



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, MNSD, MNDCT, FFT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on December 18, 2020, in which the Tenant requested monetary compensation from the Landlords in the amount of \$22,100.00, including return of their security deposit and recovery of the filing fee.

The hearing was conducted by teleconference at 1:30 p.m. on April 29, 2021. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties were cautioned that recordings of the hearing were not permitted pursuant to *Rule 6.11* of the *Residential Tenancy Branch Rules*. Both parties confirmed their understanding of this requirement and further confirmed they were not making recordings of the hearing.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matter—Date and Delivery of Decision

The hearing of the Tenant's Application concluded on April 29, 2021. This Decision was rendered on June 9, 2021. Although section 77(1)(d) of the *Residential Tenancy Act*

provides that decisions must be given within 30 days after the proceedings, conclude, 77(2) provides that the director does not lose authority in a dispute resolution proceeding, nor is the validity of the decision affected, if a decision is given after the 30 day period.

Issues to be Decided

1. Is the Tenant entitled to monetary compensation from the Landlords?
2. What should happen with the Tenant's security deposit?
3. Should the Tenant recover the filing fee?

Background and Evidence

In support of his claim, the Tenant testified as follows. He confirmed that this tenancy began April 1, 2016. Rent was \$1,600.00 per month and he paid a \$800.00 security deposit.

The Tenant received a 2 Month Notice to End Tenancy dated October 31, 2018 which was to be effective December 31, 2019 (the "Notice"). The Tenant moved from the rental unit by January 3, 2019. The reasons cited on the Notice were as follows:

The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse).

Although the Tenant filed to dispute the Notice, his application was unsuccessful, and the Notice was upheld. The file number for that matter is included on the unpublished cover page of this my Decision.

The Tenant testified that he gave the Landlord his forwarding address by letter dated March 13, 2019 by registered mail. The Tenant stated that the package was returned to the Tenant. The Tenant also sent his forwarding address by posting to the Landlord's door on April 5, 2019. Despite this, the Landlord did not return the Tenant's deposit, nor did the Landlords make an application for dispute resolution, until April 14, 2021, more than two years after the tenancy ended.

The Tenant submitted that the Landlord's daughter, K.L., did not move into the property as claimed by the Landlord. He further stated that his children go to school in the neighbourhood and as such he is regularly in the area. He testified that he did not observe the Landlord's daughter living in the rental home. He also stated that the neighbours informed him that the Landlord's daughter does not live there, only AirBnB guests. In support he provided a detailed statement from the neighbour, A.A., dated June 5, 2019, who writes that from January 2019 to June 2019 he has observed the following:

- no one has ever moved permanently into the house;
- the only signs of people at the house have been temporary short-term visitors;
- there have been signs of some renovations, but they are slow and quiet;
- he has only seen the owner at the house on a few occasions, cleaning between guests or renovating the basement;
- the frequency of short-term guests increased during the May to June 2019 time period.

The Tenant further testified that although the Landlords provided a tenancy agreement with their daughter, K.L. from January 2018 to June 2020, he was still in the rental home until January 2019, and she did not live there when he was there. He noted that he worked from home and would have known if she was there. He stated that in fact, while he was living there the Landlords were running an AirBnB in the upper unit.

The Tenant stated that they had a good relationship with the Landlords, but then when the Landlords' AirBnB guests complained about noise from the Tenant and his family the relationship started to "sour".

The Tenant noted that during the last hearing K.L. testified that she wanted to move into the basement to be closer to rapid transit; yet at the same time in a letter filed in this application, the Landlord's daughter claims to have been living in the upstairs since January 2018. The Tenant noted that this is a significant discrepancy and calls into her credibility.

The Tenant filed a Monetary Orders Worksheet in which he set out his claim as follows:

Moving truck rental	\$434.62
Gas for moving truck	\$60.00
Gas for personal vehicle	\$90.00
Miscellaneous moving expenses (boxes, padlock, dolly, etc.)	\$116.25

Temporary storage	\$1,793.68
cost of movers	\$2,880.00
Gas for transporting children to school	\$309.00
Double Security deposit	\$1,600.00
12 months' rent for breach of end-tenancy	\$19,200.00
Registered mail	\$11.31
TOTAL	\$26,494.06

In response to the Tenant's claim, the Landlord, S.C.L., testified as follows.

The Landlord confirmed he received the Tenant's forwarding address by email in March of 2019. The Landlord confirmed they did not return the Tenant's security deposit, although they did file a claim to retain the security deposit on April 14, 2021.

The Landlord testified that their daughter moved into the upper unit instead of the basement unit because the rental unit was uninhabitable and required significant repair costs; they claimed that the repairs included removing all the walls and the floors to deal with the moisture and the mold. They further claimed that the daughter intended to, and was in the process of moving into the rental unit, when she realized it could not be lived in. The Landlords further submitted that the basement suite was not rented after the Tenant moved out, as no one can be living in that space, and the unit has sat empty for over two years.

The Landlord's Agent confirmed that the Landlord's daughter operated an AirBnB out of the upstairs unit, which was started in August 2017. He stated that she uses one bedroom personally, and they rent out the other two individual rooms. He submitted that they only rent out the upstairs and there never has been a plan to use the basement as an AirBnB. He further stated that the AirBnB ceased operation by December 2019.

In reply to the Landlord's submissions, the Tenant stated that the water damage originated from a flood which occurred before he moved in. He further stated that the Landlords had insurance and the water damage was fully repaired by the Landlords' insurance company prior to the tenancy beginning.

The Tenant also noted that the Landlord failed to make an application to retain the Tenant's deposit within the required timelines and at no time did they tell him that he damaged the rental unit beyond repair.

Although the Tenant claimed his moving and storage costs as well as the cost of gas related to moving from the rental unit, I informed the parties that the 12 months' compensation pursuant to section 51(2) of the *Act* is intended to cover all related costs of a move when it is determined that the tenancy should not have ended when it did. As such I did not require submissions from either party with respect to these amounts.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at:

www.gov.bc.ca/landlordtenant.

A tenancy may only be ended in accordance with the *Act*. In the case before me, the undisputed evidence indicates that the Landlord issued the Tenant a Two Month Notice to End Tenancy for Landlord's Use of the Property, pursuant to section 49 of the *Act*; the Notice further specified that the rental unit would be occupied by the Landlord or the Landlord's spouse or a close family member. The evidence before me further confirms it was the Landlords' intention that their daughter occupy the rental unit.

The Tenant seeks monetary compensation pursuant to section 51(2) of the *Act*, which provides that if 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 if 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, the Tenant is entitled to compensation equivalent of 12 months' rent under the tenancy agreement.

Under section 51(3) of the *Act*, a landlord may be excused from paying this amount if *extenuating circumstances* prevented the landlord from accomplishing the stated purpose within a reasonable period of time after the effective date of the Notice or using the rental unit for the stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the Notice.

After consideration of the testimony and evidence before me, and on a balance of probabilities I find the following.

The Tenant alleges the Landlords did not use the property for the stated purpose. He further alleges that the Landlords' daughter did not move into the rental unit, but rather

operated an AirBnB out of the rental property. The Tenant testified that his child continues to go to school in the same neighbourhood and as such he is frequently in the area. He stated that he has not observed anyone living at the property long term, but rather only sees evidence of short-term rentals.

Additionally, the Tenant provided a copy of the Landlord's daughter, K.J.W.'s business license providing that she would be operating a short-term rental business out of the rental home. The Tenant also provided a letter from a neighbour who confirmed that he has not seen anyone living permanently at the rental home, rather only short term AirBnB guests.

The Landlords testified that it was their daughter's intention to move into the rental unit, but claimed that at that time the tenancy ended, they discovered it was uninhabitable, such that she stayed upstairs and rented out the spare rooms to short term guests. The Landlords also claimed the repairs to the rental unit were so extensive they would require tens of thousands of dollars in labour and material costs such that they have simply left the rental unit vacant for two years.

The undisputed evidence before me is that there was flooding at the rental unit prior to the tenancy beginning. The Tenant testified that the Landlords made an insurance claim and all required repairs were completed prior to his tenancy beginning.

The Landlords concede that the rental unit was not occupied but claimed that was due to the condition of the unit. While not argued before me during the hearing, in written submissions they allege the Tenant refused entry to the unit and did not inform them of its condition. Despite this, it is notable the Landlords did not make a claim against the Tenant for damage to the rental unit.

On balance, I find the Tenant has met the burden of proving that the Landlords did not use the rental unit for the stated purpose. I find that the Landlords' daughter did not occupy the rental unit, but rather operated her short- term rental business from the upstairs unit. I also find that the rental unit has remained vacant for two years and has not been occupied which was the purpose stated on the notice.

I must now consider whether *extenuating circumstances* prevented the Landlord from accomplishing the stated purpose within a reasonable period of time after the effective date of the Notice. In this case the Landlords allege the condition of the rental unit was so poor that it was uninhabitable and as such their daughter could not move in. In support they provided photos of the rental unit which showed extensive water damage

to the walls, drywall, and framing. These areas also show considerable mould. The Landlords provided a copy of a quote for repairs and upgrades in the amount of \$29,600.00. This quote speaks to the extensive nature of the repairs requires.

On balance, I accept the Landlords' testimony and evidence that the condition of the rental unit was such that their daughter could not move in. While it may not have been readily apparent when the Notice was issued, the photos confirm the extensive nature of the water damage and resulting mould. I am persuaded by the estimate provided by the Landlords in evidence and therefore accept the Landlord's evidence that the repair costs are cost prohibitive.

In all the circumstances I find the condition of the rental unit to be such that it was not possible for the Landlords' daughter to move in and occupy the rental unit. I also find this qualifies as an *extenuating circumstance* which prevented the Landlords from accomplishing the stated purpose within a reasonable period of time after the effective date of the Notice, and I therefore find they should be relieved of paying the compensation pursuant to section 51(2) of the *Act*. I therefore dismiss this portion of the Tenant's claim.

In making this finding I want to be clear that I do not find that the Tenant is responsible for the damage to the rental unit. I find it likely the repairs done after the flood in 2015 were insufficient and left water damage which became worse over time. It is possible the Tenant was unaware of the mould and water damage and simply became accustomed to the smell in the rental unit.

I will now address the Tenants' claim for return of double his security deposit pursuant to section 38 of the *Residential Tenancy Act* which reads as follows:

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.

I accept the Tenant's evidence that he did not agree to the Landlords retaining any portion of their security deposit.

I accept the Tenant's testimony that he sent his forwarding address to the Landlords by registered mail on March 13, 2019. Section 90 of the *Act* provides that documents sent by registered mail are deemed served five days later, whether the recipient chooses to accept the mail or not. I therefore find that the Landlords received the Tenants

forwarding address in writing on March 18, 2019, 5 days after the letter was sent to them.

The Landlords failed to return the deposit or apply for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenants, as required under section 38(1) of the *Act*. As such they are in breach of section 38 of the *Act*.

The security deposit is held in trust for the Tenant by the Landlords. The Landlords may only keep all or a portion of the security deposit through the authority of the *Act*, such as the written agreement of the Tenants an Order from an Arbitrator. If the Landlords believe they are entitled to monetary compensation from the Tenants, they must either obtain the Tenant's consent to such deductions or obtain an Order from an Arbitrator authorizing them to retain a portion of the Tenants' security deposit. Here the Landlords did not have any authority under the *Act* to keep any portion of the security deposit.

Having made the above findings, I must Order, pursuant to sections 38(6) and 67 of the *Act*, that the Landlords pay the Tenant the sum of **\$1,600.00**, comprised of double the security deposit (2 x \$800.00).

As the Tenant has been partially successful in his claim, I also award him recovery of the \$100.00 fee paid for filing this Application for a total award of **\$1,700.00**.

Conclusion

The Tenant's Application for compensation pursuant to section 51(2) is dismissed without leave to reapply.

The Tenant's Application for compensation for moving, storage and other related costs, as well as registered mail costs, is dismissed without leave to reapply.

The Tenant's Application for return of double the security deposit is granted.

The Tenant's Application for recovery of the filing fee is granted.

In furtherance of this the Tenant is granted a formal Monetary Order in the amount of **\$1,700.00**. The Tenant must serve a copy of the Order on the Landlords as soon as possible, and should the Landlords fail to comply with this Order, the Order may be filed in the B.C. Provincial Court (Small Claims Division) 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: June 9, 2021

Residential Tenancy Branch