Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT, MNSD, MNDCT MNDL-S, FFL, MNRL-S**

Introduction

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

The landlord applied for:

- a monetary award for damages, loss and unpaid rent pursuant to section 67;
- authorization to retain the security deposit pursuant to section 38; and
- authorization to recover the filing fee from the tenant pursuant to section 72.

The tenant applied for:

- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38, including double the amount;
- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The parties were respectively represented by counsel and an agent.

The tenant had filed their initial application on July 5, 2019. That matter was heard and a decision issued on October 18, 2019. The decision was subject to a judicial review and the matter was scheduled to be re-heard at this time with the other two applications. The tenant had filed a second application on October 24, 2019 seeking identical relief as in their July 5, 2019 application explaining that they had misspelled their name on the

initial application. The landlord subsequently filed their application on December 5, 2019.

The correct spelling of the names of both parties was confirmed several times at the hearing.

As both parties were present service of documents was confirmed. The parties each confirmed receipt of the respective materials. While both parties stated that the materials were served upon them outside of the timeframe provided under the Residential Tenancy Rules of Procedure 3.3 and 3.15, each party confirmed that all materials were received and they have had an opportunity to review the materials.

Based on the testimonies of the parties and in consideration of Rule of Procedure 3.17, as I find that there is no prejudice to either party or an infringement on the principles of procedural fairness, I find that the parties were each served with the respective materials in accordance with sections 88 and 89 of the *Act*, and in any event have been sufficiently served in accordance with section 71.

At the outset of the hearing the landlord made an application requesting to amend the amount of their monetary claim. The landlord indicated that since the application was filed they have received invoices to quantify the actual amount of their losses. Pursuant to section 64(3)(c) of the Act and Rule of Procedure 4.2, I amend the landlord's application to increase their monetary claim to $25,100.00 as receiving updated invoices is reasonably foreseeable.

Issue(s) to be Decided

Is the tenant entitled to a return of all or a portion of the security deposit, including double the amount?
Is the landlord entitled to retain the deposit?
Is the tenant entitled to a monetary award for compensation for loss?
Is the landlord entitled to a monetary award for damages and loss?
Is either party entitled to recover the filing fee from the other?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced

here. The principal aspects of each claim and my findings around each are set out below.

The parties agree on the following facts.

This periodic tenancy began in February 2011. The monthly rent was $1,100.00 payable on the first of each month. A security deposit of $550.00 was paid at the start of the tenancy and is still held by the landlord. The rental unit is the main level of a detached home. The landlord resides at a different address in a neighboring municipality. No condition inspection report was prepared at any time for this tenancy.

The tenancy ended in accordance with a 2 Month Notice to End Tenancy for Landlord's use dated September 23, 2018 on November 30, 2018. The reason provided on the notice for the tenancy to end is that the rental unit will be occupied by the landlord or a close family member.

The tenant provided a forwarding address to the landlord by a letter dated October 24, 2019. The tenant said that they had not given authorization that the landlord may retain any portion of the deposit for this tenancy.

The landlord gave evidence that they intended for their adult daughter to reside in the rental unit with their family. The landlord explained that this did not occur until November 2019 as there was a major illness in the family and that the rental suite required considerable renovation work as a result of the tenancy.

The landlord testified that their adult daughter resided with them at the time the 2 Month Notice was issued. The landlord said that the intention was that their adult daughter and her family occupy the rental unit as it provided more space. Unfortunately, in December 2018 the landlord states that they fell ill requiring multiple visits to the hospital. As a result of the landlord's poor health the landlord's daughter chose to continue residing with the landlord.

The landlord submitted into evidence their medical records. The hospital records indicate that the landlord was admitted on January 7, 2019 with massive ascites, a large abdominal buildup of fluid which was thought to be benign. Paracentesis was performed at the time and the landlord subsequently was seen a number of times and repeat paracentesis was performed. The landlord had surgery in March 2019.

The landlord subsequently travelled to Europe in May 2019 with their adult daughter. The daughter returned to the country in July 2019 while the landlord remained in

Europe. The daughter and her family continued to reside in the landlord's home until the landlord returned to the country in October 2019. The landlord states in their written submissions that repair work was being performed in the rental suite until July 2019. The landlord said that after the work was completed in the rental suite the daughter and her family continued to reside in the landlord's residence as they did not want to leave it unattended. The landlord returned to the country in October 2019. The rental unit remained unoccupied until November 11, 2019 when the landlord said the daughter and her family moved into the suite.

.

The landlord submits that the rental unit was left in a state of disarray requiring considerable work to remove garbage, repair furnishings and to clean the suite adequately. The landlord submitted into evidence several photographs and a video recording they say were taken a few days after the tenant had vacated the suite. The landlord said that the images show the damage to the suite which they say goes beyond the expected wear and tear from a tenancy. The landlord described the state of the rental unit in their written submission as:

> multiple holes in the walls, broken tiles, broken doors, food crumbs in the cupboards, blinds destroyed, and dirty debris all over the unit inside and outside

In addition the landlord accused the tenant of leaving foodstuffs in the suite during the tenancy to attract vermin, complained about the tenant's conduct during the 8 year tenancy and complained of harassment after the tenancy had ended.

The landlord submitted into evidence an invoice from a contractor and said that the total amount paid for cleaning and repair work is $14,000.00. The work described in the invoice includes, removing garbage, patching and repairing drywall in preparation of painting, painting the walls and ceilings of the suite, hanging new doors and installation of new carpet underlay for the bedrooms. In addition, the landlord submits that they were provided with a quote of $10,000.00 to replace the tiles throughout the rental unit.

The landlord also claims that there was a rental arrear for this tenancy and seeks a monetary award of $1,100.00 for rent which they say was unpaid for the month of October 2018. The landlord testified that the tenant failed to pay any portion of the rent owing for that month. The landlord submitted into evidence a copy of a text message sent to the tenant in October 2018 demanding payment as evidence that there was an arrear. The landlord also submitted into evidence a bank statement showing deposits being made into their account. The bank statements show periodic deposits ranging in amounts from $1,225.00 to $2,500.00. The landlord explained that the deposits include

rent payments collected for other tenancies. In their written submission the landlord states the tenant "owes me $2,200 for unpaid rent for August and October 2018". The landlord did not address the issue of unpaid rent for August 2018 at the hearing.

The tenant disputes that any rent is owing for this tenancy. The tenant submitted into evidence a receipt for a bank draft showing the amount of $1,100.00 was issued to the landlord on August 18, 2018. The tenant explained that in the summer of 2018 they had issued multiple bank drafts to the landlord ahead of the due date as they were travelling.

The tenant disputes that they are responsible for the damage to the rental suite. The tenant questions the veracity of the photographic and video evidence submitted by the landlord as they say they do not contain indication of when they were taken. The tenant gave evidence that during the tenancy they raised issues of repairs and maintenance work but that the landlord failed to perform the work in a timely manner. The tenant attributes the condition of the suite at the end of the tenancy to the expected wear and tear from a lengthy tenancy or the failure of the landlord to make necessary repairs during the tenancy.

Analysis

Section 38 of the Act provides that when a tenancy ends, the landlord may only keep a security deposit if the tenant has, at the end of the tenancy, consented in writing, or the landlord has an order for payment which has not been paid. Otherwise, the landlord must return the deposit, with interest if payable, or make a claim in the form of an Application for Dispute Resolution. Those steps must be taken within fifteen days of the end of the tenancy, or the date the tenant provides a forwarding address in writing, whichever is later. A landlord who does not comply with this provision may not make a claim against the deposit and must pay the tenants double the amount of the security deposit, pet deposit, or both, as applicable.

In the present case, based on the testimonies of the parties, I find that the tenant has provided a forwarding address to the landlord in writing by a letter dated October 24, 2019. The landlord therefore had fifteen days from October 24, 2019 to either return the security deposit in full or file an application for dispute resolution to retain the deposit. The landlord filed their application on December 5, 2019, outside of the fifteen days provided under the Act.

Furthermore, the parties gave evidence that no condition inspection report was prepared at any time for this tenancy. Section 24(2) of the *Act* provides that the right of a landlord to claim against a security deposit is extinguished if they do not comply with

the requirements of section 23 in offering the tenant 2 opportunities for an inspection and completing a condition inspection report at the start of a tenancy.

Based on the evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within fifteen days of receiving the tenant's forwarding address. I accept the tenant's evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is entitled to an $1,100.00 Monetary Order, double the value of the $550.00 security deposit withheld by the landlord.

Section 51 (2) of the Act provides that if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of twelve times the monthly rent payable under the tenancy agreement.

Pursuant to section 51(3), the director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from:

> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
> (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

In the 2 Month Notice the landlord indicated that the tenancy is ending as the landlord or a close family member will occupy the rental unit. The parties agree that the rental unit was not occupied for close to a year after the tenancy ended with the landlord stating that the daughter and her family began residing in the rental suite on November 11, 2019.

The landlord submits that there were extenuating circumstances as a result of the landlord's failing health and the need to have major work performed in the rental suite. While I find that there were circumstances that led to a delay in accomplishing the

stated purpose for ending the tenancy, based on the totality of the evidence I am unable to attribute the reasons to extenuating circumstances.

The landlord's own evidence is that their medical condition improved so that they were able to travel overseas in May 2019 and that the work to the rental suite was completed in July 2019. I find that the circumstances that the landlord attributes for the delay of the landlord's daughter moving into the rental unit was concluded at this time and they could have accomplished their stated purpose.

However, the landlord's daughter chose to delay their move for several additional months. Both the landlord and the daughter cite concerns with leaving the landlord's residence unoccupied as the reason why the daughter did not move out. The daughter also mentions safety concerns about possible reprisal from the tenant. I find these reasons to be spurious. By choosing to have the daughter reside in the landlord's residence the rental unit was left unoccupied. It seems a dubious solution to leave one property unattended at the expense of another. I further find the daughter's cited safety concerns to be inconsistent with their own actions. If the daughter had fears about reprisal from the tenant, choosing to move into the rental suite shortly before filing an application would seem to exacerbate the potential dangers.

I do not find that these factors can be characterized as extenuating circumstances. Extenuating circumstances are those situations that would make it unreasonable and unjust to expect a landlord to accomplish the stated purposes for ending a tenancy. While an unexpected medical issue may be an example of such an extenuating circumstance, I find that factors such as wishing to have someone look after a residence or unfounded concerns about safety are not extenuating circumstances.

Based on the evidence I find that the landlord did not accomplish their stated purpose for ending the tenancy within a reasonable amount of time. I find that a delay due to medical issues or the need to perform some work may be considered to be reasonable but that the subsequent delay of an additional three months after work was completed and the landlord was traveling is not at all reasonable under the circumstances.

I find that the landlord's daughter did not occupy the rental unit within a reasonable time after the tenant had vacated the rental unit. I do not find the reasons provided by the landlord to be sufficient to show that there were extenuating circumstances allowing the full length of the delay experienced. Consequently, I allow the tenant's claim and award an amount of $13,200.00, the equivalent of 12 times the monthly rent of $1,100.00.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

The landlord claims the amount of $1,100.00 for rental arrear for this tenancy. I find that there is insufficient evidence in support of this monetary amount. The landlord's documentary evidence consists of a demand made by text message to the tenant and a bank statement that shows some deposits into the landlord's account. I find that simply demanding rent is not sufficient evidence that any rent was owing or payable. The bank statements show inconsistent amounts being deposited periodically. The landlord explained that they collect rent from a number of tenancies they manage but no explanation was provided as to what amounts are attributable to this tenancy. The landlord was provided with a full opportunity to make submissions and explain their documentary evidence but failed to do so. All of the deposits show an amount over $1,100.00, the rent for this tenancy. Furthermore, there are deposits made on November 27, 2018 and December 24, 2018, after this tenancy had ended. In addition, the landlord's own written statement submitted into evidence states that rent was not paid for August 2018 and October 2018. No explanation was given as to why they would be claiming for an additional month in their written statement but seeking a lesser amount in their application.

Based on the totality of the evidence I find that I am not satisfied on a balance of probabilities that there is any rental arrear. Accordingly, I dismiss this portion of the landlord's application.

The landlord seeks a monetary award of $24,000.00 for work performed on the rental property as well as potential work that they seek to have done at a future date. The landlord attributes the need for the repair, cleaning and work to the tenant. I find that there is insufficient evidence in support of the full amount claimed by the landlord.

In the absence of a proper condition inspection report prepared at the start of the tenancy I find there is insufficient evidence of the condition of the suite at the outset. The landlord has submitted photographic and video evidence of the suite at the end of the tenancy and these have some probative value in determining what damages and

losses were seen at the end of the tenancy. I do not find the tenant's objection that the video and photographs are not time stamped to be a serious detriment. I find the landlord's testimony that these images were taken on or after December 5, 2018 when they first attended at the rental suite after the tenancy had ended to be credible and reasonable.

However, in the absence of a proper condition inspection report I find that the landlord must demonstrate on a balance of probabilities that the damage incurred is attributable to the negligence or action of the tenant.

I find that much of the items claimed by the landlord are more in the nature of renovations and improvements to the rental unit rather than simply repairs to bring it back to its pre-tenancy state. Many of the building elements would have exceeded its expected useful life during this 8-year tenancy. Residential Tenancy Policy Guideline 40 provides some guidance on the useful life of building elements. Interior painting is expected to have a useful life of 4 years while elements including tiling, blinds and carpeting is expected to need replacement in 10 years.

I find that items such as painting of the walls, redoing the flooring, tiles and replacement of window blinds is work that would have been required due to the age of the rental property and not attributable to the tenant. Similarly, I find that patching and filling of holes in the walls of the rental unit and cleaning of balcony areas is simply part of the expected reclamation process after a lengthy tenancy. I find that the photographs and video show a rental suite that does not appear to have been adequately vacated with items left on the premises. Nevertheless, I find that much of the condition of the suite to be in line with what would be expected from a lengthy tenancy.

From the photographs submitted I do find that the rental unit did have some damage that would not have been expected from the ordinary use of residential property. I find that there is a single larger hole in the drywall next to what appears to be a closet and that an interior door appears to have removed from its hinges and is riddled with smaller holes. I also note that the evidence shows there to be significant debris and garbage strewn throughout the interior of the rental property. I find it reasonable to conclude that this is attributable to the tenant. I find it reasonable that if the larger hole in the wall or the door torn off the hinges was present during the tenancy the tenant would have made mention of the issue to the landlord. I also find that the garbage and materials strewn about the unit to be the result of the tenant leaving it in the suite.

The invoice submitted into evidence by the landlord itemizes some of the work done.

Based on the foregoing, I find it appropriate to issue the landlord a monetary award in the amount of $2,600.00 for removal of garbage, $1,560.00 for the repair and installation of doors and hardware and $650.00 1/4th of the amount charged for repairs to the drywall in the suite for the single large hole in the wall seen in the evidence. The balance of the landlord's application is dismissed.

As the tenant was primarily successful in their application they may recover their filing fee from the landlord.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $9,590.00 on the following terms:

Item	**Amount**
Double Security Deposit (2x $550.00)	$1,100.00
Damages and Loss (12 x $1,100.00)	$13,200.00
Less Landlord's Award for Damages	-$4,810.00
Filing Fee	$100.00
TOTAL	**$9,590.00**

The landlord must be served with this Order as soon as possible. Should the landlord 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: March 11, 2020

Residential Tenancy Branch