Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT, MNRT, RR, FFT / MNDCL-S, MNRL-S, FFL**

Introduction

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

- authorization to retain all or a portion of the tenants' security and pet damage deposits in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent and for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $8,400 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenants' application for:

- a monetary order for the cost of emergency repairs to the rental unit in the amount of $2,550 pursuant to section 33;
- an order to allow the tenants to reduce rent for repairs, services or facilities agreed in the amount of $2,550 upon but not provided, pursuant to section 65; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 10:37 am in order to enable the tenants to call into this teleconference hearing scheduled for 9:30 am. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

The landlord was granted an order for substituted service on February 17, 2021, allowing him to serve the tenants by email. He testified he did this on February 19, 2020. The landlord was required to provide proof of this service to the RTB. He did not provide this in advance on the hearing. At the hearing, I permitted him to upload screenshots of his email account confirming that he served the tenants in accordance with the order for substituted service.

I find that the tenants have been served with the landlord application package in accordance with the order for substituted service.

Preliminary Issue – Amendment to Increase Amount Claimed

The Notice of dispute resolution proceeding form sets out the landlord monetary claim at $8,400. However, in the description of the monetary claim the landlord lists additional amounts which he is claiming, including advertising costs, unpaid water bill, and the cost of hot tub repair. The amount of these additional claims is $874.41.

Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
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> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.
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> If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

The increase in the landlord's monetary claim should have been reasonably anticipated by the tenants as the descriptions and amounts were listed on the application itself, I find that the fact these amounts were not included in the monetary total sought by the landlord to be an oversight. Therefore, pursuant to Rule 4.2, I order that the landlord's application be amended increase the amount sought by $874.41.

Preliminary Issue – Effect of Tenants' Non-Attendance

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
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> 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.
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> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

The tenants have made an application that was set to be heard at this hearing. They bear the onus to prove their claim. As they failed to attend the hearing, I find that they have failed to discharge their evidentiary burden to prove that they are entitled to the orders sought. Pursuant to Rule of Procedure 7.4, they (or their agent) must attend the hearing and present their evidence for it to be considered. As this did not occur, I have not considered any of the documentary evidence submitted by the tenants to the Residential Tenancy Branch in advance of the hearing.

I dismiss their claim, without leave to reapply.

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $9,274.41;
2) recover the filing fee; and
3) retain the security and pet damage deposits in partial satisfaction of the monetary orders made?

Background and Evidence

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

The parties entered into a written, fixed term tenancy agreement starting March 15, 2020 and ending February 28, 2021. Monthly rent was $2,800, excluding utilities such as gas, heat, electricity, and water. The tenants paid the landlord a security deposit of $1,400 and a pet damage deposit of $1,400. The landlord still retains these deposits.

The landlord testified that the tenants did not pay December 2020 rent when it was due. He served them a 10-day notice to end tenancy (the "**Notice**") of December 6, 2020. He sent the Notice by registered mail and is claiming the cost of the mailing ($11.36). He provided an invoice in corroboration of this amount.

The tenant's e-transferred the landlord $607 on December 9, 2020. They took the position that the balance of December rent was not due because they incurred various expenses repairing items in the rental unit that the landlord was supposed to repair or running errands that the landlord was supposed to have run. The landlord denied the tenants were entitled to make any rent deductions.

The tenants vacated the rental unit on December 19, 2020. The parties conducted a move-out condition inspection and the landlord's provided a copy of the move out

condition inspection report to the tenants. He asked them to write their forwarding address on it, but they declined.

The landlord testified that, on December 15, 2020, the tenant's emailed him stating that they did not know where they would be moving to and could not give him a forwarding address, but asked that he send any mail address to them received at the rental unit to a PO Box address (which was provided in the email). The landlord stated that he did not believe this was their forwarding address because he would not be able to personally serve them at a PO Box and because they indicated they did not yet know where they would be moving to. He also stated that he did not understand the tenants to have provided their forwarding address in accordance with the Act, because he understood that they must provide the forwarding address on the move out inspection report.

The landlord testified that the tenants have not paid any of the water bills from April 1, 2020 to the end of the tenancy. He provided municipal invoices showing that he has been billed $505.56 during this period of time. The landlord listed a similar amount ($525.39) amount as owing on the Notice, in addition to the December 2020 arrears. The landlord confirmed that amount showing on the water bills is the correct amount owing.

The landlord testified that once the tenants vacated the rental unit it took until January 2021 to get the rental unit into a rentable condition. He testified that the tenants left some of their belongings in the rental unit that they did not retrieve until after Christmas.

He testified that he posted the rental unit for rent online but only made it available for rent until the end of April 2021. He provided a copy of the invoice for the posting, which cost him $26.25. He testified that he received inquiries as to whether the unit was available to rent for a one-year term, but that he turned them down. He testified that his son was to move into the rental unit on May 1, 2021, when his sons' current lease is up in another rental unit and he finishes his school semester. The landlord testified that he and his son intended for this to occur even prior to the tenants vacating the rental unit.

The landlord testified that he was unable to secure a new renter for January or February 2021, and that he is seeking compensation for those months, as the tenants did not remain in the rental unit until the end of the term of the tenancy.

Finally, the landlord testified that during the tenancy he had to repair the rental unit's hot tub. He testified that a part broke due to "wear and use". He did not allege the tenants caused the damage intentionally or by their negligence. He stated that, per the tenancy agreement, the tenants are responsible for the cost of the repairs to the hot tub. The tenancy agreement contains the following term:

> 6.3.14 **Existing pool and or hot tub**: must be maintained by tenant or professional maintenance company. Any damage caused by the negligence of the tenant will be charged accordingly.

The landlord argued that the repair to hot tub constituted "maintenance" and the cost of this was therefore the tenants' responsibility. He provided an invoice for the repairs dated April 23, 2020 for $331.24.

In summary, the landlord seeks a monetary award of $8,667.41, representing the following:

Description	Amount
December Arrears	$2,193.00
Lost Rent (January and February)	$5,600.00
Unpaid water bills	$505.56
Cost of registered mailing	$11.36
Hot tub repair	$331.24
Cost of advertising rental unit	$26.25
Total	**$8,667.41**

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:
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> - 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.
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> (the "**Four-Part Test**")

I will apply these factors to each of the amounts sought by the landlord.

1. December Rent

Section 26(1) 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 evidence before to suggest that the tenants had a right to deduct any amount from the December rent. I note that the Act allows a tenant to deduct rent in the following circumstances: an amount in excess of a maximum limit of a deposit (section 19); in lieu of reimbursement of emergency repairs (section 33); if the landlord has improperly collected a rent increase (section 43).

As such, I find that the tenants breached the Act by failing to pay the full amount of December rent. I accept that they paid $607 of it. There is nothing the landlord could have done to minimize this loss. The loss the landlord suffered was only preventable by the tenants.

As such, the tenants must pay the landlord the balance of the December rent owed ($2,193).

2. Water Bill

The tenancy agreement clearly indicates that the water utility is not included in the monthly rent. As such, the tenants are responsible for paying it. By not paying it, they breached the tenancy agreement.

I accept the landlord's calculation that they have failed to pay $505.56 owing for water during the tenancy. There is nothing the landlord could have done to minimize this loss.

As such, the tenants must pay the landlord the full amount owing for the unpaid water bill ($505.56).

3. January and February Rent

The tenancy agreement was for a fixed term. The tenants were obligated to remain in the rental unit and pay rent until February 28, 2021. They did not do this. By failing to pay December rent when it was due, they breached the Act, which led the landlord to issue the Notice which, as it was not disputed by the tenants, functioned to end the tenancy. While the *mechanism* for ending the tenancy was the Notice, the *cause* of the end of tenancy was, ultimately, the tenants' breach of the tenancy agreement (non-payment of rent).

I find that as a result of the tenants' breach of the Act, the landlord lost the ability to earn income from the rental unit for January or February 2021. The amount he would have earned from the rental unit per the tenancy agreement for this time was $5,600.

I find that the landlord acted reasonably to minimize his loss by posting the rental unit for rent online in January 2021. I accept his testimony that the tenants left some items in the rental unit after they vacated and did not collect them until after Christmas. As such, it would have been unreasonable to expect the landlord to post the rental unit advertisement in December 2020.

Additionally, I find it reasonable that the landlord only posted the rental unit for rent until the end of April 2021. I accept his uncontroverted testimony that his son intended to move into the rental unit on May 1, 2021, and that this was his and his son's intention even prior to the tenants vacating the rental unit.

I find that the landlord acted reasonably to minimize his loss. He is entitled to recover the amount he would have earned from the rental unit during January and February 2021, but the tenants' breach of the tenancy agreement ($5,600) as well as the cost of advertising the rental unit for rent ($26.25).

4. Hot Tub

Section 32 of the Act states:

> **Landlord and tenant obligations to repair and maintain**
> **32**(1) A landlord must provide and maintain residential property in a state of decoration and repair that
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> (a) complies with the health, safety and housing standards required by law, and
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> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.
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> (2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.
> (3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.
> (4) A tenant is not required to make repairs for reasonable wear and tear.
>
> [emphasis added]

Section 5 of the Act states:

> **This Act cannot be avoided**
> **5**(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

As the Act states that a tenant is not required to make repairs for reasonable wear and tear, and as the Act does not permit parties to avoid or contract out of the Act, I find that the landlord's argument that the tenancy agreement obligates the tenants to pay for the repair costs of the hot tub, given that he testified it needed repair due to damage caused by "wear and use".

In the event I am incorrect, I do not find that the language of tenancy agreement supports the landlord's argument that the tenant should pay for the hot tub repair. The tenancy agreement requires that the tenant "maintain" the hot tub, not "repair" the hot tub. I understand these two words to have different meanings. Maintenance relates to regular upkeep, such as cleaning the hot tub, adding the appropriate chemicals to the water, and replacing filters. Repairing relates to making structural or mechanical changes to the hot tub, such as replacing parts of the motor or fixing cracks. Maintenance relates to caring for the object to extend its lifespan or to prevent it from become damaged. Repairs relate to fixing a problem after it has occurred. The damage to the hot tub requiring repairs rendered it inoperable. As such, repairs were necessary.

Accordingly, the tenant did not breach the Act or the tenancy agreement.

I dismiss this portion of the landlord's application, without leave to reapply.

5. Mailing Cost

The cost of sending documents by registered mail is not considered "damage", rather it is an administrative disbursement incurred in the course of the tenancy, and it is not recoverable under the Act. Disbursements (and legal costs) are not recoverable. The only administrative disbursement that the Act authorizes recovery for is the filing fee for making an application.

6. Filing Fee

Pursuant to section 72(1) of the Act, as the landlord has been mostly successful in the application, he may recover the filing fee from the tenants ($100).

7. Security and Pet Damage Deposits

Section 38(1) 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
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> (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.

The tenancy ended on December 19, 2020 the day the tenants vacated the rental unit, per section 44(1)(d). The tenants sent an email with a PO Box address to the landlord on December 15, 2020. The landlord argued that a PO Box address is not an address for service, as the tenants cannot be served there personally.

It is not necessary for me to address this argument, however, as section 88 of the Act sets out all modes of service that are permitted for documents required or permitted to be served under the Act. Email is not among these modes of service. If a party wants to serve another by email, they may apply for an order of substituted service (as the landlord did in this case). The tenants did not do this. Additionally, the tenants had an opportunity to provide their forwarding address, in writing, to the landlord by writing it on the move out condition inspection report. The did not do this.

I find that this, coupled with the tenants' remarks in the December 15, 2020 email to the effect that they were not sure where they would be moving after the tenancy was sufficient to cause the landlord confusion as to whether the PO Box address was their forwarding address.

As such, I decline to exercise my discretion under section 71(2) of the Act to find that the tenants' forwarding address was served by email on December 15, 2020, notwithstanding the fact that email is not a permitted form of service.

Accordingly, I find that the tenants have not served the landlord with their forwarding address in accordance with the Act, so the landlord's obligations under section 38(1)(c) and (d) are not triggered.

Pursuant to section 72(2) of the Act, the landlord may retain the deposits in partial satisfaction of the monetary orders made above.

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the tenants pay the landlord $amount, representing the following:

Description	Amount
December arrears	$2,193.00
Lost Rent (January and February)	$5,600.00

Unpaid water bills	$505.56
Cost of advertising rental unit	$26.25
Filing fee	$100.00
Deposit credit	-$2,800.00
Total	**$5,624.81**

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 9, 2021

Residential Tenancy Branch