Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT MNDCT MNSD FFL MNDCL-S MNDL-S MNRL-S

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $14,145 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenants' for:

- a monetary order for $9,500 representing two times the amount of the security deposit and pet damage deposit, pursuant to sections 38 and 62 of the Act;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $573.30 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

All parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenants testified, and the landlord confirmed, that the tenants served the landlord with their notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenants confirmed, that the landlord served the tenants with his notice of dispute resolution form and supporting evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $14,145; and
2) recover his filing fee from the tenants?

Are the tenants entitled to:

1) a monetary order for $10,073.30; and
2) recover their filing fee from the landlord?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

1. Tenancy Agreements

The parties entered into a written, fixed-term tenancy agreement starting June 1, 2016 and ending May 31, 2017. Monthly rent was $5,250 and is payable on the first of each month. The tenants paid the landlord a security deposit of $2,625 and a pet damage deposit of $2,625 (collectively, the "**Deposits**"). The landlord still retains the Deposits. A copy of this tenancy agreement (the "**First Tenancy Agreement**") was entered into evidence.

On May 15, 2017, the parties entered into another fixed-term tenancy agreement, starting June 1, 2017 and ending May 31, 2018. Monthly rent was $5,500. A copy of this tenancy agreement (the "**Second Tenancy Agreement**") was entered into evidence.

On April 5, 2018, the landlord emailed the tenant and stated:

> The rent on renewal will stay the same at $5500 per month. Could you please have 1 year prepaid cheques made payable to [the landlord]. I can pick them up at your convenience.

On April 12, 2018, the tenant NS responded:

> I was short cheques and will be picking up a new batch from the bank tomorrow. I will leave them in the mailbox for Saturday.
>
> This makes me more comfortable anyway as the box is at the base of the driveway and no mail will be coming.

The tenants provided the requested cheques to the landlord and continued to reside in the rental unit until November 15, 2018.

2. Condition of Rental Unit

Tenant NS testified that the roof of the rental unit required significant repairs.

She testified that, in October 2018, she advised the landlord that the roof was leaking and, on October 28, 208, an agent of the landlord came to the rental unit, inspected the roof, and placed a tarp on it. She testified that this was insufficient to halt the leaking. She testified that there was heavy rainfall on November 1, 2018, and the water leaked into the rental unit. She testified that the ceilings of several rooms were wet, that the tenants had to cover some of their furniture with tarps to protect them from dripping water, and that water was collecting in several light fixtures. The tenants submitted photographs corroborating this into evidence.

On November 2, 2018, tenant NS emailed the landlord advising him that the roof was leaking in many rooms of the house and that the ceiling was wet. She attached three photographs of this damage. The landlord responded several hours later, asking if a repairman contact had contacted her and stated that if not, he would contact the repairman “ASAP”. Roughly one hour later, NS responded:

> Yes I spoke with him and he came by on Monday [October 29, 2018] to look at everything. He said he was to busy with another job until the weekend to check this out thoroughly.
>
> As for the new ceiling issues they will not hold another rain fall. They will collapse and God knows what unsafe things will come down from the family of squirrels that lived up there for a while.
>
> We will not be able to live there if this is not addressed asap.

The landlord testified that, on November 7, 2018, he was notified by his bank that the tenants’ rent cheque for November 2018 had had a stop payment order placed on it. Tenant NS confirmed that she stopped payment on the cheque. She testified that she believed that this was the only way she could get the landlord’s attention to make the necessary repairs to the roof.

Tenant NS testified that the landlord came to the rental unit on November 8, 2018 to inspect the roof and told her that he would need to install new drywall and light fixtures. She testified that the landlord told her that “she could stay or she could go”. The landlord denied this. She testified that during this visit she gave the landlord a “breach letter” (which she entered into evidence), which stated:

> On Friday November 2, 2018 I [tenant NS] sent you a email with images regarding the excessive leaks in multiple rooms. Your response (on November 2, 2018 4 hours later) was vague and with no hurry to solve or help elevate the problem.
>
> I again returned a email to you on November 2, 2018 stating how urgent it was and my family could no longer stay here if it was not addressed. You did not respond. Since you have no interest on fixing the matter this will be a breach of

> our tenancy. We would not be able to live in the home while it was fixed because of the safety issue the asbestos.
>
> This is one of many problems that you have not attended to that I have had email communication with you. If you would like all email communications I can send them to you.
>
> We are moving out this month and will require our deposit cheque back mailed to our new address of [forwarding address].
>
> (the "**November 7 Letter**")

The landlord denied that the tenants gave him this letter.

The tenants moved out one week later, on November 15, 2018.

The landlord testified that the roof was repaired in November 23, 2018. He submitted an invoice dated November 23, 2018 for "roofing installation" into evidence in support of this testimony.

The landlord argued that by moving out on November 15, 2018, the tenants breached of the fixed term tenancy agreement and he is entitled to rent for November and December 2018.

The tenants argued that, by not repairing the roof in a timely fashion, the landlord breached the tenancy agreement, and as such, they are not required to pay rent for these times.

3. Landlord's Claim for Damages

    a. Loss of Rent

The landlord argued that the tenants breached the fixed-term tenancy agreement by moving out prior to the end of the term. Additionally, he argued that he is entitled to receive rent for the month of November 2018.

He seeks compensation for November and December 2018 in the amount of $11,000.

The tenants argued that the landlord breached the tenancy agreement by not repairing the roof, and as such, they are not required to pay rent for these months and were entitled to end the tenancy in the manner they did.

    b. Cost of cleaning and repairs

Beyond his claim for rent for November and December 2018, the landlord claims compensation in the amount of $3,045 for the cost to clean and repair the rental unit after the tenants moved out, representing the following:

Regular Cleaning Services	$800
Carpet Cleaning	$300
Repairs to Tennis Net/Fence	$300
Repainting	$700
Refuse removal	$300
Remove scuff on hardwood	$500
5% tax	$145
Total	**$3,045**

The landlord submitted an itemized invoice from a cleaning company in support of these amounts.

The landlord testified that the tenants left the rental unit in poor condition when the tenancy ended. He testified significant cleaning was required inside the rental unit, and that the tennis court was left in an unsightly condition. He testified that piles of debris were on the tennis court and that the net was damaged. He called a witness who attended the rental unit on November 15, 2019, who testified that the tennis courts “did not look appealing” and made the rental unit “not marketable”. She also testified that ere were scuff marks on the inside of the rental unit.

The landlord submitted a number of photos into evidence which he alleged show the condition of the rental unit at the time of the end of tenancy. They depict a dirty bathroom, dirty appliances, damaged walls, and exterior garbage cans containing insects (which the landlord testified are maggots).

The landlord submitted a move-in condition inspection report, which indicates some damage to the walls and ceiling at the start of the tenancy and is silent on the condition of the tennis court.

The tenants denied that the rental unit was left uncleaned. Tenant NS testified that they hired cleaners to clean the rental unit before they left. They submitted numerous photos of the rental unit which tenant NS testified were taken at the end of the tenancy. They show an empty rental unit in which the carpets, bathrooms, appliances, kitchen, cupboards, and floors appear to have been cleaned. These photographs show some scratches and damage to the walls and floorboards of the rental unit. However, the tenant submitted photographs taken at the start of the First Tenancy (whose metadata confirms the creation date as June 3, 2016) which depict this same damage.

Tenant NS argued that any debris left on the tennis court was left there by the landlord’s roofers, and not the tenants.

The landlord did not conduct a move-out condition inspection report. The landlord did not offer two opportunities to the tenant to conduct such an inspection, in the proscribed form, or at all.

c. Fee for cancelled cheque

The landlord claims $100 in compensation, pursuant to the tenancy agreement, in connection with the stop payment order on the November 2018 rent cheque. The First and Second Tenancy Agreements contains the following clause in their addenda:

> The tenants will provide 12 post dated cheques for the lease upon moving in date. The tenants will be charge $100 for each and any cheque that are returned NSF or otherwise, in addition to any bank charges that the landlord incur.
>
> (the "**NSF Clause**")

The tenants made no submissions in response to this part of the landlord's application.

4. Tenants' Claim for Damages

a. Double the Deposit

The tenants claim for the return of two times the Deposits. Tenant NS testified that the tenants provided their forwarding address to the landlord in the November 8 Letter and that the tenants moved out on November 15, 2018.

Tenant NS argued that the landlord was required to either return the Deposits to the tenants or file an application claiming against the Deposits by November 30, 2018. She testified that he did neither of these. The landlord filed his application in October 2019. She argued that, pursuant to section 38(6) of the Act, the landlord must pay the tenants an amount equal to double the Deposits ($9,500).

As stated above, the landlord denies having received the tenants' November 8 Letter and testified that he did not receive the tenant's forward address until receiving the tenants' application materials. As such, he argued, section 38(6) does not apply.

b. Improper Rent Increases

The tenants argue that by increasing monthly rent from $5,250 per the First Tenancy Agreement to $5,500 per the Second Tenancy Agreement the landlord increased monthly rent in excess of the amount permitted by the Act. The tenants also argued that they were not provided notice of the rent increase three months in advance, as required by the Act.

Tenant NS argued that the increase from $5,250 to $5,500 in monthly rent represented a 4.75% increase. She argued that only a 3.7% increase was permitted in 2017 and a 4% increase was permitted in 2018. Accordingly, the tenants claim for the difference between these percentages be returned to them. The tenants seek a monetary of $574.50, calculated as follows:

	Original Rent	Permitted % Increase	Permitted Rent Increase	Actual Rent Increase	Difference
Jul-17	$5,250.00	3.7%	$194.25	$250.00	$55.75
Aug-17	$5,250.00	3.7%	$194.25	$250.00	$55.75
Sep-17	$5,250.00	3.7%	$194.25	$250.00	$55.75
Oct-17	$5,250.00	3.7%	$194.25	$250.00	$55.75
Nov-17	$5,250.00	3.7%	$194.25	$250.00	$55.75
Dec-17	$5,250.00	3.7%	$194.25	$250.00	$55.75
Jan-18	$5,250.00	4.0%	$210.00	$250.00	$40.00
Feb-18	$5,250.00	4.0%	$210.00	$250.00	$40.00
Mar-18	$5,250.00	4.0%	$210.00	$250.00	$40.00
Apr-18	$5,250.00	4.0%	$210.00	$250.00	$40.00
May-18	$5,250.00	4.0%	$210.00	$250.00	$40.00
Jun-18	$5,250.00	4.0%	$210.00	$250.00	$40.00
				Total	**$574.50**

The landlord made no submissions in response to this portion of the tenants' claim.

Analysis

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> 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. In most circumstances this is the person making the application.

So, each party is required to prove the facts necessary to support their respective claims

1. Landlord's Claims for Damages

   a. November Rent

The parties agree that the tenants did not pay rent for November 2018 in the amount of $5,500.

Section 26 of the Act states:

> **Rules about payment and non-payment of rent**
>
> 26(1) 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.

As such, the tenants are not permitted to withhold rent for the month of November 2018 due to their allegation that the landlord breached a material term of the tenancy agreement.

Accordingly, I order that the tenants pay the landlord $5,500, representing payment of November 2018 rent.

b. December Rent

Based on the testimony of the parties and the documentary evidence provided, I find that by providing 12 post-dated cheques to the landlord in April 2018, the tenants entered into a fixed-term tenancy agreement starting June 1, 2018 and ending May 31, 2019 on the same terms as the First and Second Tenancy Agreements (the "**Third Tenancy Agreement**").

I do not find that the landlord told the tenants that the could "stay or go" or that, if he did, that it meant that he was terminating the tenancy or offering the tenants an opportunity to mutually end the tenancy. If this were the case, there would have been no need for the tenants to give the landlord a copy of the November 8 Letter. Instead, I find that by moving out on November 15, 2018, the tenants unilaterally ended the tenancy.

Section 45 of the Act states:

> **Tenant's notice**
>
> (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.

> (3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.
>
> [emphasis added]

I find that, as the term of the Third Tenancy Agreement ended on May 31, 2019, the tenants could not end the tenancy pursuant to section 45(2). As such, we must look to section 45(3) of the Act.

I find that the tenants gave the landlord written notice of the rook leaks on November 2, 2018. While it is apparent that the landlord was made aware of the issue prior to this date (as is evidenced by the fact the landlord's agent attended the rental unit on October 29, 2018 to place tarps on the roof), there is no documentary evidence to show that the landlord was made aware of the leaks in the roof in writing prior to November 2, 2018.

I find that the landlord had repaired the roof leaks by November 23, 2019. I find that 21 days between being notified of the roof leak and having repaired the roof leak is a reasonable time to have made the repairs

As such, I find that, if the roof leak was a material breach of the tenancy (which I make no determination of), the landlord was not given an opportunity to correct the material breach in a reasonable amount period of time after the tenant gave him notice of the breach. In any event, I find that by repairing the roof by November 23, 2018, the landlord corrected the material breach in a reasonable period of time after receiving the tenants' written notice. As such, I find that the tenants were not permitted to end the tenancy pursuant to section 45(3) of the Act.

Accordingly, I find that the tenants breached the Third Tenancy Agreement by moving out before the end of the term (May 31, 2019). Per the relief sought by the landlord, I order that the tenants pay the landlord monthly rent for December 2018 in the amount of $5,500.

c. Cost of cleaning and repairs

As stated above, the landlord bears the onus to prove the truth of his allegations regarding the condition of the rental unit at the end of the tenancy. As no move-out condition inspection report was completed, it is difficult for me to determine the true condition of the rental unit. The parties have each submitted photographs showing significantly different conditions inside the rental unit. I cannot say which accurately depict the true condition of the rental unit at the end of the tenancy.

Additionally, based on the testimony of the landlord's witness, I accept that there were piles of debris and damage to the tennis court at the end of the tenancy. I also find that, prior to the witness' visit to the rental unit, the landlord had workers on the roof of the rental unit making repairs. I cannot say if the piles of debris on the court were caused by these workers or the tenants. Additionally, as the move-in condition inspection report does not describe the condition of the tennis court at the start of the tenancy, I cannot say if the damage the landlord alleged the tenants caused to the tennis court existed at the start of the tenancy or not.

For the foregoing reasons, I find that the landlord has failed to meet his evidentiary burden to prove that the actions of the tenants caused the landlord to incur the cleaning and repair costs claimed.

Accordingly, I dismiss this portion of the landlord's application.

d. Fee for cancelled cheque

As stated above, I find that the Third Tenancy Agreement, although not reduced to writing, contains the same terms as the First and Second Tenancy Agreement. These terms include the NSF Clause, which sets the consequence of causing a cheque to be "returned NSF or otherwise". I find that by stopping payment on the November rent cheque, the tenants caused that cheque to be "returned NSF or otherwise", thus engaging the NSF Clause.

Section 7 of the *Residential Tenancy Regulations* states:

> **Non-refundable fees charged by landlord**
>
> 7(1) A landlord may charge any of the following non-refundable fees:
>
> (d) subject to subsection (2), an administration fee of not more than $25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
>
> (2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

As such, the landlord is not permitted the charge a fee of $100 for a returned cheque, as set out in the NSF Clause. However, as I have found that the actions of the tenants caused the November rent cheque to be returned, I order that the tenants pay the landlord $25, pursuant to Section 7 of the *Residential Tenancy Regulations*.

2. Tenants' Claim

a. Double the Security Deposit

I accept tenant NS's evidence that she gave the landlord the tenants' forwarding address in the November 8 Letter. I find that the tenants moved out of the rental unit on November 15, 2018.

Section 38 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.
>
> […]
>
> (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.

I find that the landlord did not make a claim against the Deposits until October 2019. This is more than 15 days after the end of the tenancy or the date the tenant gave the landlord her forwarding address. Accordingly, I find that the landlord failed to comply with section 38(1) of the Act and that the landlord must pay the tenant double the amount of the Deposits ($10,500).

In the event I am incorrect, and the landlord did not receive the tenants' forwarding address until having received the tenants' evidence in support of this application, I would still find that the landlord must pay the tenants an amount equal to double the Deposits, as the landlord failed to conduct a move-out condition inspection report.

Sections 35 and 36 of the Act state:

> **Condition inspection: end of tenancy**
>
> 35(2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
>
> **Consequences for tenant and landlord if report requirements not met**

> 36(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord
>
> (a) does not comply with section 35 (2) *[2 opportunities for inspection]*,
>
> (b) having complied with section 35 (2), does not participate on either occasion, or
>
> (c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

I find that the landlord did not offer the tenant two opportunities to do an inspection eport at the end of the tenancy. As such, pursuant to section 36(2) of the Act, I find that his right to claim against the Deposits is extinguished.

Residential Tenancy Policy Guideline 17 states:

> C3. 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;
>
> […]
>
> - whether or not the landlord may have a valid monetary claim.

The tenants have not specifically waived the doubling of the Deposits. Accordingly, I find that as the landlord's right to claim against the Deposits is extinguished and the tenants are entitled to receive an amount equal to double the Deposits from the landlord.

Accordingly, I order that the landlord pay the tenants $10,500.

Notwithstanding this extinguishment, the landlord retains the right to make a monetary claim, as per Policy Guideline 17:

> B9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
>
> […]
>
> - to deduct from the deposit an arbitrator's order outstanding at the end of the tenancy; and
> - to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.

Accordingly, any monetary orders made in favour of the landlord against the tenants will be offset against the order that the landlord return double the Deposits to the tenants.

b. Rent Increase

I find that the monthly rent was increased from $5,250 on the First Tenancy Agreement to $5,550 on the Second Tenancy Agreement.

Policy Guideline 30 states:

> **RENEWING A FIXED TERM TENANCY AGREEMENT**
> A landlord and tenant may agree to renew a fixed term tenancy agreement with or without changes, for another fixed term. If a tenancy does not end at the end of the fixed term, and if the parties do not enter into a new tenancy agreement, the tenancy automatically continues as a month-to-month tenancy on the same terms. Rent can only be increased between fixed-term tenancy agreements with the same tenant if the notice and timing requirements for rent increases are met.
>
> [emphasis added]

Section 42 of the Act, in part, states:

> **Timing and notice of rent increases**
> 42(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.
> (3) A notice of a rent increase must be in the approved form.

Based on my review of the documentary evidence, I find that the landlord failed to provide notice of the rent increases in the approved form (that is form RTB-7). As such, I find that the rental increases are invalid.

Section 43(5) of the Act states:

> **Amount of rent increase**
> 43(5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.

As the tenants no longer reside at the rental unit, they cannot make any deductions from their monthly rent. As such, they are entitled to a monetary order to recover the portion of the rent they have paid as the result of the invalid increase in rent. I accept the calculations submitted by the tenants as accurate and find that the tenants have paid an extra $574.50 under the Second Tenancy Agreement than permitted by the Act. Therefore, I order that the landlord pay the tenants $574.50.

3. Filing fee

As both parties have been at least parties successful in their application, I order that each bear the cost of their own filing fee.

Conclusion

Pursuant to sections 65 and 67, I order the landlord pay the tenants $49.50, representing the following:

Double Security Deposit	$10,500.00
Improper rent increase	$574.50
NSF Fee	-$25.00
November and December 2018 rent	-$11,000.00
Total	**$49.50**

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: February 12, 2020

Residential Tenancy Branch