# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes **MNSDS-DR, FFT**

**MNDL-S, FFL**

Introduction

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

The tenant applied for:

- An order for the return of a security deposit or pet damage deposit by way of direct request, pursuant to section 38; and
- Authorization to recover the filing fee for this application from the opposing party pursuant to section 72.

The landlord applied for:

- A monetary Order for Damages and authorization to retain a security deposit pursuant to sections 38 and 67; and
- Authorization to recover the filing fee for this application from the opposing party pursuant to section 72.

Both the tenant and the landlord attended the hearing. The landlord was assisted by an agent, JS who provided testimony and interpreting service to the landlord. As both parties were present, service of documents was confirmed. The landlord acknowledged receipt of the tenant's Application for Dispute Resolution and evidence. The tenant acknowledged receipt of the landlord's Application for Dispute Resolution and two receipts provided as evidence by the landlord. The tenant did not acknowledge receipt of any of the additional evidence from the landlord.

Preliminary Issue – Evidence Exchange

The landlord's application was filed on January 23, 2021 in response to the tenant's application filed on December 31, 2020. The landlord's application is considered a cross application in accordance with Rule 2.11 of the Residential Tenancy Branch Rules of Procedure (the "Rules").

The landlord uploaded evidence in support of his cross application to the Residential Tenancy Branch on the day prior to the hearing and tried unsuccessfully to serve the tenant with a copy of the evidence last night. Rule 3.3 of the Rules states:

***3.3 Evidence for cross-Application for Dispute Resolution***
*Evidence supporting a cross-application must:*

- *be submitted at the same time as the application is submitted, or within three days of submitting an Online Application for Dispute Resolution;*
- *be served on the other party at the same time as the Notice of Dispute Resolution Proceeding Package for the cross-application is served; and*
- *be received by the other party and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.*

As the evidence was not compliant with Rule 3.3, the evidence was excluded from consideration at the commencement of the hearing. The two receipts provided to the tenant were acknowledged received by the tenant and were allowed into evidence.

Issue(s) to be Decided
Is the landlord entitled to compensation for damages?
Can the landlord recover the filing fee?
Should the security deposit be returned to the tenant?

Background and Evidence
In accordance with rule 7.14, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the allowed documentary evidence, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The tenant gave the following testimony. The rental unit is a basement unit in a brand new house. The tenancy began on May 1, 2020 between the landlord and the tenant although the tenant had 3 other roommates living with her with the landlord's consent. Rent was set at $1,450.00 per month payable on the first day of each month. A security deposit of $700.00 was collected from the landlord which the landlord continues to hold. The tenant testified that the landlord did not present her with a tenancy agreement to sign at the commencement of the tenancy because the landlord wanted to avoid declaring the rental income and paying income tax on it. The tenant testified that the

landlord did not do a condition inspection report with her at the commencement of the tenancy because the rental unit was brand new.

Due to the Covid-19 pandemic, the tenant's roommates decided to move out, leaving the tenant unable to pay rent alone. The tenant gave the landlord a two month notice to end tenancy, ending the tenancy on September 30, 2020. At the end of the tenancy, the landlord did not invite the tenant to take part in a move-out condition inspection report. The tenant testified that the rental unit was left in good shape except for reasonable wear and tear, without any damage. After she left, the landlord chose to paint the rental unit because the landlord wanted the smell of new paint or to change the wall colour, not because of any damage. The tenant also disputes the landlord's claim for drywall repairs, arguing that the landlord is in the construction business and could have repaired any alleged damage to the walls himself, thereby mitigating the damages sought. The tenant also questions the veracity of the invoices, suggesting they were fabricated by the landlord.

The tenant testified that she served the landlord with her forwarding address on November 23, 2020 by putting the document in the landlord's mailbox. An unsigned copy of the forwarding address notice was provided as evidence as was a signed proof of service document. The tenant testified that she had a conversation with the landlord the evening of November 23 and advised him that the forwarding address was in the mailbox. She testified that the landlord responded saying he will "see to it" meaning he would check his mailbox.

The landlord's agent provided the following testimony, which was given intermittently while consulting with the landlord in his own language. The reason the landlord didn't sign a tenancy agreement with the tenant was because he trusted the tenant.

The landlord testified that he received the tenant's forwarding address on November 23, when it was put into his mailbox. Later on in his testimony, the landlord stated he received it some time in January, date unknown.

The landlord testified that the address of the tenant on the notice of forwarding address ("Notice") does not match the address shown on the tenant's Application for Dispute Resolution. The landlord testified that the middle two numbers on the Notice are inverted, making it difficult to exchange documents with the tenant. The landlord alleges the tenant did this on purpose, but did not provide any reasoning for this allegation. The landlord did not provide a copy of the forwarding address with the alleged wrong address into evidence.

The landlord agrees that no condition inspection report was done with the tenant at the commencement of the tenancy, saying that condition inspection reports are rarely ever done between landlords and tenants. The tenant accepted the condition of the rental unit at the beginning of the tenancy. There was no condition inspection report done with the tenant at the end of the tenancy because the night she moved out, the tenant returned the keys late at night (9:30 p.m.) and told the landlord not to worry, she would pay for or fix all the damage done to the rental unit.

The landlord alleges there was damage done to the cabinets and dents to the fridge, both repairs not yet fixed. The landlord also seeks compensation for paint and drywall repairs as the unit required wall damage repair and repainting.

The landlord called his son, GH as a witness. The witness testified that his father trusted the tenant like a sister at the beginning of the tenancy, but she became rude with them after the tenancy ended. He doesn't know why. The landlord was unaware he had to provide the evidence to the tenant at least 14 days before the hearing and apologized for the late submission. He denies the invoices for the work done to the rental unit is fraudulent.

Analysis

- Tenant's monetary claim for return of her security deposit

At the commencement and at the end of the tenancy, the landlord did not pursue a condition inspection of the rental unit with the tenant, as required by section 23 of the *Act*. Pursuant to section 24, the landlord's right to claim against the security deposit **is extinguished** if the landlord does not offer the tenant at least two opportunities for inspection.

Secondly, section 38(1) and (6) of the *Act* addresses the return of security deposits.

(1)Except as provided in subsection (3) or (4) (a), **within 15 days after** the later of

a. the date the tenancy ends, and
b. **the date the landlord receives the tenant's forwarding address in writing,**

the landlord must do one of the following:

c. repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
d. make an application for dispute resolution claiming against the security deposit or pet damage deposit.

…

(6) If a landlord does not comply with subsection (1), the landlord

a. may not make a claim against the security deposit or any pet damage deposit, and
b. **must pay the tenant double the amount of the security deposit**, pet damage deposit, or both, as applicable.

In the case before me, the landlord's right to claim against the security deposit was extinguished at the commencement of the tenancy when he failed to conduct a condition inspection report with the tenant. The fact that the rental unit was brand new does not negate the landlord's responsibility to have the tenant agree to the condition of the rental unit in writing at the beginning of the tenancy.

The landlord testified that he received the tenant's forwarding address on November 23rd however during the hearing, the landlord changed his testimony to indicate the tenant's forwarding address was not received until some time in January. Conversely, the tenant testified that the forwarding address was served by placing the document in the landlord's mailbox on November 23rd and she provided a signed proof of delivery as evidence to corroborate her testimony. The landlord's own conflicting testimony and a lack of evidence to corroborate an alternate version of events, leads me to find that it is more likely than not that the tenant's version of events is the truth. I find the tenant served the landlord with her forwarding address on November 26, 2020, three days after it was put in the landlord's mailbox in accordance with sections 88 and 90 of the *Act*.

Pursuant to section 38(6), the landlord had 15 days from November 26th to return the tenant's security deposit, since his right to claim against it was already extinguished for failing to conduct a condition inspection report with the tenant. The landlord acknowledged he has not yet returned it and in accordance with section 38(6)(b), the tenant is entitled to a doubling of her $700.00 security deposit for a total of $1,400.00. The tenant is awarded a monetary order for $1,400.00 pursuant to sections 38 and 67 of the *Act*. As the tenant's application was successful, the tenant is also entitled to recovery of the $100.00 filing fee for the cost of this application.

- Landlord's monetary claim for damages

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim, the landlord. The standard of proof is on a balance of probabilities. If the landlord is successful in proving it is more likely than not

the facts occurred as claimed, applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

At the beginning of the hearing, I excluded the evidence provided to me by the landlord the night before the hearing as it was not provided to the tenant and not provided to me at least 14 days in advance of the hearing in accordance with rule 3.3 of the Residential Tenancy Branch Rules of Procedure.

Although the landlord testified that there was some damage to the drywall, damage to the cabinets and dents to the fridge, no photographs of the alleged damage were provided to me or to the tenant in accordance with rule 3.3. The tenant testified that the rental unit was left in good condition with the exception of wear and tear.

Section 21 of the Regs state that:

> *in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary*.

I find that without any photographic evidence or a condition inspection report noting the alleged “damage” to the unit sustained during the tenancy, the landlord has not met his burden to prove to me the existence of the alleged damage (point 1 of the 4 point test). I dismiss the landlord’s claim for compensation.

As the landlord’s application was not successful, the landlord is not entitled to recover the $100.00 filing fee for the cost of this application.

Conclusion

I issue a monetary order in the tenant’s favour in the amount of $1,500.00.

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: April 18, 2021

Residential Tenancy Branch