



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NAI Commercial Okanagan Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, MNDL-S, FFL

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The landlord applied for:

- compensation for monetary loss or other money owed pursuant to section 7 and 67;
- compensation for damage caused by the tenant to the unit, site or property pursuant to section 7 and 67;
- an authorization to retain the tenants' deposits in satisfaction of the monetary order requested, pursuant to sections 38 and 72; and
- an authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing which started promptly at 1:30PM. Each participant affirmed they would provide truthful information during the hearing and confirmed they understand the Rules of Procedure prohibit recording of the hearing.

The participants were given a full opportunity to be heard. At 2:08PM I advised the parties that I had enough information to make my decision and the tenant disconnected from the hearing.

Preliminary matter – Landlord's late submission

The landlord affirmed he served the notice of hearing, the tenancy agreement and the condition inspection report to the tenant by registered mail on January 02, 2021. The landlord confirmed receiving the tenant's response on April 19, 2021. The landlord hand-delivered additional evidence to the tenant on April 22, 2021, the same day it was provided to the Residential Tenancy Branch. The tenant objected to this late service,

stating their response was prepared prior to receiving this evidence.

The tenant said they reviewed the landlord's late submission and are prepared to respond to it during the hearing today. The tenant objected to the landlord's late submission because it is against the published policy and beneath the standard expected of a professional property manager.

The landlord's late submission does not identify anything substantively new and reduces the monetary claim from \$2,025.00 to \$1521.99. The tenant's timely response to the notice of hearing is robust and the tenant stated they had time to review the landlord's late submission and are prepared to respond to this submission today. I find that the tenant is not prejudiced by allowing the late submission to be part of the landlord's application. I find the tenant has been served with the landlord's application pursuant to section 89 of the Act and the landlord has been served with the tenant's response pursuant to section 88 of the Act.

Issues to be Decided

Is the landlord entitled to:

1. monetary compensation for loss or damage caused by the tenant in the amount of \$1,521.99?
2. retention of the tenant's deposit in partial satisfaction of monetary compensation owed by the tenant?
3. recovery of the \$100.00 filing fee from the tenant?

Background and Evidence

The landlord's worksheet claims \$1,521.99 which includes \$735.00 for tenant placement, \$90.50 for replacing a locking interior door handle, \$628.24 for a gazebo and \$68.25 for cleaning up the yard. The landlord has also applied to recover the filing fee from the tenant for a total claim against the tenant of \$1,621.99.

The tenancy agreement was for a fixed term of March 27, 2020 to March 31, 2021. The rental unit is one side of a duplex; the duplex is located on a single parcel of land and there is no fence between the yards. Rent was \$2,200.00 per month due on the first of the month. A security deposit of \$1,000.00 and a pet damage deposit of \$250.00 was collected by the landlord on or about March 21, 2020 and the landlord continues to hold the deposits in trust.

The tenant provided undisputed testimony that at the start of the tenancy the landlord left the condition inspection report with her to complete. After she completed it and gave to the landlord, the landlord did not return a copy to her.

The landlord testified the tenant breached the agreement and ended the tenancy early effective November 30, 2020; there was no mutual agreement to end the tenancy. He provided undisputed testimony that he received the tenant's forwarding address in writing on December 8, 2020. The landlord filed this application to retain the tenant's deposit on December 22, 2020.

The landlord submitted his contract with the rental unit owner. The landlord's remuneration is 7% + GST of the gross rental receipt for the rental unit and an hourly rate of \$65.00 + GST for services. The landlord charges a flat fee of 1/2 month's rent up to a maximum of \$700.00 + GST for placing a tenant in the rental unit.

The tenant noted the tenancy agreement states the cost of liquidated damages for ending the tenancy early is \$0.00. The tenant claims there was a mutual agreement to end the tenancy and she offered to find a new tenant.

The move out inspection occurred on November 29, 2021 and the tenant provided undisputed testimony that the landlord did not provide her with a copy of the move-out inspection report until she received it with the notice of hearing. The inspection report notes the issue with the door handle, yard clean up and missing gazebo; the tenant did not authorize any of her deposits to be withheld.

The tenancy agreement is silent on the obligation to maintain the yard. The tenant provided evidence there is no division between the yards and asserts the yard is a common area. It is noted on the move-in side of the inspection report that the yard was a mess and cleaned by the tenant. The tenant acknowledged she did not provide the landlord with keys to an interior door handle she installed. The tenant disputed the handle needed to be replaced, it is a functional door handle regardless of the missing key.

The landlord testified there was a 10 foot by 12 foot metal gazebo in the yard when he became responsible for the property in February 2020 and it was still there when he showed the unit to prospective new tenants in November 2020. The landlord didn't know when it was originally put there and guessed it was two to three years old. He provided evidence of a new gazebo on sale at a hardware store for \$559.00.

The tenant testified the landlord told her at move-in she could do what she wanted with the gazebo, that it was junk. In her written submission the tenant noted that when she unrolled the cover of the gazebo, it was mouldy and contained a dead bird. Near the end of the tenancy the tenant advertised the gazebo for sale at \$100.00 and accepted \$80.00 after about a month of advertising.

Analysis

- Retention of the tenant's deposits

A landlord may not retain a tenant's deposit to claim against it when the landlord has not met their obligations for condition inspection reports.

Section 23 of Act and section 18 of the Regulation require the landlord to conduct a move-in condition inspection together with the tenant and provide the tenant a copy of the completed report within seven days after the inspection.

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.

Condition inspection report

18 (1) The landlord must give the tenant a copy of the signed condition inspection report

(a) of an inspection made under section 23 of the Act, promptly and in any event within 7 days after the condition inspection is completed, and

- (b) of an inspection made under section 35 of the Act, promptly and in any event within 15 days after the later of
 - (i) the date the condition inspection is completed, and
 - (ii) the date the landlord receives the tenant's forwarding address in writing.

(2) The landlord must use a service method described in section 88 of the Act [*service of documents*].

Section 24(c) of the Act extinguishes the landlord's right to claim against the tenant's deposits when the landlord fails to meet their obligations under section 23:

- 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.

As a result of the tenant's undisputed evidence about completing the move-in inspection without the landlord and not receiving a copy of the report back from him, I find that at the start of the tenancy landlord breached section 23 of the Act and therefore pursuant to section 24, the landlord extinguished his right to retain the deposits to claim against them.

As the landlord extinguished his right to claim against the tenant's deposits, the landlord should have returned the tenant's deposits 15 days after he received her forwarding address. As the landlord did not return the tenant's deposits, pursuant to section 38, the value of the tenant's deposits are doubled (emphasis added):

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].

(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.**

The Act's requirement to double the value of the tenant's deposits is described in [Policy Guideline 17](#); below are relevant excerpts:

B. 7. The right of a landlord to obtain the tenant's consent to retain or file a claim against a security deposit for damage to the rental unit is extinguished if:

- the landlord does not offer the tenant at least two opportunities for inspection as required (the landlord must use Notice of Final Opportunity to Schedule a Condition Inspection (form RTB-22) to propose a second opportunity); and/or
- **having made an inspection does not complete the condition inspection report, in the form required by the Regulation, or provide the tenant with a copy of it.**

C. 3. 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 not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;
- **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;**

- if the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the dispute resolution process;
- if the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;
- whether or not the landlord may have a valid monetary claim.

I order the tenant's \$1,250.00 deposits doubled to the value of \$2,500.00.

- Monetary claims: Tenant placement, door handle, yard clean-up, gazebo
 - Tenant placement

The fixed term tenancy ended early. While the tenant claims it was by mutual agreement, the tenant did not provide evidence to substantiate that the tenancy was mutually ended pursuant to section 44(c) "the landlord and tenant agree in writing to end the tenancy." Pursuant to section 45(2)(b) of the Act, I find the tenant breached the tenancy agreement:

45 (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
- (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.

Although the landlord refers to "tenant placement", the landlord's claim is in effect a claim for liquidated damages and I think [Policy Guideline 4](#) is relevant. To successfully claim liquidated damages, the landlord must demonstrate that at the time the tenancy was entered into, the amount of liquidated damages is a genuine pre-estimate of a loss and the tenant agreed to the amount. Had the tenant agreed to pay an amount for liquidated damages, the Guideline advises it would be payable even if the landlord's actual loss or damages were negligible.

The tenancy agreement provides no amount for liquidated damages and the landlord has failed to demonstrate the tenant agreed to pay \$700.00 + GST if she ended the

tenancy early, thus the landlord cannot succeed with a claim of \$735.00 for liquidated damages.

Adhering strictly to the landlord's application, the claim is for compensation for a loss of \$735.00 pursuant to section 7 of the Act. With reference to [Policy Guideline 16](#), the landlord must prove there was a loss as a result of the tenant's breach:

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.

There is no itemization of the landlord's costs incurred to place a new tenant or any explanation of why finding a new tenant three months early has incurred costs that would not have been incurred had the tenant not breached the agreement and ended it effective March 30, 2021.

As the landlord's remuneration is a percentage of the rent payment and it's possible the new tenant is paying higher rent, the landlord may have incurred a benefit from the tenant's early termination.

The landlord's contract with the rental owner and related invoice proves that in addition this claim against the tenant, the landlord is charging the rental unit owner the same amount.

The landlord has not substantiated the loss that resulted directly from the tenant ending the tenancy three months prior to the end of the fixed term.

As the landlord has not proven the tenant agreed to a liquidated damages clause requiring a \$700.00 + GST payment if the tenancy is ended early, and the landlord has

not substantiated the value of any loss he suffered due to the tenant ending the tenancy early, the claim for a \$735.00 tenant placement fee is dismissed.

- Door handle

The tenant acknowledged the bedroom door handle was replaced with a locking handle and she did not give the key to the landlord at the end of the tenancy. By failing to ensure the landlord could unlock the bedroom door, I find the tenant damaged the bedroom door and thus breached section 32(3) of the Act:

32(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.

The landlord provided proof of the cost of the handle in the form of a \$22.25 receipt from a hardware store and his contract with the rental unit owner with his hourly rate of \$65.00 + GST for the service of installing the new handle. I award the landlord \$90.50.

- Yard clean up

The tenancy agreement includes a clause for “Common Areas and Outside” but it contains no reference to yard maintenance. [Policy Guideline 1](#) provides guidance on property maintenance:

1. The tenant must obtain the consent of the landlord prior to changing the landscaping on the residential property, including digging a garden, where no garden previously existed.
2. Unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate.
3. Generally the tenant who lives in a single-family dwelling is responsible for routine yard maintenance, which includes cutting grass, and clearing snow. The tenant is responsible for a reasonable amount of weeding the flower beds if the tenancy agreement requires a tenant to maintain the flower beds.
4. Generally the tenant living in a townhouse or multi-family dwelling who has exclusive use of the yard is responsible for routine yard maintenance, which includes cutting grass, clearing snow.
5. The landlord is generally responsible for major projects, such as tree cutting, pruning and insect control.
6. The landlord is responsible for cutting grass, shovelling snow and weeding flower beds and gardens of multi-unit residential complexes and common areas of manufactured home parks.

I find points 3 & 4 relevant. The rental property is a duplex, not a single-family dwelling. Although the landlord maintains the tenant had exclusive use of her half of the yard, the tenancy agreement does not substantiate this. The landlord did not offer any evidence

that he notified the tenant of the obligation to maintain half of the yard and the condition inspection report indicates the yard had not been maintained when the tenant moved in. I find the landlord has not demonstrated the tenant breached the tenancy agreement or the Act by not cleaning up the yard and I dismiss the landlord's claim.

- Gazebo

The onus is on the landlord to prove the tenant breached the tenancy agreement by removing the gazebo and that he suffered a loss from this breach.

If I were to conclude the gazebo was a fixture of the unit, I would determine the tenant damaged the rental unit by removing it and therefore breached the Act. Following the guidance in [Policy Guideline 40](#), I would value the landlord's loss by assessing the condition of the fixture based on its age and other evidence provided by the landlord.

The landlord's testimony and evidence did not substantiate the origin or age of the gazebo. The tenant did not surreptitiously remove the gazebo and I believe she did not consider the gazebo to be a fixture of the rental unit for a good reason, namely the conversation she testified she had with the property manager at the start of the tenancy. I believe the tenant's evidence that the gazebo was not a fixture of the rental unit and was in poor condition.

I am dismissing the landlord's claim because I am not convinced the gazebo was a fixture of the rental unit, and even if it were a fixture, the landlord has not substantiated the value of the loss that has resulted from its removal.

Conclusion

I dismiss the landlord's claim for the filing fee because the landlord's application is largely unsuccessful. Pursuant to section 67, I award the landlord \$90.50 to replace the interior door handle. All other claims are dismissed.

Pursuant to section 38, I order the tenant's deposits doubled to the value of \$2,500.00.

I order the landlord to return the tenant's deposits (no interest is payable), minus \$90.50. To give legal force to this order, I issue the tenant a monetary order in the amount of \$2,409.50. This order should be served by the tenant to the landlord immediately. Should the landlord fail to pay the tenant, the tenant may seek enforcement of the order in the small claims division of provincial 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 4, 2021

Residential Tenancy Branch