addendum to the tenancy agreement indicating her agreement that in the event she ended the fixed term tenancy early, she agreed would pay the \$600.00 liquidated damages to cover the administrative costs of re-renting the unit. In this case, the liquidated damages clause is beneficial to the tenant as it prevents the landlord from pursuing a claim for additional rent for the balance of the fixed term of the agreement.

I am satisfied both parties understood and agreed to the liquidated damages clause at the time the tenancy agreement was signed. I am also satisfied the landlord bore administrative costs associated with re-renting the rental unit. I award the landlord **\$600.00** for the liquidated damages as claimed.

Landlord's Application to retain the security deposit

Section 23(1) of the *Act* states:

The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.

Section 23(3) states:

The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

Pursuant to section 23(6),

The landlord must make the inspection and complete and sign the report without the tenant if

- (a) the landlord has complied with subsection (3), and
- (b) the tenant does not participate on either occasion.

While the landlord and his witness provided testimony regarding their attempts to do a 'walk-through' with the tenant after she moved in, they did not provide any evidence of attempts to conduct a condition inspection at the start of the tenancy. I am not satisfied by the evidence that the two opportunities for inspection were offered. Pursuant to section 24, the landlord's right to claim against the security deposit is extinguished if the landlord does not offer the tenant at least two opportunities for inspection.

Section 38(5) and (6) of the *Act* state that when the landlord's right to claim against the security deposit is extinguished, the landlord may not make a claim against it and must pay the tenant double the amount of the security deposit or pet damage deposit, or both, as applicable. This is further clarified in Residential Tenancy Branch Policy Guideline PG-17 which says, in part C-3:

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 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*;

As I have insufficient evidence to persuade me that the landlord provided the tenant with 2 opportunities for a condition inspection at the commencement of the tenancy, I find the landlord's right to the security deposit was extinguished. Even though there is evidence the tenant agreed in writing to allow the landlord to retain the security deposit, the landlord's right to retain it does not apply if it was extinguished in accordance with section 38(5). The security deposit of \$600.00 held by the tenant must be doubled and returned to the tenant. The tenant is entitled to compensation in the amount of **\$1,200.00**.

Filing Fee

As the landlord's claim was only partially successful, the filing fee is not recoverable.

Tenant's claim for compensation

Section 6(2) of the *Act* states:

A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58
(1) [*determining disputes*].

Section 58(1) states:

Except as restricted under this *Act*, a person may make an application to the director for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:

- (a) rights, obligations and prohibitions under this *Act*;
- (b) rights and obligations under the terms of a tenancy agreement that

- (i) are required or prohibited under this *Act*, or
- (ii) relate to (A) the tenant's use, occupation or maintenance of the rental unit, or (B) the use of common areas or services or facilities.

The tenant claims for compensation for monetary loss for the landlord's failure to address pest, plumbing and heat issues.

I find there is insufficient evidence to substantiate the tenant's claim that plumbing and heat issues were left unaddressed by the landlord. The only evidence of the tenant seeking heating repairs is one email which the landlord says was responded to in a timely manner. No photographs of the plumbing issues was presented in evidence. Lastly, the evidence of notifying the landlord of the mouse issue is an email dated after the date she gave notice to end the tenancy. For these reasons, I find the tenant has not shown on a balance of probabilities that she is entitled to compensation for damages.

Further, pursuant to sections 6 and 58 the tenant had the right to apply for dispute resolution to have each and any of the issues resolved during the tenancy. Rather than exercising this right, the tenant chose to end the tenancy. Since the tenant did not seek to remedy her living situation while still living in the rental unit and during the time the landlord could have been ordered to rectify the stated issues; I find it unreasonable that she should seek monetary compensation after ending the tenancy. For these reasons, I dismiss this portion of the tenant's claim.

24 Hours Notice to enter rental unit

Section 29(1)(b) of the *Act* states:

A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

- (i) the purpose for entering, which must be reasonable;
- (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

With the emails from the tenant dated March 13th where the landlord complains to the tenant that her rental unit was a "mess" after being shown to prospective tenants, the tenant has provided compelling evidence to show the landlord entered her rental unit without 24 hours notice, and without agreement from the tenant, breaching section 29 of the *Act*. For this breach, I find it reasonable to compensate the tenant with nominal compensation in the amount of **\$100.00**.

Item	To the landlord	To the tenant
Half March Rent	\$600.00	
Liquidated Damages	\$600.00	
Security Deposit		\$1,200.00

Sec. 29 breach compensation		\$100.00
Total Awarded		\$100.00

Conclusion

I issue a monetary order in the tenant's favour in the amount of \$100.00.

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: August 21, 2019

Residential Tenancy Branch