



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding UNIQUE TELECOMMUNICATIONS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL-S, FFL
 MNSD, MNETC, FFT

Introduction

This hearing dealt with the twice adjourned cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (the “Act”). The matter was set for a conference call.

The Landlord’s Application for Dispute Resolution was made on October 2, 2020. The Landlord applied for a monetary order for damage caused by the tenant, their pets or guests to the unit, site or property, permission to retain the security deposit and to recover their filing fee.

The Tenants’ Application for Dispute Resolution was made on November 25, 2020. The Tenants applied for the return of their security deposit, for compensation from the landlord related to a Notice to End Tenancy for Landlord’s Use of Property, and the return of their filing fee.

This hearing decision should be read in conjunction with the first Interim decision dated January 21, 2021, and the second interim decision dated April 20, 2021.

The Landlord’s Agent, the Landlord’s Spouse (the “Landlord”), both the Tenants and the Tenants Advocate (the “Tenants”) attended the hearing and were each affirmed to be truthful in their testimony. The Tenants and the Landlord were provided with the opportunity to present their evidence orally and in written and documentary form and to make submissions at the hearing. Both parties acknowledged the service of their respective Notice of Hearing documents and the Tenant’s evidence package in accordance with the Residential Tenancy Rules of Procedure.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matter – *Landlord's Evidence Submission*

At the outset of the proceedings on January 21, 2021, the Tenants testified that they had received the Landlord evidence package on January 19, 2021, three days before these proceedings.

The Landlord testified that they had sent their evidence package to the Tenants on January 14, 2021, by Canada Post mail.

The Tenants testified that they had not been given the required 14 days to review the Landlord's evidence package, as per the Residential Tenancy Rules of Procedure, and that, therefore, the Landlord's evidence should not be considered these proceedings.

The Residential Tenancy Rules of Procedure section 3.14 states the following regarding the service of evidence:

Residential Tenancy Rules of Procedure

3.14 Evidence not submitted at the time of Application for Dispute Resolution

“Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.”

The Landlord testified that they acknowledged that their evidence package was not serviced in accordance with the Residential Tenancy Rules of Procedure.

As the Landlord offered no reasonable explanation as to why their evidence was served late to the Tenants, and these Tenants had provided only three days to review the Landlord's evidence before the date of this hearing, I find that it would be prejudicial to these Tenants to allow the Landlord's documentary evidence, contained in their January 14, 2021 mailing, into these proceedings.

Consequently, as the Landlord's evidence package was not served in accordance with the Residential Tenancy Rules of Procedure, I will not consider any of the Landlord's evidence contained in their January 14, 2021 mailing in my final decision for these proceedings.

Issues to be Decided

- Is the Landlord entitled to a monetary order for damages or losses due to the tenancy?
- Is the Landlord entitled to retain the security deposit?
- Is the Landlord entitled to the return for their filing fee for this application?
- Are the Tenants entitled to the return of their security deposit?
- Are the Tenants entitled to compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property?
- Are the Tenants entitled to the return of their filing fee?

Background and Evidence

While I have turned my mind to all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

The tenancy agreement recorded that the tenancy began on July 1, 2019, as a one-year fixed term tenancy that rolled into a month-to-month tenancy and the end of the initial fixed term. Rent in the amount of \$3,100.00 is to be paid by the first day of each month, and the Landlord collected a security deposit of \$1,550.00 and at the outset of this tenancy. The Tenants submitted a copy of the tenancy agreement into documentary evidence.

All parties agreed that the Landlord served the Tenants a Two Month Notice to End Tenancy for the Landlord's Use of the Property (the "Notice") on June 30, 2020. The Notice indicated that the Tenants were required to vacate the rental unit as of August 30, 2020. The reason checked off by the Landlord within the Notice was as follows:

- *The rental unit will be occupied by the landlord or the landlord's close family member (Landlord or the Landlord's spouse).*

The parties agreed that this tenancy ended on July 31, 2020, in accordance with the Two-Month Notice.

Both the Landlord and the Tenants agreed that a verbal walkthrough of the rental property had been completed at both move-in and move-out but that no written move-in/move-out inspection had been completed for this tenancy.

The Tenants testified that they provided the Landlord with their forwarding address by serving the Landlord with the Residential tenancy Branches (RTB) form #47 -Tenant's Notice of Forwarding Address for Return of Security and/or Pet Damage Deposit by Canada Post mail sent on September 18, 2020. The Tenants submitted a copy of the RTB form #47 into documentary evidence.

The Landlord testified that the walls, ceilings and doors in the entranceway, stairway, kitchen, bedrooms, and garage had been damaged during this tenancy and that it had cost them \$6,000.00 to have them repaired and repainted at the end of the tenancy. The Landlord testified that there were nail and screw holes in the walls of the entranceway, stairway, kitchen, bedrooms, and garage, that there were stickers on a bedroom door and that this door needed to be replaced at the end of this tenancy.

The Tenants testified that there were some nail holes in the walls at the end of this tenancy but that nail holes are just normal wear and tear and that they are not responsible for patching and painting the Landlord's entire home due to normal wear and tear. The Tenants testified that they had not damaged any of the walls, ceilings, or doors in the rental unit during their tenancy.

The Landlord testified that the lawn had been damaged during the tenancy and that it will cost them an estimated \$1,200.00 to have the lawn repaired. The Landlord testified that the Tenants had not taken proper care of the lawn and that they had installed a garden during the tenancy that they should have removed before returning the rental property to the Landlord at the end of the tenancy.

The Tenant's testified that they had permission to put the garden in and that at no time during the move-out walkthrough or during any of their conversation with the Landlord that took place between the end of their tenancy and the Landlord filing their application for these proceedings were they advise by the Landlord that there was a problem with the garden or the lawn. The Tenants testified that they did not damage the lawn and that they should not be responsible for this portion of the Landlord's claim.

The Landlord testified that two antique lamps had been included in this rental property and that one of the lamps was missing when the property was returned to them. The

Landlord acknowledged that the rental of these two lamps had not been included in the tenancy agreement. The Landlord testified that the missing lamp could not be replaced and is requesting \$500.00 in compensation due to the loss of this lamp.

The Tenants testified that they did not rent two lamps from the Landlord with this tenancy. The Tenants testified that the Landlord had requested to leave some personal furnishings in the rental unit during their tenancy but that they had refused, as they had their own furniture and did not want the items the Landlord wanted to leave in their home. The Tenants testified that it was agreed that the Landlord could leave some of their furniture in a storage area on the rental property but that the Tenants were not taking possession of or responsibility for what the Landlord chose to leave there.

The Tenants testified that they are claiming for \$37,200.00, the equivalent of 12-months rent, in compensation due to the Landlord issuing a Two-Month Notice and not using the property as stated on the Notice. The Tenants claim that the Landlord gave the Notice in bad faith, and that they never intended to move in, and that the person currently living there is not the Landlord's spouse.

The Landlord testified that the Landlord has been delayed in their return to Canada due to travel restriction around the Covid-19 pandemic but that the Landlord's Common Law husband, who is also their fiancé, has moved into the rental unit and is currently living there full time.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

I accept the testimony of the Landlord that they did not conduct the written move-in inspection for this tenancy. Section 23 of the *Act* states the following:

Condition inspection: start of tenancy or new pet

23 (1) *The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.*

(2) *The landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day, if*

- (a) the landlord permits the tenant to keep a pet on the residential property after the start of a tenancy, and*
- (b) a previous inspection was not completed under subsection (1).*
- (3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.*
- (4) The landlord must complete a condition inspection report in accordance with the regulations.*
- (5) 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.*
- (6) The landlord must make the inspection and complete and sign the report without the tenant if*
 - (a) the landlord has complied with subsection (3), and*
 - (b) the tenant does not participate on either occasion.*

I find that the Landlord breached section 23 of the *Act* when they did not complete the required written move-in inspection of the rental unit at the beginning of this tenancy as required. Section 24(2) of the *Act* outlines the consequence for a landlord when the inspection requirements are not met.

Consequences for tenant and landlord if report requirements not met

- 24** *(2) The right of a 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 23 (3) [2 opportunities for inspection],*
 - (b) having complied with section 23 (3), does not participate on either occasion, or*
 - (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.*

Pursuant to section 24(2) of the *Act*, I find that the Landlord extinguished their right to make a claim against the security deposit for damage to the residential property for this tenancy.

Section 38 of the *Act* sets the requirements on how a security deposit is handled at the end of a tenancy, stating the following:

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*

- (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.*

(2) *Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].*

(3) *A landlord may retain from a security deposit or a pet damage deposit an amount that*

- (a) the director has previously ordered the tenant to pay to the landlord, and*
- (b) at the end of the tenancy remains unpaid.*

(4) *A landlord may retain an amount from a security deposit or a pet damage deposit if,*

- (a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or*
- (b) after the end of the tenancy, the director orders that the landlord may retain the amount.*

(5) *The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) [landlord failure to meet start of tenancy condition report requirements] or 36 (2) [landlord failure to meet end of tenancy condition report requirements].*

I accept the agreed-upon testimony of these parties, and I find that this tenancy ended on July 31, 2020, the dated the Landlord conducted a verbal move-out inspection and took back possession of the rental unit. In addition, I also accept the testimony

supported by the documentary evidence submitted by the Tenants, that the Tenants had provided their forwarding address to the Landlord on September 18, 2020, by Canada Post mail. Pursuant to section 90 of the Act, I find that the Landlord was deemed in receipt of the Tenants' forwarding address five days after it was mailed, on September 23, 2020. Accordingly, this Landlord had until November 8, 2020, to comply with sections 38(1) and 38(5) of the Act by repaying the security deposit in full to the Tenants, as the Landlord had extinguished their right to claim against the deposit for damages caused during this tenancy.

However, in this case, the Landlord did not return the security deposit, as required, but instead made a claim against the deposit for damages even though they had extinguished their right to make this claim when they did not complete the written move-in inspection as required by the Act.

Section 38(6) of the Act goes on to state that if the landlord does not comply with the requirement to return the deposit within 15 days, a landlord must pay the tenant double the security deposit.

Return of security deposit and pet damage deposit

38 (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.

Therefore, I find that pursuant to section 38(6) of the Act, the security deposit for this tenancy has double in value to the amount of \$3,100.00.

As for the Landlord claims for their recovery of repairing and painting walls, and ceilings, replacing a door, and repairing a damaged lawn, in the amount of \$7,200.00, and for \$500.00 in compensation for a lost lamp. Awards for compensation due to damage are provided for under sections 7 and 67 of the Act. A party that makes an application for monetary compensation against another party has the burden to prove their claim. The Residential Tenancy Policy Guideline #16 Compensation for Damage or Loss provides guidance on how an applicant must prove their claim. The policy guide states the following:

“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. 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.

During the hearing, the parties to this dispute provided conflicting verbal testimony regarding the condition of the rental property at the end of this tenancy and the existence of an agreement to rent lamps from the Landlord. In cases where two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim; in this case, that is the Landlord.

An Arbitrator normally looks to the move-in/move-out inspection report (the “inspection report”) as the official document that represents the condition of the rental unit at the beginning and the end of a tenancy; as this required document was not created for this tenancy, I must look to the support documentary evidence submitted by the claimant to determine the validity of their claims. However, the Landlord has failed to submit any evidence that met the Residential Tenancy Branches Rules of Procedure that I could review in relation to their claims.

Consequently, as there is no evidence before me that could outweigh the conflicting verbal testimony presented by these parties during these proceedings, I must dismiss the Landlord’s claim in its entirety.

As the Landlord had been unsuccessful in their claims, I order the Landlord to return the \$3,100.00 security deposit they are holding for this tenancy to the Tenants within 15 days of the date of this decision.

As for the Tenants’ application in regard to their request for compensation pursuant to section 51(2) of the *Act*, the *Act* states the following:

Tenant's compensation: section 49 notice

51 (2) *Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if*

(a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

(b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

I have reviewed the testimony of these parties and the documentary evidence submitted by the Tenants, and I find it reasonable that during the current Covid-19 pandemic, that the Landlord's planned move to this nation would have been reasonably delayed. Additionally, I accept the Landlord's Spouse's testimony that they are the current Common Law husband/fiancé of the Landlord, and that they have moved into the rental unit as indicated they would on the Landlord's Notice to end tenancy.

As the Landlord's Common Law husband has moved into the rental unit, I find that the Landlord has used the rental property for the stated purpose on their Notice to end the tenancy and that the Tenants are not entitled to compensation under section 51(2) of the Act. Consequently, I must dismiss this portion of the Tenants' claim.

Section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Tenants have been partially successful in their application, I find that the Tenants are entitled to recover the \$100.00 filing fee paid for their application.

Overall, I grant the Tenants a monetary order in the amount of \$3,200.00, consisting of \$3,100.00 in the recovery of their double security deposit and \$100.00 in the recovery of their filing fee these proceedings.

Conclusion

The Landlord's application is dismissed in its entirety.

I find for the Tenants pursuant to sections 38, 67 and 72 of the Act. I grant the Tenants a **Monetary Order** in the amount of **\$3,200.00**. The Tenants are provided with this Order in the above terms, and 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: May 12, 2021

Residential Tenancy Branch