Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent and for damage to the unit in the amount of $2,750 pursuant to section 67;
- authorization to recover the filing fee for this application from the tenants 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 landlords testified, and the tenants confirmed, that the landlords served the tenants with the notice of dispute resolution form and supporting evidence package. The tenants testified that they uploaded a number of documents to the RTB evidence portal, but that they did not send these documents to the landlords. I must note that the RTB evidence portal only shows a single document uploaded by the tenants. The tenants testified that they were walked through the upload process by an information officer of the RTB, and that there must have been an error along the way which accounts for the evidence not being in the system.

However, as the tenants never served the landlord with copies of their documentary evidence, the issue of the missing documents is moot. Even if they were uploaded, I would not be able to consider them, as the landlords were deprived of their right to review the tenants' documentary evidence in advance of the hearing by the tenants' failure to serve them no later than seven days before (as set out in Rule of Procedure 3.15).

As such, I exclude the single document uploaded to the RTB evidence portal by the tenants from the evidentiary record.

Issues to be Decided

Are the landlords entitled to:

1) a monetary order for $2,750;

2) recover the filing fee;
3) retain the security deposit in partial satisfaction of the monetary orders made?

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.

The landlords and tenant KF entered into a written tenancy agreement on March 2, 2017. It indicated a starting date of March 3, 2017, however the parties agree that the tenant did not move into the rental unit until mid-March 2017. The parties agree that the rental unit was brand new at the start of the tenancy (the reason for the delay in KF's moving in was so that it could be completed). Monthly rent is $1,500 and is payable on the first of each month. The KF paid the landlord a security deposit of $750. There is some confusion as to what occurred to this deposit. I will discuss it in more detail below

The landlord and KF conducted a move-in condition inspection on March 2, 2017. The landlords and KF initialed a condition inspection report next to the words "brand new", but otherwise the left the report blank. KF testified, and the landlords did not disagree, that at the time of the inspection, the rental unit had not been finished, and was missing some windows and doors.

In December 2019 or January 2020, tenant HM moved into the rental unit. The landlords alleged she moved in during June 2019, based on the fact they saw her mother's cat in the rental unit. However, the tenants explained KF was cat-sitting for HM's mother for the weekend, and that the cat's presence did not mean that HM had moved in.

In any event, the tenants asked for HM to be added to the tenancy agreement in January 2020, but the landlords refused initially. A month or so later, the landlords agreed, but informed the tenants that this would be accompanied by a $300 rent increase. The tenants advised the landlords they were required to give two months' notice of any such increase. These discussions were paused due to outbreak of the COVID-19 pandemic.

HM lost her job in March 2019 due to the pandemic. KF, who is a free-lance contractor, lost his means of income (his line of work requires him to travel internationally). This impacted their ability to pay rent. HM was ultimately able to qualify for CERB and other government subsidy programs, but KF, as a free-lance contractor, was not. The parties agree that the tenants paid rent as follows:

	Owed	Paid	Balance
01-Mar-20	$ 1,500.00		$ 1,500.00
01-Mar-20		$1,500.00	$ -
01-Apr-20	$ 1,500.00		$ 1,500.00
01-May-20	$ 1,500.00		$ 3,000.00
01-Jun-20	$ 1,500.00		$ 4,500.00
16-Jun-20		$3,000.00	$ 1,500.00
26-Jun-20		*$300.00	$ 1,200.00
01-Jul-20	$ 1,500.00		$ 2,700.00
01-Jul-20		$1,100.00	$ 1,600.00
01-Jul-20		*$300.00	$ 1,300.00
01-Aug-20	$ 1,500.00		$ 2,800.00
01-Aug-20		$1,100.00	$ 1,700.00
01-Aug-20		*$300.00	$ 1,400.00
01-Sep-20	$ 1,500.00		$ 2,900.00
02-Sep-20		$650.00	$ 2,250.00

*government rent subsidy payments

The tenants testified that they withheld portions of the rent due to various alleged breaches of the Act by the landlords during the tenancy.

KF testified that the rental unit's air conditioner started to drip water and have a diminished cooling capacity in 2019. He testified that he notified the landlord of this many times, and that they event sent a technician to repair it. He testified that the technician advised him that the unit was improperly installed, was likely leaking internally which would necessitate further repairs. KF testified that the landlord decline to spend additional money to conduct a test to determine if the air conditioner was leaking internally. He testified that he did not use the unit in the fall or winter of 2019, but in the spring and summer of 2020 he tried using it again, and that it continued to drip water and failed to provide adequate cooling. He testified that the tenants reported this to the landlord, and withheld $100 per month for April, May, and June 2020 from the monthly rent in an effort to spur the landlords into fixing the air conditioner properly.

Additionally, HM testified that she requested to be provided with a key fob for the building and garage when she moved in, but that the landlords never provided her with one. KF asserted that she was entitled to one by law, and that the lack of one caused her a great deal of inconvenience, and caused her, on one occasion, to incur a parking fine for parking in a visitor's spot. The tenants testified that they withheld $100 per month for April, May, June, July, August, and September 2020 from their rent in an attempt to motivate the landlord to provide an additional key fob.

Landlord KG testified that the landlords did provide an additional fob to the tenants, but that the tenants failed to return it at the end of the tenancy. The tenants denied this.

HM testified that she notified the landlord in March 2020 of the need for the landlords to confirm that she was residing at the rental unit, so that she could receive a $300 per month government rent subsidy. She testified that she requested this multiple times, and that the landlords only provided this to her in June 2020. She argued that, had the landlord provided this confirmation when she had asked for it, the landlord would have received $300 payments in April and May 2020.

The landlords did not dispute that the tenants requested this confirmation from them in March 2020. Rather, GK testified that landlord RG was stuck in India due to the COVID travel restrictions, and that she was so overloaded with work that she was unable to provide the required confirmation. GK testified that she is a pharmacist and that, early in the pandemic, she and her colleagues were overrun with work due to people stockpiling medications (among other things). She testified that she would frequently work a full day without a break and was too mentally exhausted to do anything else when she arrived home.

Finally, the tenants testified that they only paid $650 in monthly rent in September, as they were told by the landlords' realtor (the landlords were in the process of selling the rental unit) that the landlords intended to keep the damage deposit after the tenancy ended to cover the damage they say the tenants caused to the rental unit. The tenants, afraid that the landlords would do this, and of the opinion that they had not caused any damage to the rental unit beyond ordinary wear and tear, opted to "take back" the security deposit by withholding an amount equal to it ($750) from September 2020 rent. The tenancy ended on October 1, 2020.

The parties conducted a move out condition inspection of October 1, 2020, but the landlords did not prepare a condition inspection report. KG testified that she took photos during the inspection. She submitted some of these photos into evidence.

The landlord seeks compensation in the amount of $750. KG testified that the loss suffered by the landlord was actually $1,500, as that was the amount they agreed to pay the purchaser of the rental unit in compensation for the damage to the rental unit.

The landlords allege that the tenants scratched the floor, caused water damage to the floor, damaged to the walls which necessitated that they be repainted, and caused exterior flagstones to be cracked. Aside from five photographs submitted into evidence, the landlord provided no documentary evidence supporting these allegations, or demonstrating how much their repairs cost.

The tenants testified that the water damage to the floor was caused by the dripping air conditioner unit that they repeated informed the landlords about. Additionally, the tenants testified they put towels and bowls under it to catch dripping water, and that they changed it daily. The tenants testified that all other damage to the rental unit was ordinary wear and tear, and therefore was not compensable. Additionally, KF testified

that he volunteered to paint the interior walls of the rental unit after vacating, but that the landlords refused.

The tenants testified they verbally gave their forwarding address to the landlords on October 1, 2020. The landlords deny this. They testified that the tenants merely told them that they were moving into another unit in the same building, and that they asked around the building the find out their new address.

Analysis

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. 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.
>
> (the "**Four Part Test**")

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, the landlord must prove it is more likely than not that the tenants breached the Act, that they suffered a quantifiable loss as a result, and that the y acted reasonably to minimize the loss.

1. Rental Arrears

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.

There is no dispute that the monthly rent is $1,500. Additionally, there is no dispute that the tenants made payments as follows:

	Owed	Paid	Balance
01-Mar-20	$ 1,500.00		$ 1,500.00
01-Mar-20		$1,500.00	$ -
01-Apr-20	$ 1,500.00		$ 1,500.00
01-May-20	$ 1,500.00		$ 3,000.00
01-Jun-20	$ 1,500.00		$ 4,500.00
16-Jun-20		$3,000.00	$ 1,500.00
26-Jun-20		*$300.00	$ 1,200.00
01-Jul-20	$ 1,500.00		$ 2,700.00
01-Jul-20		$1,100.00	$ 1,600.00
01-Jul-20		*$300.00	$ 1,300.00
01-Aug-20	$ 1,500.00		$ 2,800.00
01-Aug-20		$1,100.00	$ 1,700.00
01-Aug-20		*$300.00	$ 1,400.00
01-Sep-20	$ 1,500.00		$ 2,900.00
02-Sep-20		$650.00	$ 2,250.00

*government rent subsidy payments

As such, I find that the tenants have failed to pay $2,250 in rent. The tenants' argument that they were entitled to make these deductions because the landlord was not, in their view, complying with the Act by failing to provide key fobs, failing to make repairs, failing to provide confirmation that HM resided at the rental unit or improperly intended to withhold the deposit are not valid reasons under the Act to withhold rent.

If the tenants believe that the landlords were acting in breach of the Act, the proper recourse is to file an application for dispute resolution with the RTB seeking monetary compensation rather than resort to "self-help remedies". As such, I find that the tenants breached section 26 of Act by failing to pay their rent in full and on time, as required by the tenancy agreement. The breach cost the landlord $2,250.

However, the landlords are required to act reasonably to minimize their loss. Ordinarily, there is not much a landlord can do to minimize their loss in circumstances where a tenant refuses to pay rent in full. However, in the instances, there was one step that the landlords could have taken to minimize their loss. They could have provided the tenants with confirmation that HM resided at the rental unit when the tenants asked for it, so that

the tenants could have received some amount of rent relief from the government. I understand that the tenants would have received $300 for each of April and May, had they provided the information when it was requested (in March).

I also understand that due to the circumstances thrust upon the landlords by the pandemic, they were unable to provide the tenants with the requested information when they were asked for it. I am not without sympathy for the landlords in their circumstances. The early days of the pandemic were especially taxing for individuals in the healthcare profession. These times would have been especially taxing for the landlords, in light of the fact that RG was unable to return to Canada due to travel restrictions to assist with the administration of the rental unit. I do not find it unreasonable for there to have been some delay between when the tenants requested the confirmation from the landlords and when they received it.

However, the landlords' do not relieve them entirely from their obligation to act reasonably to minimize their loss. Rather, it only changes what actions might be considered "reasonable". In this case, the delay of the landlords is measured in months and not weeks. I find that a reasonable delay, in the landlords' circumstances, between receiving the tenants' request and providing the requested information would have been one month. The landlords delayed by three months. I note that, when the tenants finally received the landlord's confirmation that HM lived in the rental unit in June, the landlord's received the subsidy payment that same month. From this I infer that, had the landlords provided the tenants with the confirmation they sought in April (one month after the tenants requested it), the landlord would have received a subsidy payment that same month.

Accordingly, I find that, had the landlords acted reasonably to minimize their loss of rent, they would have received subsidy payments from April and May 2020. As such, the landlords failed to act reasonably to minimize their loss of $300 in rent for these two months. They are not entitled to recover this amount ($600). They are entitled to recover the balance of rent owed ($1,650).

2. Damage to Rental Unit

As stated above, the landlords bear the onus to show that the tenants breached the Act by damaging the rental unit. Section 37(2) of the Act states:

> **Leaving the rental unit at the end of a tenancy**
> 37(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,

Policy Guideline 1 states:

> PAINTING

> The landlord is responsible for painting the interior of the rental unit at reasonable intervals. The tenant cannot be required as a condition of tenancy to paint the premises. The tenant may only be required to paint or repair where the work is necessary because of damages for which the tenant is responsible.

I find that the landlord has failed to demonstrate that the water damage to floor was caused by the tenants. I find that it is more likely than not that it was caused due to the dripping air conditioner unit. I find that the tenants acted reasonably to minimize the damage by notifying the landlord of problems with the air conditioner unit and but putting towels and bowls under it to catch the water.

Additionally, I find that the smudges to the walls and the scratches to the floor are the result of reasonable wear and tear that is to be expected over a three-year tenancy.

Finally, I find that the tenants patched holes in the walls that they created, and that, by doing so, repaired any damage to the walls they caused. However, this portion of the wall necessitated repainting due to the (no fixed) damaged caused by the tenants. As such, per Policy Guideline 1, the tenants are responsible for the cost of repainting. The landlords did not provide any documentation as to the cost of repainting this section of the wall or what portion of the offset payment to the purchaser was attributable to the painting of this wall. As such, I find that nominal damages in the amount of $50 are appropriate. I order the tenants to pay the landlords this amount.

Additionally, I note that the landlords have not provided any documentary evidence supporting the quantum of their loss. I have merely their testimony that they were required to pay the purchaser of the rental unit $1,500 as an offset for the cost he would incur repairing the damage. At a minimum, I would have expected the landlords to provide documentation confirming this offset (a copy of the cheque use, correspondence regarding the transaction, or an addendum to the contract of purchase and sale, if applicable). Furthermore, the landlords provided no evidence as to how this valuation of $1,500 was reached. Accordingly, the landlords have failed to meet the second and third parts of the Four Part Test.

In any event, as I have found that the tenants (mostly) did not breach the Act as alleged by the landlord, the landlords have failed to meet the first part of the Four Part Test (except for damage associated with repainting the wall which the tenants patched holes on).

I order the tenants to pay the landlords $50 as nominal compensation for the repainting of the wall that the tenants damaged (and subsequently repaired). I dismiss the balance of the landlords' monetary claim arising from damage to the rental unit, without leave to reapply.

3. Effect of Landlord's Failure to Complete A Move-Out Report

The landlords testified that they did not complete a condition inspection report following the move out inspection. Sections 35 and 36 of the Act sets out the obligations of the parties regarding such reports and the consequences.

Condition inspection: end of tenancy

35(1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit

(a) on or after the day the tenant ceases to occupy the rental unit, or

(b) on another mutually agreed day.

(2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

(3) The landlord must complete a condition inspection report in accordance with the regulations.

(4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(5) The landlord may make the inspection and complete and sign the report without the tenant if

(a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or

(b)the tenant has abandoned the rental unit.

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.

[emphasis added]

As the landlords did not complete a move out condition inspection report following the move out inspection, their right to claim against the security deposit 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 deposit. Accordingly, I find that as the landlords' right to claim against the deposits is extinguished. Therefore, the tenants are entitled to receive double the amount of the deposits ($1,500) from the landlords.

This does not mean that the landlords' monetary claim fails, however. Rather this amount is offset against the amount the tenants have been ordered to pay the landlords. Accordingly, I order the tenants to pay the landlords $200, representing the following:

Rent Arrears	$1,650
Nominal Damages	$50
Double Security Deposit Credit	-$1,500
Total	**$200**

As the tenants have been mostly successful in the application, I decline to order that they reimburse the landlord the filing fee.

Conclusion

For the reasons stated above, pursuant to sections 65, 67, and 72 of the Act, I order that the tenants pay the landlord $200.

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 23, 2021

Residential Tenancy Branch