Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, MNRL-S, FFL

Introduction

This hearing was initially heard on October 24, 2019 and was adjourned to December 12, 2019 due to time constraints. This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- a Monetary Order for damage or compensation, pursuant to section 67;
- a Monetary Order for damage, pursuant to section 67;
- authorization to retain the tenants' security and pet damage deposits, pursuant to section 38; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

The landlord, the landlord's wife and representative and the tenants attended both hearings and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord called witness M.A. The tenants called witness D.K., their immigration sponsor (the "sponsor").

Both parties agree that the landlord sent the tenants his application for dispute resolution in July of 2019 via registered mail; however, neither party could recall on what date. I find that the tenants were served with the landlord's application for dispute resolution in accordance with section 89 of the *Act.*

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?

3. Is the landlord entitled to a Monetary Order for damage, pursuant to section 67 of the *Act*?
4. Is the landlord entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
5. Is the landlord entitled to recover the filing fee from the tenants, pursuant to section 72 of the *Act*?

Background/Evidence

Both parties provided testimony during the hearing. In this decision, I will only address the facts and evidence which underpin my findings and will only summarize and speak to the points which are essential in order to determine whether or not the landlords are entitled to monetary damages. Not all documentary evidence and testimony will be summarized and addressed, unless it is pertinent to my findings. This was an acrimonious hearing and a large portion of the testimony from both parties was aimed at maligning the character of the other. This hearing lasted 2.65 hours due to the hostility between the parties. A large portion of the testimony provided was not relevant and will not appear in this decision.

Both parties agreed to the following facts. This tenancy began on January 1, 2019 and ended on June 30, 2019. Monthly rent in the amount of $1,350.00 and a monthly utility charge of $100.00 were payable on the first day of each month. A security deposit of $675.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and copies were submitted for this application.

Tenancy Agreement

Both parties agree that the tenants are new immigrants to Canada whose immigration was aided by their sponsor. Both parties agree that the tenancy agreement was signed at the sponsor's home in the presence of the sponsor.

The landlord testified that the tenancy agreement was a one-year fixed term tenancy set to end on December 31, 2019. A signed tenancy agreement stating same was entered into evidence.

The tenants testified that the tenancy agreement was a month to month tenancy agreement. The tenants entered into evidence a signed tenancy agreement that did not

indicate if the tenancy was fixed term or month to month. The tenants testified that the landlord added in the fixed term end date after they signed the tenancy agreement and without their consent. The tenants testified that it was their understanding when they signed the tenancy agreement, that it was on a month to month basis.

The tenancy agreement entered into evidence is identical to the tenancy agreement entered into evidence by the landlord, except part 2 of the tenancy agreement has added terms in the landlord's version. Both the landlord's and the tenants' tenancy agreement has Part 2 section E selected which states:

> At the end of this time, the tenancy is ended and the tenant must vacate the rental unit. This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation, or if this is a sublease agreement as defined in the Act.

This section was initialed by both parties.

I asked the landlord when the fixed term was added to the tenancy agreement and he testified that when the tenancy agreement was filled out his wife was out of town and he did not know what length of tenancy to put on the tenancy agreement and so section 2 of the tenancy agreement was left blank and the rest of the tenancy agreement was filled out.

The landlord testified that prior to signing the tenancy agreement on the last page, his wife called him and told him to make the tenancy agreement a one-year fixed term tenancy agreement. The landlord testified that he then filled in section 2 of the tenancy agreement and after he filled in section 2 of the tenancy agreement, both parties signed the last page of the tenancy agreement. The landlord testified that before section 2 was properly filled in and before the parties signed the tenancy agreement, the tenants took the tenancy agreement and made themselves a copy which is what the tenants entered into evidence. The landlord maintained that the tenancy agreement was not signed until after the fixed term date was filled in.

The tenants deny the above and testified that section 2 of the tenancy agreement did not have a fixed term when they signed the tenancy agreement. The tenants testified that after they and the landlord signed the tenancy agreement, they made a photocopy for themselves and their sponsor and the landlord took the original. The tenants testified that the landlord added in the fixed term date after they signed the agreement and without their consent.

The tenants called their sponsor as a witness. The sponsor testified that the tenancy agreement was signed in his home and that he, the tenants and the landlord all sat at the table together. The sponsor testified that the tenancy agreement was intentionally left open and that no fixed term was entered on the tenancy agreement when it was signed.

The sponsor testified that after the tenancy agreement was signed by both parties, he took the tenancy agreement and made two copies, one for the tenants and one for himself. The sponsor testified that the landlord kept the original tenancy agreement.

The landlord testified that the tenants verbally agreed, at the time the tenancy agreement was signed, to provide him with 11 postdated cheques. The landlord testified that his request for 11 postdated cheques confirms that the parties agreed to enter into a fixed term tenancy agreement.

The tenants testified that they never agreed to provide the landlord with postdated cheques and when the landlord asked for them, the tenants asked their sponsor to speak to the landlord on their behalf. The tenants entered into evidence a signed letter dated January 31, 2019 from the tenants' sponsor to the landlord which states that the sponsors were puzzled by the landlord's problem with the cheques thus far provided and that the sponsor guaranteed the tenants' rent.

The sponsor testified that the he and the tenants never agreed to provide the landlord with postdated cheques because it was not a fixed term tenancy.

Both parties agree that the landlord did not ask the tenants in writing to complete a move in or out condition inspection and that no such inspections were completed. The landlord testified that he personally attended at the subject rental property on three occasions in January 2019 and asked the tenants to complete a move in condition inspection report, but the tenants refused. The tenants denied the landlord's above testimony.

The landlord testified that he attended at the subject rental property on January 6, 2019 with witness M.A. and provided the tenants with a copy of the signed fixed term tenancy agreement and asked the tenants to complete a move in condition inspection report, but the tenants refused. The tenants denied that the above occurred. The landlord called witness M.A. The landlord asked witness M.A. leading questions about what witness M.A. saw on January 6, 2019. Witness M.A. did not understand the landlord's

questions, which he asked in English. The landlord then asked Witness M.A. questions in Kurdish until witness M.A. gave the answer in English the landlord was looking for.

The landlord requested that he be allowed to call witness M.A. again in the future with an interpreter present. The landlord testified that he did not realize that witness M.A.'s English language skills were so low as they usually converse in Kurdish. I informed the landlord that it was his responsibility to prepare his witness and it was his responsibility to arrange for an interpreter in advance of this hearing. I declined to adjourn this hearing a second time.

Both parties agree that the landlord's agent refused to accept the tenants' written notice to end tenancy which they attempted to personally serve on the landlord's agent on June 3, 2019. The landlord's agent testified that she refused to accept the tenants' written notice to end tenancy because the tenants should have given her that notice on the first of the month and since they did not provide her with one full month's notice, she was not required to accept it.

The landlord's representative testified that she also refused to accept the tenants' notice because they had a one-year fixed term tenancy agreement. Both parties agree that at the time service of the tenants' notice to end tenancy was refused, June 3, 2019, the tenants provided the landlord's representative with verbal notice that they were ending their tenancy effective June 30, 2019.

The tenants testified that they also served the landlord with their notice to end tenancy via registered mail on June 5, 2019. The tenants entered into evidence the Canada Post Tracking Number to confirm this registered mailing. The landlord and his representative testified that they did not receive this package.

Both parties agreed that the tenants provided the landlord with their forwarding address via text message sometime in July 2019, though neither party could recall on what date. The landlord testified that he filed his application for dispute resolution on July 11, 2019.

Monetary Claim

The landlord testified that he is seeking the following monetary awards arising out of this tenancy:

Item	**Amount**
Damage to property	$1890.00
Rent from July 2019 to December 2019	$8,700.00
Total	**$10,590.00**

Damage to Subject Rental Property

The landlord testified that the tenants damaged the floors, the walls and two doors in the subject rental property. The landlord testified that subject rental property was completely renovated before the tenants moved in and was in perfect condition. No photographs or other evidence to prove the condition of the subject rental property on move in was entered into evidence.

The landlord testified that the tenants scratched the walls in the living room when they moved their furniture out of the subject rental property. The landlord entered into evidence photographs showing scratch marks on the walls. The landlord testified that the photographs were taken after the tenants moved out, but he did not recall the specific date the photographs were taken.

The tenants testified that they did not scratch the walls at the subject rental property and that there were no scratches on the walls when they moved out. The tenants testified that the landlord must have damaged the walls after they left.

The landlord testified that the tenants scratched the floor of the subject rental property. Photographs of scratches to the floor were entered into evidence. The landlord testified that the photographs were taken after the tenants moved out, but he did not recall the specific date the photographs were taken.

The tenants testified that they did not scratch the floors at the subject rental property and that the only scratch on the floor when they left was caused by the landlord when he brought a fridge into the subject rental property. The tenants testified that any other scratches at the subject rental property were not caused by them.

The landlord testified that the tenants scratched two-bedroom doors and the entrance door. Photographs showing marks on the doors were entered into evidence. The landlord testified that the photographs were taken after the tenants moved out, but he did not recall the specific date the photographs were taken. The tenants testified that they left the subject rental property in good condition without any scratches on the doors and that the landlord must have damaged the doors after they moved out.

The landlord entered into evidence a receipt for repairs for the doors, walls and flooring in the amount of $1,890.00.

Lost Rental Income/Frustration

The landlord's representative testified that she started advertising the subject rental property for rent on July 4, 2019 at a rental rate of $1,450.00 per month plus $100.00 utilities. Advertisements were entered into evidence. The landlord's representative testified that they were unable to find new tenants at the advertised rental rate and so dropped the price to $1,280.00 per month plus $100.00 utilities on October 5, 2019.

The landlord and his representative testified that they have not been able to find a new tenant for the subject rental property and so are seeking the tenants to pay their lost rental income to the end of the fixed term tenancy, that being December 31, 2019 in the amount of $8,700.00.

The tenants testified that they do not owe the landlord any money for unpaid rent because the tenancy agreement was frustrated because the landlord refused to do necessary repairs including repairing a water leak and restoring heat to the subject rental property.

The landlord testified that he greatly values his property and always did repairs as soon as possible to prevent losses to the value of his property.

Analysis

Tenancy Agreement and the Landlord's Claim for Unpaid Rent

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases

such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

In this case, the tenants' testimony as to the contents of the tenancy agreement when it was signed is in harmony with that of the sponsor. That is to say that both the tenants and the tenants' sponsor independently provided their recollection of the contents of the tenancy agreement when it was signed, and those recollections were consistent with each other. It is the recollection of the landlord which is inconsistent with the other testimony provided at the hearing.

I also find that the landlord's testimony that the fixed term was added after the tenants copied the tenancy agreement but before the parties signed the tenancy agreement to be unsupported by the evidence. The copy of the tenancy agreement entered into evidence by the tenants, which does not specify an end date for the tenancy, bears the signature of both parties. This fact supports the testimony of the tenants, that no end date for the tenancy was on the tenancy agreement at the time of signing. I also find that it does not accord with common sense that the tenants would copy the tenancy agreement before it was executed and completed.

Based on the above, I accept the tenants' testimony over that of the landlord. I find that the tenancy agreement did not have a fixed end date when it was signed by the parties.

Section 1 of the tenancy agreement defines a "fixed term tenancy" as a tenancy under a tenancy agreement that specifies the date on which the tenancy ends. I find that the tenancy agreement did not specify the date on which the tenancy ends; therefore, the tenancy is not a fixed term tenancy.

Section 1 of the tenancy agreement defines a periodic tenancy as:

> (a)a tenancy on a weekly, monthly or other periodic basis under a tenancy agreement that continues until it is ended in accordance with this Act, and

> (b)in relation to a fixed term tenancy agreement that does not provide that the tenant will vacate the rental unit at the end of the fixed term, a tenancy that arises under section 44 (3) *[how a tenancy ends]*.

I find that since the tenancy agreement was not a fixed term tenancy agreement, it is a periodic tenancy as defined under section 1 of the *Act.*

Section 45(1) of the *Act* states that a tenant may end a periodic 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, and
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> (b)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.

I find that the tenants provided the landlord's wife notice to end the tenancy in writing and verbally on June 3, 2019 effective June 30, 2019. I find that while this notice was less than one full month's notice, the landlord's wife was not permitted to refuse to accept the written notice. The landlord's wife's acceptance of the physical written notice on June 3, 2019 would not have altered the tenants' requirement under section 45(1) of the *Act* to provide one full month's notice. I find that the landlord was sufficiently served, for the purpose of this *Act*, with the tenant's notice to end tenancy on June 3, 2019 in accordance with section 71 of the *Act.*

The requirements for ending a periodic tenancy are expanded upon in Residential Tenancy Branch Policy Guideline #5 (PG #5). PG #5 explains that, where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect.

In this case, contrary to section 45 of the *Act,* less than one month's written notice was provided to the landlord to end the tenancy. The earliest date the tenants were permitted to end the tenancy was July 31, 2019. I therefore find that the tenants owe the landlord $1,350.00 in unpaid rent for July 2019. I find that the tenants are not required to pay the $100.00 utility fee as no utilities would have been used by the tenants for the month of July 2019.

I find that the landlord is not entitled to recover unpaid rent from August to December 2019 as this was not a fixed term tenancy agreement and the tenants' obligation to the landlord ended on July 31, 2019.

Residential Tenancy Policy Guideline 34 states:

> 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. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

I find that the tenancy agreement was not frustrated because allegations made by the tenants allege fault on the landlord. A contract is not frustrated unless neither party is at fault. By definition, the tenancy agreement was not frustrated.

Damage to Subject Rental Property

Section 37 of the *Act* states that when tenants vacate a rental unit, the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

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 tenants. 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. These requirements are designed to clarify disputes

regarding the condition of rental units at the beginning and end of a tenancy. When no such reports exist, the party claiming a loss bears the burden of proof.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that 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 onus to prove their case is on the person making the claim.

The testimony of the parties in regard to the condition of the subject rental property at the beginning and the ending of the tenancy is conflicting. The onus or burden of proof is on the party making the claim. When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

I find that the landlord has not proved, on a balance of probabilities, that the tenants damaged the subject rental property. I find that the landlord has not proved the move in condition of the subject rental property as no evidence to support his testimony was entered into evidence. I find that the landlord has not proved the date the photographs of the damages were taken. Since the landlord has not proved when the photographs were taken, I find that they have not proved that the damaged occurred during the tenants' tenancy. Based on the above, I dismiss the landlord's claim for damages to the subject rental property.

Security Deposit

Section 24(2) of the *Act* states that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not offer the tenant two opportunities to complete the condition inspection. Pursuant to section 17 of the *Residential Tenancy Act Regulations* (the "Regulations"), the second opportunity must be in writing.

The landlord admitted that he did not provide an opportunity in writing for the tenants to complete a move in or out condition inspection report. Responsibility for completing the move in and out inspection reports rests with the landlord. I find that the landlord did not provide the tenants with an opportunity, in writing, to complete the move in condition inspection report in accordance with the Regulations, contrary to section 24 of the *Act.*

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-in inspection, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is extinguished. However, since the landlord's application claims losses for damage to the subject rental property as well as unpaid rent and loss of rental income, I find that the landlords were entitled to retain the tenant's security deposit pending the outcome of this decision, pursuant to section 38 of the *Act.* The extinguishment provision only applies if the only loss claimed by the landlord is damage to the subject rental property which is not the case here.

Section 38 of the *Act* states that within 15 days after the later of:

> (a)the date the tenancy ends, and
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> (b)the date the landlord receives the tenant's forwarding address in writing,
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> 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 landlord made an application for dispute resolution claiming against the security deposit pursuant to section 38(a) and 38(b) of the *Act.*

Section 72(2) of the *Act* states that if the director orders a party to a dispute resolution proceeding to pay any amount to the other, the amount may be deducted in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenants' entire security deposit in the amount of $675.00.

As the landlord was successful in his application for dispute resolution, I find that he is entitled to recover the $100.00 filing fee from the tenants, pursuant to section 72 of the *Act.*

Conclusion

I issue a Monetary Order to the landlords under the following terms:

Item	Amount
July 2019 rent	$1350.00

Filing Fee	$100.00
Less security deposit	-$675.00
TOTAL	**$775.00**

The landlord is provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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: December 13, 2019

Residential Tenancy Branch