



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Noquits Property Management Services
Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes For the landlord: MNRL-S, MNDL-S, MNDCL-S, FFL
For the tenants: MNSDS-DR, FFT

Introduction

This hearing dealt with a cross application. The landlord's application pursuant to the Residential Tenancy Act (the Act) is for:

- a monetary order for unpaid rent, pursuant to section 26;
- a monetary order for compensation for damage and loss under the Act, the Regulation Tenancy Regulation (the Regulation) or tenancy agreement, pursuant to section 67; and
- an authorization to retain the security deposit (the deposit), pursuant to section 38; and
- an authorization to recover the filing fee, pursuant to section 72.

The tenants' application pursuant to Act is for:

- an order for the landlord to return the deposit, pursuant to section 38; and
- an authorization to recover the filing fee, pursuant to section 72.

The on June 29, 2021 was adjourned until January 10, 2022. The landlord and tenants DS (the tenant) and EM attended both hearings. The landlord was represented by IA (the landlord). The tenants were assisted by advocate TS. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the Act.

Preliminary issues – partial withdrawal of the landlord's claims

The landlord advised that he received the payment for the move out fee and the fob replacement. The landlord is no longer seeking compensation for these expenses.

Therefore, pursuant to my authority under section 64(3)(c) of the Act, I amended the landlord's application to withdraw the claim for compensation for the move out fee and the fob replacement.

Issues to be Decided

Is the landlord entitled to:

1. a monetary order for unpaid rent?
2. a monetary order for loss?
3. an authorization to retain the deposit?
4. an authorization to recover the filing?

Are the tenants entitled to:

1. an order for the return of the deposit?
2. an authorization to recover the filing?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's and tenants' claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the applicants' obligation to present the evidence to substantiate their application. I note the hearing on January 10, 2022 lasted for approximately 118 minutes.

Both parties agreed they entered into a fixed term tenancy from November 10, 2020 to May 31, 2021. The tenancy ended on January 31, 2021, prior to the end of the fixed term. Monthly rent of \$1,750.00 was due on the first day of the month. At the outset of the tenancy a security deposit of \$875.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It states:

12. Upon Vacating:

The Tenant undertakes to dean the Premises and return ft to Landlord In the same condition as provided except reasonable wear and tear. Al carpets must be professionally steam cleaned with receipts provided to the Landlord.

[...]

18. Liquidated Damages:

If the Tenant breaches a material term of the tenancy agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this tenancy agreement or end the tenancy by vacating the premises, and the tenant does vacate the premises before the end of any fixed term or other notice period, the tenant shall pay to the landlord the sum of ONE MONTHS RENT as liquidated damages and not as a penalty for the pre-estimated cost associated with re-renting the premises which shall be paid by the tenant in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the premises or the property. **The tenant is solely responsible for all rent payments to the landlord until the premises is re-rented to a suitable new tenant. Payment of any liquidated damages does not preclude the landlord from claiming future rental revenue losses to the end of the fixed term or applicable notice period that will remain un-liquidated.**

(emphasis added)

The landlord confirmed receipt of the tenants' notice to end tenancy on January 03, 2021 and posted two advertisements to re-rent the rental unit asking for monthly rent of \$1,750.00.

On January 27, 2021 the tenant emailed the landlord and agreed to pay \$830.00 to the prospective tenant move in on February 01, 2021:

Thanks for speaking with me today about the interested tenant with the potential move in for February 1st. I am writing to authorize you to offer this tenant that we help him pay for the first 14 days of February (half a month's rent) as an incentive to move in for February 1st, rather than his desired March 1st date!

The landlord emailed the tenant on January 28, 2021:

As an update, the prospective tenant has confirmed he will be taking the suite and I have scheduled their move in on Monday February 1. As such I will do your move out inspection on Sunday January 31 at 1pm.

Attached is the cleaning checklist for move outs. Please ensure the suite is cleaned accordingly.

The tenant affirmed he agreed to move out on January 31, 2021, but a move out inspection was not scheduled.

The landlord stated the tenants left the rental unit before the move out inspection and emailed him at night on January 31, 2021 confirming they moved out. The landlord was able to enter the rental unit around 8 or 9:00 P.M. on January 31, 2021 with a spare key. The tenant apologized for leaving on January 30, 2021 and testified he believes the landlord was able to enter the rental unit before 9:00 P.M. on January 31, 2021.

A copy of the condition inspection report (the report) was submitted into evidence. Both parties signed it when the tenancy started. The move out inspection is not signed. The landlord said he conducted the move out inspection alone and forgot to sign the report. The tenant affirmed he only received a copy of the move out inspection more than 15 days after the tenancy ended.

On January 31, 2021 the landlord emailed the tenants:

Without Prejudice

I was expecting to do the move out inspection today together and I am extremely disappointed that you failed to show up for the scheduled move out inspection which is mandatory for both tenant and landlord to conduct pursuant to the Residential Tenancy Act (BC).

I remind you that pursuant to the tenancy agreement, which is fixed term tenancy ending on May 2021 (the "Tenancy End Date"), you are required to pay rent on the first of each and every month to the Tenancy End Date. As you terminated the tenancy earlier than the Tenancy End Date, you are required to pay the Landlord \$1750 as liquidated damages including compensating the Landlord for all rental revenue losses incurred to the Tenancy End Date. The tenancy agreement further requires you to pay the landlord \$100 upon move out and \$100 for the fob access. Please note, I have and continue to incur significant time and cost arising from your breach of the tenancy agreement. The suite is still not rented although the prospective tenant whom you authorized me to offer 1/2 month's rent has indicated that he will rent it from February 1st.

As we last discussed earlier in the week, I was, on a without prejudice basis, expecting to receive payment of \$1030 which is the \$830 amount for the 1/2 month's rent you authorized me to offer to the prospective tenant plus payment for the \$100 move out fee and \$100 for the replacement of the damaged fob (the "Without Prejudice Payment").

Please note unless I receive an etransfer of \$1030 [redacted for privacy] for the Without Prejudice Payment by the end of day today, I shall have no other option but to pursue available legal remedies for damages arising from your breach of the lease including but not limited to Tenancy End Date, the move out fee, and the fob replacement.

The tenants replied on January 31, 2021:

Without Prejudice

The unit was left in a clean condition ready for move In by the new tenant who you confirmed in your email of Jan 28, will be moving in on Monday, February 1. You told me that the new tenant signing a one year lease which means that you will not be suffering any financial loss as a result of our departure and, in fact, you will be in better financial position as the new lease will run until the end of January 2022.

You are still in possession of our Security Deposit In the amount of \$875 plus accrued interest, which we will waive in recognition of our early departure. I will additionally forward you an a-transfer in the amount of \$200 to cover the move-out fee and the cost to replace the entry fob, upon receipt of your written confirmation that these amounts are in full settlement of all remaining obligations under the Residential Tenancy Agreement.

This is a fair and reasonable settlement that ensures that you are not suffering financial loss and we cannot afford to pay more. Please let me know that you accept this offer so we can all put this matter behind us and avoid the need to have you go through the long and drawn out process of applying for dispute resolution under the Residential Tenancy Ad.

Once you confirm your acceptance, in writing, I will arrange the e-transfer.

(emphasis added)

The landlord confirmed that on January 31, 2021 he received \$830.00 for the incentive for the prospective tenant to move in on February 01, 2021, \$100.00 for the fob replacement and \$100.00 for the move out fee, in the total amount of \$1,030.00. The landlord stated the tenants have a credit of \$830.00.

The tenant testified that he did not authorize the landlord to retain the deposit and that he was under pressure when he sent the email and payment on January 31, 2021.

The tenant said he served his forwarding address by registered mail on February 23, 2021. The landlord affirmed he received the forwarding address in late February 2021.

The landlord is claiming for loss of rental income of \$1,750.00 for February rent, and \$270.00 (\$90.00 per month for March, April and May 2021), as the rental unit was rented on March 01, 2021 for \$1,660.00.

The landlord stated the prospective tenant did not move in on February 01, 2021 because the rental unit was not clean, and the landlord could not clean the unit before February 01, 2021 because he only had possession of the rental unit on January 31, 2021 at night.

The tenant testified he helped to find a new tenant and the landlord has a very high standard for prospective new tenants. The tenant would not have left the rental unit if it had not been re-rented.

The landlord said he reduced the rental price on February 01, 2021 to \$1,660.00 and hired a real estate agent on February 14, 2021 to re-rent the unit.

The landlord is claiming for loss in the amount of \$1,456.00 for the property manager fee paid to find a new tenant. The landlord submitted a receipt dated February 14, 2021 for the amount claimed. The tenant affirmed the landlord owns several properties and that he could have rented the rental unit without hiring a real estate agent.

The landlord is claiming for loss in the amount of \$671.99 for a new mattress, \$68.25 for the damaged mattress removal and \$100.80 for a chair removal. The landlord stated the tenant caused a hole measuring at least 3 feet in length in the mattress (photo submitted). The move in report indicates the rental unit was in good condition when the tenancy started. The mattress was used for 3 months before the tenancy started. The tenant testified the mattress was damaged when the tenancy started and he did not notice this until after he signed the move in report. The tenant said he did not complain to the landlord about the damaged mattress because he could still use it.

The landlord submitted a receipt for a new mattress in the amount of \$671.99, and the receipt to remove the damaged mattress in the amount of \$68.25.

The tenant affirmed he abandoned a chair in the rental unit and did not ask the landlord if he could abandon the chair. The landlord submitted a receipt to remove the abandoned chair in the amount of \$100.80.

The landlord is claiming for loss in the amount of \$19.87 for a light bulb removed by the tenants from the bathroom (receipt submitted). The tenant stated he removed the light because it was not working and he intended to replace it.

The landlord is claiming for loss in the amount of \$112.00 for painting expenses. The landlord testified the tenants damaged the painting of the bedroom closet door and the bedroom and living room walls. The rental unit was painted before the tenancy started. The landlord submitted 6 photographs and a receipt for painting. The tenant said he did not damage the painting and submitted 12 photographs.

The landlord is claiming for loss in the amount of \$168.00 for cleaning and laundry expenses, as the coffee maker, the toaster and the oven were not clean. The landlord hired a cleaner to clean the 500 square feet, one bedroom rental unit and submitted a receipt for cleaning and laundry services. The tenant affirmed the rental unit was reasonably clean when the tenancy ended. Later the tenant stated he may have not cleaned the coffee maker. Both parties submitted photographs.

Both parties submitted into evidence monetary orders worksheets. The landlord's worksheet indicates a claim of \$4,816.91 for the monetary claims above mentioned. The tenants' worksheet indicates a claim of \$875.00 for the return of the deposit.

Analysis

Section 7 of the Act states:

Liability for not complying with this Act or a tenancy agreement

(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Residential Tenancy Branch 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:

- 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.

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. The onus to prove the case is on the person making the claim.

Move out inspection and deposit

Section 35(1) of the Act states:

The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit

- (a) on or after the day the tenant ceases to occupy the rental unit, or
- (b) on another mutually agreed day.

Regulation 17 states:

(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

- (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
- (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

Based on the testimony offered by both parties and the emails dated January 27 and 28, 2021, I find the tenants agreed to inspect the rental unit on January 31, 2021 at 1:00 P.M. and the tenant abandoned the rental unit on January 30, 2021.

Section 36 of the Act states:

- (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if
 - (a) the landlord complied with section 35 (2) [2 opportunities for inspection], and
 - (b) the tenant has not participated on either occasion.

As the tenants agreed on a time for the move out inspection and abandoned the rental unit, I find the landlord complied with Regulation 17 and the tenants extinguished their right for the return of the deposit, per section 36(1) of the Act.

Regulation 18(1) states: “The landlord must give the tenant a copy of the signed condition inspection report”.

I find the landlord breached regulation 18, as he did not sign the move out inspection.

Regulation 21 states:

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 the report has no evidentiary weight, as the landlord did not complete it in accordance with the Regulation.

Residential Tenancy Branch Policy Guideline 17 states:

In cases where both the landlord’s right to retain and the tenant’s right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even though the tenant may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord’s breach occurred first.

I note the tenants breached their obligation regarding the return of the deposit prior to the landlord’s breach of regulation 18. Thus, the tenants are precluded from claiming the return of the deposit.

Furthermore, the tenants authorized the landlord in writing to retain the deposit on January 31, 2021. I find the parties' emails dated January 31, 2021 are well written and that the tenants were fully aware that they authorized the landlord to retain the deposit.

Cleaning and laundry expenses

Section 37(2) of the Act states:

Leaving the rental unit at the end of a tenancy

37(2) When a tenant vacates a rental unit, the tenant must

(a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear

Residential Tenancy Branch Policy Guideline 1 states:

The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy Act.

The tenant's testimony about the cleanliness of the rental unit was contradictory. Based on the landlord's convincing testimony and the photographs, I find the tenants failed to reasonably clean the rental unit and the landlord incurred a loss because of the tenants' failure to comply with section 37(2) of the Act.

The landlord did not indicate how many hours of cleaning were needed to clean the 500 square feet rental unit. I find the landlord failed to prove, on a balance of probabilities, that he suffered a loss of \$168.00. The receipt submitted is for cleaning and laundry services and the landlord did not provide testimony about laundry services.

Based on the photographs submitted into evidence and the size of the rental unit, I find it reasonable to award one hour of cleaning at the rate of \$30.00 for cleaning expenses.

I award the landlord \$30.00.

Loss of rental income

Section 45(2) of the Act states:

(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.

(emphasis added)

I find the landlord incurred a loss of rental income from February 01 to May 31, 2021 because the tenants failed to comply with section 45(2)(b) of the Act and did not pay rent until the end of the fixed term tenancy agreement on May 31, 2021.

Residential Tenancy Branch Policy Guideline 3 sets conditions for loss of rental income claims. It states:

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.

[...]

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

Further to that, Policy Guideline 5 states:

When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:

1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
2. re-rent the unit as soon as possible.

For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of

November. Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear.

If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.

I find the landlord acted to minimize his losses by posting two advertisements to re-rent the rental unit on January 03, 2021. I find that because the tenants did not clean the rental unit the landlord could not re-rent it on February 01, 2021. I further find the landlord continued to act to minimize his losses by hiring a real estate agent on February 14, 2021.

As such, I find the landlord suffered a loss of rental income in the amount of \$1,750.00 from February 01 to 28, 2021.

I find the landlord incurred a loss of rental income from March 01 to May 31, 2021 in the amount of \$90.00 per month, as the unit was re-rented at \$1,660.00 instead of \$1,750.00 per month, totalling \$270.00 (\$90.00 per month x 3 months).

Thus, in accordance with section 7 of the Act, I order the tenants to pay the landlord the amount of \$2,020.00.

Tenants' replacement cost

Based on the landlord's convincing testimony and the property manager fee receipt, I find the tenants breached clause 18 of the tenancy agreement by vacating before the end of the fixed term and, as a consequence of the tenants' breach of the tenancy agreement, the landlord suffered a loss.

The tenancy started on November 10, 2020, ended on January 31, 2021 and was supposed to end on May 31, 2021. As the tenant occupied the rental unit for 40% of the fixed term period and that landlord would have the same replacement cost if the tenancy had lasted until the end of the fixed term, I find the landlord is entitled to 60% of the tenants' replacement cost of \$1,456.00.

As such, I award the landlord the amount of \$873.60.

Mattress and chair

Section 32(3) of the Act states: "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".

Based on the landlord's more convincing testimony, the photographs and the receipt submitted into evidence, I find the tenants breached section 32(3) of the Act by failing to repair the damaged mattress and the landlord suffered a loss of \$671.99 to replace it and \$68.25 to remove it from the rental unit.

Based on the tenant's testimony, I find the landlord suffered a loss because the tenants abandoned a chair in the rental unit.

I find it is not reasonable to award \$100.80 to remove the abandoned chair. The removal of a mattress, a much larger object, cost the landlord less than the amount claimed for the chair. I find it reasonable to award the landlord \$25.00 to remove the chair.

Thus, I award the landlord \$765.24 for the mattress and chair expenses.

Light bulb

Based on the tenant's testimony and the receipt, I find the tenants breached section 32(3) of the Act by failing to replace the light bulb and the landlord suffered a loss of \$19.87.

I award the landlord \$19.87.

Painting

Residential Tenancy Branch Policy Guideline 1 states:

The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy Act or Manufactured Home Park Tenancy Act (the Legislation).

PAINTING

The landlord is responsible for painting the interior of the rental unit at reasonable intervals. The tenant cannot be required as a condition of tenancy to paint the premises. The tenant may only be required to paint or repair where the work is necessary because of damages for which the tenant is responsible.

[...]

Cleaning: The tenant is responsible for washing scuff marks, finger prints, etc. off the walls unless the texture of the wall prohibited wiping.

Nail Holes:

1. Most tenants will put up pictures in their unit. The landlord may set rules as to how this can be done e.g. no adhesive hangers or only picture hook nails may be used. If the tenant follows the landlord's reasonable instructions for hanging and removing pictures/mirrors/wall hangings/ceiling hooks, it is not considered damage and he or she is not responsible for filling the holes or the cost of filling the holes.
2. The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.
3. The tenant is responsible for all deliberate or negligent damage to the walls.

Based on the photographs submitted into evidence by both parties, I find the landlord failed to prove, on a balance of probabilities, that the tenants damaged the walls. I find the small scuff marks and wall damages shown in the photographs are regular wear and tear.

Thus, I dismiss the landlord's claim for painting expenses without leave to reapply.

Filing fee and summary

As the landlord was successful, I find the landlord is entitled to recover the \$100.00 filing fee.

The tenants must bear the cost of their filing fee, as they were not successful.

Residential Tenancy Branch Policy Guideline 17 states:

The Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord.

The landlord is authorized to retain the \$875.00 deposit in partial satisfaction of the monetary award.

In summary:

Item	\$
Cleaning	30.00

Loss of rental income	2,020.00
Tenants' replacement cost	873.60
Mattress and chair	765.24
Light bulb	19.87
Filing fee	100.00
Subtotal	3,808.71
Minus deposit	875.00 (-)
Minus January 31, 2021 credit	830.00 (-)
Total	2,103.71

Conclusion

Pursuant to sections 7, 67 and 72 of the Act, I authorize the landlord to retain the \$875.00 deposit and grant the landlord a monetary order in the amount of \$2,103.71.

The landlord is provided with this order in the above terms and the tenants must be served with this order. Should the tenants 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: January 14, 2022

Residential Tenancy Branch