



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT MNDCT MNSD**

Introduction

This hearing dealt with an application by the tenants under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for the landlord to return the security deposit pursuant to section 38;
- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

The tenant's agent LB attended ("the tenants"). The landlord attended. Each party had the opportunity to call witnesses and present affirmed testimony and written evidence. No issues of service were raised. I find the tenants served the landlord in accordance with section 89 of the *Act*.

Issue(s) to be Decided

Are the tenants entitled to:

- An order for the landlord to return the security deposit pursuant to section 38;
- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;

- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

Background and Evidence

The parties agreed that the month-to-month tenancy between them started on July 15, 2018 for rent of \$1,500.00 monthly payable on the first of the month. The tenants provided a security deposit of \$750.00 at the beginning of the tenancy which is held by the landlord without authorization by the tenants.

The parties agreed the tenants paid rent as follows:

ITEM	AMOUNT
Rent from July 15 – 31, 2018	\$750.00
Rent for August 2018	\$1,500.00

The tenants testified that they did not move in to the unit. The tenants explained that they were students and planned to move in at the commencement of the upcoming school year.

The tenants testified that on August 4, 2018, they went to the unit and discovered that water damage had occurred an indeterminable number of days previously. The water damage had saturated the unit's flooring which was "squishy" to walk on. The tenants also discovered mold. The tenants submitted photographs of the wet, warped flooring and the mold on the baseboards.

The tenants testified they immediately notified the landlord of the water damage requesting action right away to fix the problem. The landlord acknowledged she did not respond in a timely manner and explained that she was out of town. She testified that she attended to the matter upon her return later in August 2019 when she replaced the flooring.

As the tenants did not have a quick response from the landlord and as they needed accommodation at the start of the school year, they informed the landlord they considered the unit uninhabitable for the month of August 2019 and requested the

return of the rent paid for August 2018 as well as a return of their security deposit. The tenants started looking for alternate accommodations.

The tenants provided their forwarding address to the landlord by letter sent August 27, 2018, receipt of which the landlord acknowledged.

The landlord failed to return either the rent for August 2019 or the security deposit.

The landlord acknowledged she has not brought an application to retain the security deposit. Accordingly, the tenants request a doubling of the security deposit pursuant to the *Act*.

Analysis

The tenants' argument is similar to the claim that the tenancy agreement was 'frustrated'. That is, the tenants were required by circumstances to cancel plans to move in and therefore the tenants are entitled to return of rent for August 2019 and the security deposit.

Section 44 of the *Act* sets out the ways a tenancy ends. Section 44(1)(e) states that a tenancy may end if the agreement is frustrated. In other words, there are sometimes exceptional circumstances that force tenancies to end unexpectedly. When a tenancy cannot possibly continue, it is considered a "frustrated contract".

Residential Tenancy Policy Guideline 34 provides guidance on when a contract is frustrated:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract. The test for determining that a contract has been frustrated is a high one.

The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms

In this case, the alleged frustrating event was water damage and ensuing mold which occurred on an indeterminate number of days prior to August 4, 2019 plus the failure of the landlord to acknowledge notice of the damage and carry out repairs in a reasonable period of time.

I accept the tenants' evidence, supported by the photographs, that they discovered on August 4, 2019 that the unit was extensively damaged by water and mold such that it could not be occupied. I also accept their evidence, supported by the photographs, that the extent of the damage visible in the photographs and the presence of mold indicated that the water damage started many days earlier at a date which cannot be determined. From the extent of the damage evidenced in the photographs and the tenants' testimony, I find it is reasonable to assume the unit was uninhabitable for the entire month of August 2019 although the damage was only discovered on August 4, 2019.

I therefore find that the tenants have met the burden of proof on a balance of probabilities that the unit was uninhabitable on August 1, 2019 and the tenancy agreement was effectively frustrated at that time. I accept the tenants' evidence that they immediately notified the landlord of the situation and did not get a reply within a normal time frame. I accept both parties' evidence that the landlord did not respond in a reasonable time to the information that the unit had incurred damage as the landlord was away. I do not accept as a reasonable explanation that the landlord was out of town and could not attend to the matter until her return. I find the tenants acted reasonably in considering the tenancy at an end and looking for alternate accommodations when the landlord did not respond in a timely manner and they had doubt that the unit would be fixed in time for occupancy.

During her evidence, I found the landlord had an indifferent attitude towards the tenants' concerns. Her failure to respond quickly to the tenants' notification of the water damage is bewildering. I find the landlord minimized the disturbance to the tenants and adopted an attitude that the tenants could wait for a response or action and that she was not obliged to communicate with them or begin repairs quickly. I find the tenants rightfully lost confidence that the unit would be habitable in a reasonable time.

Based on my assessment of the parties' testimony and credibility, I prefer the tenants' version of events to the landlord's.

Accordingly, I find the tenants are entitled to the return of their rent for the month of August 2019. I grant the tenants a monetary award in the amount of \$1,500.00.

Security deposit

The *Act* contains comprehensive provisions regarding security and pet damage deposits.

As stated in section 38 of the *Act*, the landlord is required to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit, 15 days after the later of the end of a tenancy and receipt of the tenant's forwarding address in writing.

Section 38 states as follows:

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.

If that does not occur, the landlord must pay a monetary award equivalent to double the value of the security deposit.

Section 38(6) states as follows:

(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

However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit pursuant to section 38(4)(a).

I find the landlord has not brought proceedings for compensation or an application for dispute resolution claiming against the security deposit for any outstanding rent or damage to the rental unit pursuant to section 38(1)(d) of the *Act*.

I find the tenants provided their forwarding address in writing pursuant to section 38(1)(b) on August 27, 2018. I find the tenants did not provide consent to the landlord to keep any portion of the security deposit pursuant to section 38(4)(a).

Based on the above, the testimony and evidence, and on a balance of probabilities, I find the landlord is in breach of the *Act* by failing to return the security deposit or applying for dispute resolution as required.

I find the tenants are entitled to a doubling of the security deposit. Accordingly, I grant the tenant a monetary award in the amount of \$1,500.00 (2 x \$750.00).

Filing fee

As the tenants are successful in their claims, they are entitled to a monetary award for reimbursement of the filing fee in the amount of \$100.00.

Summary

In summary, the tenant is entitled to a monetary award of **\$3,100.00** calculated as follows:

ITEM	AMOUNT
Rent for August 2018 - reimbursement	\$1,500.00
Return of security deposit	\$750.00
Return of double the security deposit	\$750.00
Filing fee	\$100.00
Total Monetary Award	\$3,100.00

Conclusion

The tenants are entitled to a monetary order in the amount of **\$3,100.00**. This order must be served on the landlord. 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: August 26, 2019

Residential Tenancy Branch