Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MNRL-S, MNDL-S, FFL

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on March 13, 2020 (the "Application"). The Landlord applied as follows:

- To recover unpaid rent;
- For compensation for damage to the rental unit;
- To keep the security deposit; and
- For reimbursement for the filing fee.

The Agent appeared at the hearing for the Landlord. The Tenants appeared at the hearing with M.K. to assist. I explained the hearing process to the parties. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all testimony provided and reviewed all documentary evidence submitted. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to recover unpaid rent?
2. Is the Landlord entitled to compensation for damage to the rental unit?
3. Is the Landlord entitled to keep the security deposit?
4. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord sought the following compensation:

Item	Description	Amount
1	Cleaning and handyman	$1,150.61
2	Tile repair	$1,260.00
3	Painting	$2,446.50
4	Unpaid rent	$26,583.00
5	Filing fee	$100.00
	TOTAL	**$31,540.11**

In relation to a tenancy agreement, the parties agreed the tenancy started in October of 2015. The parties agreed rent was $8,861.00 per month due on the first day of each month at the end of the tenancy. The parties agreed the Tenants paid a security deposit of $4,000.00. A Lease Extension Addendum was submitted and the parties agreed it is accurate. It extended the tenancy for a period commencing October 23, 2018 and ending October 31, 2020 with a term that the Tenants could terminate the agreement after October 31, 2019 with three clear months written notice.

Both parties agreed the tenancy ended February 29, 2020.

Both parties agreed the Tenants provided the Landlord their forwarding address in writing January 31, 2020.

A Condition Inspection Report ("CIR") was submitted and the parties agreed it is accurate. It shows a move-in inspection was done October 23, 2015, both parties participated, the CIR was completed and both parties signed the CIR.

The Agent testified that a move-out inspection was done February 29, 2020 and both parties participated but the Tenant would not sign the CIR.

The Tenants disputed the above and testified as follows. The Agent and Tenant F.B. met February 29, 2020. The Agent did not complete the CIR in front of Tenant F.B. Tenant F.B. wanted to sign the CIR but was not given an opportunity to do so. The Agent kicked Tenant F.B. out of the rental unit during the inspection.

In reply, the Agent disputed the Tenants' version of events in relation to the move-out inspection. The Agent testified that he asked Tenant F.B. to leave because they were done the inspection.

In reply, the Tenants testified that the Agent did not give them an opportunity to look at the issues claimed on the CIR.

1 Cleaning and handyman $1,150.61

The Tenants agreed to pay this amount for cleaning and agreed it could be deducted from the security deposit.

2 Tile repair $1,260.00

The Agent testified that the Tenants left a large rust stain on the tile floor of one of the bathrooms in the rental unit. The Agent testified that the cleaning company could not remove the stain. The Agent testified that the Landlord is looking to have a company buff and grind down the tile as well as use special solvents to remove the stain. The Agent referred to a quote for this in evidence. The Agent also relied on the CIR and a photo submitted.

At first, M.K. submitted that there was just natural discoloration of the stone in the bathroom and that this was not caused by the Tenants. M.K. also stated that this issue was not brought to the Tenants' attention in the CIR.

I asked M.K. to refer to the photo of the stain. M.K. then said the stain shown could have been removed with a $10.00 solvent. M.K. also submitted that the quote is just a quote and not the actual cost. M.K. said the tile is not good anyway if the stain cannot come out. M.K. further stated that if the stain had not been cleaned in the past there would have been 1,000 circular stains not three or four. M.K. submitted that the stain could have easily been cleaned and had been cleaned previously.

3 Painting $2,446.50

The Agent testified as follows. The Tenants had a very large art collection and used screws to hang the art. There were dozens of screw holes in the walls at the end of the tenancy. The Tenants did not patch any of the holes and left screws in the walls. The Landlord could not re-rent the unit without getting the holes fixed. The Landlord had to have the unit painted. The unit was painted at the start of the tenancy.

The Agent relied on an invoice in evidence for patching and painting the walls, the CIR and photos.

M.K. made the following submissions. The Tenants do not recall the rental unit being freshly painted when they moved in. The Tenants agree they should have filled in the holes, but their position is that this was done by the handyman and is covered in item one. The Tenants lived in the unit for four years, paint will get old and look old which is reasonable wear and tear. The invoice in relation to item one mentions grout which is for filing the holes.

In reply, the Agent testified that grout is between the tiles and flooring and has nothing to do with the walls. The Agent further stated that the invoice in relation to item one shows the grout was cleaned. The Agent testified that the Landlord wanted a professional to fix the walls given the extent of the damage.

4 Unpaid rent $26,583.00

The Agent testified as follows. The Landlord is seeking three months of loss of rent. The Tenants had a fixed term tenancy ending October 31, 2020. The Landlord received notice from the Tenants on January 31, 2020 ending the tenancy for February 29, 2020.

The Agent further testified as follows. The unit was listed for rent February 21, 2020. It was listed for $8,637.00 in rent. It was listed as available March 01, 2020 for a term ending October 31, 2020. The Landlord was also open to a shorter term. The Landlord did showings of the rental unit. The pandemic negatively impacted the luxury rental market. The rental unit was offered at a term of less than one year because the owner's son intended on moving into the rental unit at the end of the fixed term. The unit was never re-rented. The owner's son moved in June 01, 2020. The Landlord lost three months of rent.

The Agent testified that the rental unit was posted on a rental website and was constantly flagged for removal. The Agent submitted that the Tenants were responsible for this.

There were emails submitted from May 24, 2019 and May 30, 2019 where the parties discussed ending the tenancy earlier than the end of the fixed term. In the May 24, 2019 email the Agent asked the Tenants their plans as the owner wanted to use the rental unit themselves and was agreeable to an early end to the tenancy.

Tenant I.B. responded as follows on May 30, 2019:

> …We appreciate this option, although since our developer is unsure of the due date for our settlement, we currently have no plans as to terminating the contract sooner than set. If there are any updates on this situation I will inform you.

The Agent took the following position in relation to the above emails. The tenancy was never amended because the parties did not come to an agreement about ending the tenancy earlier than as stated in the agreement. If the parties had agreed, the Landlord would have captured this in an addendum and had both parties sign it. The first time the Landlord heard from the Tenants about ending the tenancy early was the notice received January 31, 2020. The "out clause" was never invoked by the Tenants. If the Tenants had agreed to the May 24, 2019 email, the parties could have come to an agreement about ending the tenancy early. When the Tenants gave notice, the owner's son had other commitments.

M.K. acknowledged that the Tenants gave notice January 31, 2020 ending the tenancy February 29, 2020.

M.K. submitted that the tenancy agreement was amended by email and accepted which became a contract. He relied on the May 24, 2019 email. He submitted that the Landlord offered the option to terminate the tenancy early May 24, 2019 and the Tenants accepted this offer January 31, 2020. M.K. submitted that the Landlord had told the Tenants that the owner wanted to move into the rental unit and had issued a Two Month Notice. Given this, the Tenants looked for a new place but could not accept the offer immediately.

M.K. made the following further submissions. The Tenants found a place in January and wanted to confirm ending the tenancy with the Landlord. M.W. replied she was glad to hear the Tenants found a place and that they just needed to complete a form. The email from M.W. was confirmation of the Landlord's agreement to end the tenancy early. Given this, the Tenants went ahead with the new place. If the Tenants had known the penalties they faced for ending the tenancy early they would not have done so. The Tenants thought the owner wanted to move in.

M.K. made the following further submissions. The Tenants did not flag the rental listings. The Landlord has not submitted evidence of the listings. Short-term rentals are popular at the rental unit building. The Tenants do not know what happened with the

rental unit after they vacated. They do not know if it was advertised, for how much or whether there was an opportunity provided for a shorter term.

Evidence

I note the following relevant evidence submitted by the Landlord.

Written submissions which state in part the following. The owner's son wanted to move into the rental unit which prompted the May 24, 3019 email. The parties did not agree to an early end to the tenancy and therefore the owner's son rented somewhere else and signed a fixed term tenancy agreement. The Landlord issued a Two Month Notice effective October 31, 2020, the end of the fixed term. The unit was listed on two rental websites as well as through a company which posted it on four further sites.

A letter dated June 25, 2019 from the Agent to the Tenants with the Two Month Notice attached. It states that the owner would be willing to accept an earlier termination date on a mutually agreed upon basis and for the Tenants to let the Landlord know if they wished to do so.

A letter dated February 19, 2020 from the Agent to the Tenants acknowledging the termination of the tenancy and advising that the Tenants will be responsible for rent until a new tenant is secured.

Emails showing the unit was listed for rent February 21, 2020 through a company and on a rental website. The emails show the unit was listed on the rental website again March 23, 2020, April 03, 2020, April 06, 2020, April 07, 2020, April 17, 2020, April 22, 2020, April 23, 2020 and May 13, 2020.

Photos of the rental unit at the end of the tenancy.

The CIR completed at move-in and move-out.

An invoice for cleaning and handyman services.

A quote to fix the stain on the bathroom floor.

An invoice for the patching and painting of walls.

I note the following relevant evidence submitted by the Tenants.

A Termination of Tenancy By Tenant form ending the tenancy February 29, 2020. It states that the reason for leaving is that the owner agreed to accept an early termination date before October 31, 2020.

An email from the Tenants to M.W. dated January 29, 2020 stating:

> …As we are going to vacate the flat by the end of next month, I am wondering do you have the email address of our agent to inform him.

M.W.'s email response as follows:

> I got a call from your new landlord yesterday asking for a reference – of course I told them that you…are fantastic so I'm glad to hear you got the place you wanted…
>
> We'll just need you to complete, sign, and return the attached form and then we can start end of tenancy procedures…

Analysis

Security deposit

Under sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to the security deposit if they do not comply with the *Act* and *Residential Tenancy Regulation* (the "*Regulations*"). Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

Based on the testimony of the parties and the CIR, I am satisfied the Tenants participated in the move-in inspection and therefore did not extinguish their rights in relation to the security deposit under section 24 of the *Act*.

The parties disagreed about what occurred at the move-out inspection. However, I am not satisfied this was a situation where the Tenants were offered two opportunities to do a move-out inspection, one on the RTB form, and declined to participate. I did not understand this to be the position of either party. Therefore, I am not satisfied the Tenants extinguished their rights in relation to the security deposit under section 36 of the *Act*.

It is not necessary to determine whether the Landlord extinguished their rights in relation to the security deposit under sections 24 or 36 of the *Act* as extinguishment only relates to claims for damage to the rental unit and the Landlord has claimed for loss of rent.

Based on the testimony of both parties, I accept that the tenancy ended February 29, 2020.

Based on the testimony of both parties, I accept that the Tenants provided the Landlord their forwarding address in writing January 31, 2020.

Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from the later of the end of the tenancy or the date the Landlord received the Tenants' forwarding address in writing to repay the security deposit or claim against it. The Landlord therefore had 15 days from February 29, 2020 to repay the security deposit or claim against it. The Application was filed March 13, 2020, within time. I find the Landlord complied with section 38(1) of the *Act*.

Compensation

Section 7 of the *Act* states:

> 7 (1) If a…tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying…tenant must compensate the [landlord] for damage or loss that results.
>
> (2) A landlord…who claims compensation for damage or loss that results from the [tenant's] non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

> It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
>
> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;

- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Pursuant to rule 6.6 of the Rules of Procedure, it is the Landlord as applicant who has the onus to prove the claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

1 Cleaning and handyman $1,150.61

The Tenants agreed to pay this amount for cleaning and agreed it could be deducted from the security deposit. Therefore, the Landlord is entitled to this amount.

2 Tile repair $1,260.00

Section 37 of the *Act* states:

> (2) When a tenant vacates a rental unit, the tenant must
>
> > (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear…

I am satisfied based on the CIR that there was rust damage to the floor of the second bathroom at the end of the tenancy. This is supported by the photo. I am satisfied based on the CIR that the rust damage was not there at the start of the tenancy. Therefore, I am satisfied the Tenants caused the rust damage. The Tenants did not dispute that they caused the stains shown in the photo.

The Tenants did dispute that the stains are damage. The Tenants took the position that the stains could have easily been cleaned. I do not accept this. The photo shows numerous circular rust stains on the floor where a metal container has been left. There are at least five separate circular stains. The stains are in different spots. I find it unlikely that there would be five stains in different spots if the stains could be easily

cleaned. I find it unlikely that the Tenants would not have cleaned the stains prior to the point of there being five stains in five separate locations if these were easily cleaned. I also note the statement on the quote which says that removal of all rust may not be possible. In my view, this tends to support the Landlord's position.

I also note that if the stains were easy to clean, the Tenants should have cleaned them at the end of the tenancy.

I am satisfied based on the photo and invoice that it is more likely than not the rust stains are stains that cannot be easily cleaned. I find the rust stains are not natural deterioration that occurred due to aging or other natural forces. Based on the photo, I find the stains are a result of the Tenants leaving a metal container on the bathroom floor and allowing it to repeatedly stain the flooring. I find this could have easily been avoided with minimal care and effort by removing the metal container or placing something under the metal container. I find the Tenants breached section 37 of the *Act* by leaving the flooring stained at the end of the tenancy.

I am satisfied the Landlord has to have the stains removed by a company with the experience and materials to do so given the nature of the damage. I am satisfied based on the quote that this will cost $1,260.00. I find this amount reasonable. It is not relevant that this is a quote and not money the Landlord has already paid. The Landlord has proven loss and proven the amount of loss through the quote. The Landlord is entitled to the amount sought.

3 Painting $2,446.50

I again note section 37 of the *Act*.

I also note Policy Guideline 01 which states (page 4):

> The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.

Based on the CIR, I am satisfied the walls of the rental unit were in good condition on move-in. I am also satisfied many of the rooms were freshly painted as the CIR specifically states this, the Tenants agreed with the CIR and the Tenants signed the CIR. Based on the photos and CIR, I am satisfied there were screws and holes left in the walls at the end of the tenancy. Based on the photos, I am satisfied the damage is beyond reasonable wear and tear given the number of screws and holes and the nature

of the damage. I am satisfied the Tenants breached section 37 of the *Act* by leaving the wall damage at the end of the tenancy. I did not understand the Tenants to dispute this as M.K. acknowledged the Tenants should have filled the holes.

I am satisfied based on the extent of the wall damage that the Landlord had to have the damage fixed. I do not accept that the cleaners fixed the wall damage or that the price of fixing the wall damage is covered by the cleaning invoice. A reading of the invoice does not support this position. The reference to grout is clearly a reference to cleaning grout and I find it unlikely the reference to grout refers to fixing the wall damage as this does not accord with common sense. I am satisfied based on the invoice which refers to repairing the wall damage that it cost $2,446.50 to repair the wall damage in the rental unit.

Policy Guideline 40 outlines the useful life of building elements and shows that the useful life of interior paint is four years (page 5). I find the paint in the rental unit was more than four years old at the end of the tenancy as the tenancy started in October of 2015 and ended in February of 2020. The invoice includes the cost of painting and therefore I reduce the amount awarded to the Landlord to take into account that the paint was past its useful life. I award the Landlord $1,223.25 being half the amount sought. I find this amount balances the fact that the Landlord had to have the wall damage fixed which necessitated painting with the fact that the paint was past its useful life.

4 Unpaid rent $26,583.00

Section 45 of the *Act* states:

> (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 (emphasis added)
>
> (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.

The Lease Extension Addendum states that the tenancy was extended for a period starting October 23, 2018 and ending October 31, 2020 but that the Tenants could terminate the agreement after October 31, 2019 with three months written notice.

I find the Tenants had a fixed term tenancy ending October 31, 2020 based on the Lease Extension Addendum.

I do not accept that the May 24, 2019 email from the Agent changed the term of the tenancy. I find the Agent opened up a discussion about the Tenants possibly ending the tenancy early. However, the Tenants replied May 30, 2019 and I find the reply ended the discussion without a change to the terms of the tenancy agreement. I find this is supported by the letter dated June 25, 2019 from the Agent which states that "the owner would be willing to accept an earlier termination date on a mutually agreed upon basis" (emphasis added) and asked the Tenants to advise if they wished to do so. Again, in my view, the Agent was opening up a discussion about ending the tenancy early through a mutual agreement.

However, the Tenants did not raise the issue of ending the tenancy early again until January 29, 2020, more than eight months after the May 24, 2019 email and more than seven months after the June 25, 2019 letter.

I find the first relevant correspondence was the email sent from the Tenants to M.W. January 29, 2020 stating:

> …As we are going to vacate the flat by the end of next month, I am wondering do you have the email address of our agent to inform him.

This email is not the Tenants opening up a discussion about ending the tenancy early or coming to a mutual agreement about ending the tenancy. The Tenants are stating that they are vacating. They are not asking if the owner is still interested in moving in. They are not asking if the Landlord is still willing to allow them to end the tenancy early. They are not asking to discuss the issue. The Tenants told the Landlord they were ending the tenancy.

The Tenants took the position that the email from M.W. dated Janaury 29, 2020 was acceptance by the Landlord of them ending the tenancy early. I do not agree. Once tenants tell a landlord they are vacating, the landlord does not have an obligation to tell them they cannot vacate. A landlord cannot stop tenants from vacating. The email

from M.W. does not state that the Landlord is mutually agreeing to end the tenancy or agreeing to waive their right to claim for loss of rent.

Further, the Landlord did not send the Tenants a Mutual Agreement to End Tenancy form or sign such a form. The Tenants completed the Termination Of Tenancy By Tenant form which clearly indicates it applies when tenants are ending the tenancy, not when parties are agreeing to end the tenancy.

I do not find that M.W. said anything in the January 29, 2020 email that precluded the Landlord from seeking loss of rent.

I also find the Tenants had notice that they would be responsible for loss of rent when they ended the fixed term tenancy early for two reasons.

First, section 45 of the *Act* states that the Tenants were not entitled to end the fixed term tenancy early and section 7 of the *Act* states that the Tenants would be responsible for loss associated with breaching the *Act* or tenancy agreement. It is clear from the tenancy agreement that the parties were bound by the *Act*. The Tenants were expected to know their rights and obligations under the *Act*.

Second, the Agent sent the Tenants notice that they would be responsible for loss of rent on February 19, 2020. In my view, this should have been the response provided January 29, 2020 when the Tenants first advised of their intention to vacate. However, I find the notice provided February 19, 2020 sufficient given the Tenants should have been aware of their obligations and given the notice was provided prior to the end of the tenancy.

In the circumstances, I find the Tenants breached section 45 of the *Act*. I also find the Tenants did not comply with the tenancy agreement as they did not give three months notice.

I am satisfied the rental unit remained empty from March to June 01, 2020. I accept the Agent's testimony on this point given the evidence shows the rental unit was listed in March, April and May of 2020 which would not have been necessary if the rental unit was occupied. I also did not find the Tenants to dispute this, the Tenants did not know what happened with the rental unit.

I am satisfied the Landlord lost rent for March, April and May given the rental unit remained empty. However, the tenancy agreement states the Tenants could end the

tenancy with three clear months written notice. The Tenants gave notice January 31, 2020. According to the tenancy agreement, the Tenants could have ended the tenancy for the end of April. Therefore, I do not accept that the Landlord lost May rent due to the Tenants' breach.

In relation to mitigation, the Landlord was required to mitigate the loss of rent. Mitigation in these circumstances includes attempting to re-rent the unit within a reasonable period for the same rent amount. When a rental unit remains empty for one month, I would expect a landlord to take further steps to mitigate loss.

I am satisfied based on the evidence that the Landlord listed the unit for rent February 21, 2020. However, the Landlord did not submit the listings such that I can confirm what they say or how much the unit was listed for.

In the circumstances, I award the Landlord loss of one month of rent for the following reasons. The Tenants breached the *Act* and tenancy agreement and should be required to compensate the Landlord for at least some of the resulting loss. However, I am not satisfied based on the evidence provided that the Landlord took reasonable steps to mitigate the loss in relation to the rent amount or once the unit remained empty for one month. I also find the unit should have been listed before February 21, 2020. Balancing these considerations, I am satisfied the Landlord is entitled to $8,861.00 for one month of loss of rent.

5 Filing fee $100.00

Given the Landlord was partially successful in the Application, I award the Landlord reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*.

Summary

The Landlord is entitled to the following:

Item	Description	Amount
1	Cleaning and handyman	$1,150.61
2	Tile repair	$1,260.00
3	Painting	$1,223.25
4	Unpaid rent	$8,861.00
5	Filing fee	$100.00
	TOTAL	**$12,594.86**

The Landlord can keep the $4,000.00 security deposit pursuant to section 72(2) of the *Act*. The Landlord is issued a monetary order for the remaining $8,594.86 pursuant to section 67 of the *Act*.

Conclusion

The Landlord is entitled to $12,594.86. The Landlord can keep the security deposit. The Landlord is issued a monetary order for the remaining $8,594.86. This Order must be served on the Tenants. If the Tenants fail to comply with this Order, it 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 *Act*.

Dated: August 19, 2020

Residential Tenancy Branch