Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDL-S, FFL**

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $625.00 pursuant to section 67;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 2:00 p.m.in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 p.m. The landlord was represented at the hearing by the Property Manager (hereafter referred to as the "landlord"). The landlord was given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

The landlord testified she served that the tenant with the notice of dispute resolution form and supporting evidence package via registered mail on July 28, 2021. The landlord provided a Canada Post tracking number confirming this mailing which is reproduced on the cover of this decision.

Based on the testimony and the written submissions of the landlord, and in accordance with sections 89 and 90 of the Act, I find that:

1) the tenant is deemed served with the notice of dispute resolution package which pertain to compensation for damages caused by the tenant to the unit on August 2, 2021, the fifth (5th) day after mailing.

Rule 7.1 of the Rules of Procedure [the **"Rules**"] stipulates that the hearing will commence at the scheduled time unless otherwise decided by the Arbitrator. The Arbitrator may

conduct the hearing in the absence of a party and may decide or dismiss the Application, with or without leave to re-apply.

Relying on M.B.B v. Affordable Housing Charitable Association, 2018 BSCS 2418, the landlord must still prove the grounds to end tenancy when a tenant does not appear to present their application to cancel the notice.

> [27] I accept it was open to the arbitrator to proceed with the hearing or dispense with the hearing altogether and decide the matter in the absence of M.B.B., but in doing so, the arbitrator still had to resolve the issue raised by the application on the merits in some way. It was insufficient to dismiss the application solely on the grounds that M.B.B. had not dialed in to the hearing within the first ten minutes as she was supposed to have done.

I decided the hearing would proceed in the absence of the tenant.

The landlord was advised that pursuant to rule 6.11 of the Rules, persons are prohibited from recording dispute resolution hearings, except as allowed by rule 6.12. As the landlord had neither requested nor been granted authorization to hire an accredited Court reporter as allowable under rule 6.12, I confirmed with the landlord that she was not recording the hearing. The landlord was provided the opportunity to present her evidence orally and in written and documentary form, and to make submissions at the hearing.

Issues to be Decided

Are the landlords entitled to:

1) a monetary order for $625.00;
2) recover the filing fee;
3) retain the security deposit in satisfaction of the monetary orders made?

Background and Evidence

While I have considered the documentary evidence and the testimony of the landlord not all details of her submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The parties entered into a written fixed term tenancy agreement starting October 1, 2019. Monthly rent was $1720.00, payable on the first calendar day of each month. The tenant paid a security deposit of $860.00 on August 14, 2019. The landlord still retains this deposit, in trust.

The landlord testified when the tenant signed the tenancy agreement, he also signed two (2) addendums: 1) prohibiting the growing of cannabis 2) a "cleaning" instructions

sheet outlining end of tenancy cleaning expectations with the associated fees for non-compliance. When the tenant gave notice, he was provided "Move Out Instructions".

Initially, the landlord testified the tenant moved out June 29 but later corrected the date stating the tenant "may have moved mid- month June". The landlord thought the first date set for final inspection may have been June 29, 2021, but was unable to confirm this date was offered to the tenant.

The landlord pointed out that an email with a date and time for the Condition Inspection (June 30, 2021 at 1:00 p.m.) was sent to the tenant and when the tenant said he likely could not attend, a Final Opportunity Notice (RTB-22) was posted on the tenant's door probably on June 29, 2021 with the same date and time for the Condition Inspection.

The landlord submitted a Monetary Order Worksheet (RTB-37) into evidence that outlined the costs associated with cleaning and repairing damage to the suite and the penalty for using the front entrance to move out. The costs are reproduced below:

#1	XX cleaning form	Curtain cleaning	$150.00
#2	Invoice XXXXXX XX Limited	Painting	$250.00
#3	4 hrs unit cleaning	Cleaning	$120.00
#4	Replacement	Light bulb	$ 5.00
#5	XX moving instructions	Moved out through front door	$100.00
		Total monetary order claim	**$625.00**

The following is an explanation for each cost as provided by the landlord.

Curtain Cleaning

The curtains are removed, washed, and replaced by the cleaning staff that maintain the common areas on the property. (No invoice provided.)

Painting

Painting is contracted out. Rental units are painted, on average, every 3-5 years depending on the condition of the unit. For example, a tenant recently moved from a unit occupied by the tenant for 18 years that did not require painting. Painting is not usually done between tenants.

In this case, the tenant did not wipe down the walls, fill the holes left in the walls etc. and the landlord determined the unit needed to be painted. The landlord did not know when the unit had previously been painted. (invoice = $250.00).

4 Hours Cleaning

The cleaning staff that maintain the common areas on the property were pulled from common area cleaning to clean the unit (windows, fridge, stove etc.) (no invoice provided)

Replacement light bulb

One light bulb was burned out and needed replacement. The landlord noted that this $5.00 cost was not included on the original cleaning sheet signed by the tenant on September 30, 2019. (no invoice provided)

XX moving instructions

The landlord testified that the Move Out Instructions provided to the tenant are explicit. All moves must use the back elevator and door. The "Move Out Instructions" read in part: "ABSOLUTELY NO MOVES through the front door ($100 will be deducted from your security deposit)".

There is a video camera at the front door. The video camera showed the tenant moving out through the front entrance rather than through the back door as instructed. The landlord acknowledged that sometimes furniture is too bulky to fit into the back elevator and needs to be moved through the front; however, the tenant should have told the building manager before time and did not do so.

The landlord did not personally view the video and, therefore, could not attest to what belongings or how much of the tenant's belongings were moved out through the front entrance or why the front entrance was used.

The landlord concluded her testimony stating that the tenant does not respond to any of the landlord's phone calls or text messages.

Analysis

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

The *Act* applied to this tenancy. The tenant paid rent up to and including June 30, 2021, and the keys returned June 30, 2021, thereby ending tenancy. In the one-month notice provided to the landlord, the tenant provided a forwarding address. On June 13, 2021, the tenant moved.

The landlord still holds the tenant's $860.00 security deposit, in trust. The landlord filed an application requesting a monetary order against the tenant's security deposit in the amount of $525.00 to compensate for damage to the rental unit and a $100.00 penalty

for moving out through the front door for total compensation equaling $625.00. The landlord also requested reimbursement of the $100.00 filing fee.

Before deciding on the merits of the application, I must be satisfied that the landlord complied with the "Scheduling of the inspection" and the "Two opportunities for inspection" as provided in s. 16 and s. 17, respectively, of the Residential Tenancy Regulations ("**Regulations**") and as provided in s. 35 of the *Act.*

Pursuant to sections 23 and 35 of the Act, a landlord must complete a Condition Inspection Report (CIR) at both the beginning and the end of a tenancy in order to establish that any damage claimed actually occurred as a result of the tenancy. Landlords who fail to complete move-in or move-out inspections and CIRs extinguish their right to claim against the security and /or pet damage deposits for damage to the rental unit pursuant to sections 24 and 36. Further, landlords are required by section 24(2)(c) to complete and give tenants copies CIRs in accordance with the regulations.

In addition to the above referenced requirements, Section 35 prescribes the obligations of the landlord and tenant as set out below:

35 (1) 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.

(2) The landlord **must** offer the tenant at least 2 opportunities, as prescribed, for the inspection.
[emphasis added]

The Regulations provide further direction regarding the scheduling of inspections in Part 3 "Condition Inspections". Section 17 lays out the separate and joint obligations of the landlord and tenant– what the landlord **must** do; what the tenant **may** do, and what the tenant and landlord **must** do together.

Scheduling of the Inspection

17 (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.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant **must** consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

[emphasis added]

Other than the June 30, 2021, date, the landlord was unable to confirm that another and different Condition Inspection date was offered to the tenant. She speculated that June 29, 2021, may have been offered, but there was insufficient evidence available to confirm if this date was, in fact, offered. The landlord pointed out the "final notice" was posted on the tenant's door most likely on June 29, 2021, with the Condition Inspection set for June 30, 2021, at 1:00 p.m.

I reviewed the email chain referenced at the hearing in its entirety. The relevant information, reproduced below, provides a chronology of events along with confirmed dates and times.

On **June 10, 2021, at 3:49 p.m**. the tenant requested a move out time between 8:30-1:00 on June 13, 2021. On **June 10, 2021 at 4:31 p.m.** the residence manager responded confirming a move out time for June 13, 2021, between 9:00 and noon and recommended a "pre-inspection" prior to booking "a final inspection later in the month".

On Friday, June 25 at 5:32 p.m. the residence manager informs the tenant, *"We need to book an hour for the move out inspection for 1 p.m. Wednesday. When are a couple times that you are available?"* What Wednesday as referenced in the landlord's email is unspecified.

The tenant did not respond and on **June 29, 2021 at 5:56 p.m.** the residence manager then writes, "*Since I haven't heard back from you, I have sent you a final notice for the move out inspection. I will be at unit XXX, tomorrow,* ***Wednesday, June 30, 2021 at 1 p.m.***" .

The tenant responds the following morning, **Wednesday, June 30 at 8:45 a.m.**, saying, "Please feel free to do it by yourself. Most probably I can't be there." [emphasis added]

The landlord responds to the tenant's email on **Wednesday, June 30, 2021, at 11:06 a.m.** "If you're not going to be there at the move out inspection then you're not going to be able to verify what I write on the inspection form. Do you realize this?"

I have reviewed the evidence provided by the landlord in concert with the legislation and Regulations referenced above.

While I acknowledge the landlord, prior to the tenant move out date, sent an email suggesting a "pre-inspection" prior to booking a "final inspection" there is insufficient evidence available to conclude that the landlord followed up with the tenant. Between

June 10 and June 25, there is no further email communication submitted into evidence between landlord and tenant in this email chain.

The landlord sent an email to the tenant late afternoon, Friday, June 25, 2021, and did not get a timely response. The landlord's reaction was a follow up email late in the afternoon of June 29, four (4) days later declaring that the final inspection will take place at 1:00 p.m. on June 30, 2021. The tenant responded the following morning saying, "Most probably I can't be there". In this email exchange, the landlord had an opportunity but made no attempt to ascertain a different date and/or time or offer a different date and/or time. The landlord was aware the tenant worked, provided very short notice, offered no options, failing to "consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection" as required by the Regulation.

The tacit suggestion that the email sent on June 29 and subsequent posting of the final notice on the tenant's door constituted two offers, does not conform to the requirements under the *Act* or the Regulations. Section 17 of the Regulations expands on the requirement under s. 35(2) stating that the second opportunity must be different from the first opportunity. While setting a date/time by email and subsequently posting a "final notice" with the same date and time, are two different methods, they do not meet the test of compliance of two (2) different opportunities.

Section 35(2) of the *Act* places the onus directly on the landlord to offer the tenant at least two (2) opportunities, "as prescribed" for inspection. In other words, the minimum requirement under the *Act* requires the landlord to proffer two (2) opportunities for a final inspection date/time- the landlord can offer more than two (2) opportunities.

I find the landlord breached s. 35 of the *Act* by not providing the tenant two (2) different opportunities to participate in a move out inspection thus extinguishing the right to claim against the security deposit.

Having determined the landlord was in breach of s. 35 of the *Act*, I now turn my mind to Section 36(1) of the *Act*, which outlines the consequences to tenants and landlords when inspection requirements are not met.

36 (1) The right of a tenant to the return of a security deposit or 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.

(2) Unless the tenant has abandoned the rental unit, the right of the 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 35(2) *[2 opportunities for inspection],*

(b) having complied with section 35(2), does not participate on either occasion, or

(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

These principles are described more fully in Policy Guideline #17. This Guideline, "Security Deposit and Set Off" sets out the requirements and resulting penalties for a landlord's failure to comply with s. 35 in lay terms. Guideline #17 states in part:

> 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 RT-22) to propose a second opportunity);….

Pursuant to s. 38 of the *Act*, the landlord must return the tenant's $860.00 security deposit in full.

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.

Section 38 (8) provides as follows:

38 (8) For the purposes of subsection (1)©, the landlord must repay a deposit

(a) in the same way as a document may be served under section 88(c), (d) or (f) *[service of documents],*

(b) by giving the deposit personally to the tenant, or

(c) by using any form of electronic

(i) payment to the tenant, or
(ii) transfer of funds to the tenant.

The landlord extinguished the right to retain the security deposit for damage to the rental unit. I therefore order the landlord return the security deposit, in full, to the tenant within 15 days in accordance with the section 38 of the Act and Regulation 4.

Conclusion

The landlord is unsuccessful in the application, as they failed to provide sufficient evidence to met their burden of proof on a balance of probabilities. The landlords claims are dismissed wholly without leave to reapply.

I order the landlord to return the tenant $860.00 for the security deposit held for this tenancy to the tenant within 15 days of the date they received this decision.

I grant the tenant a **Monetary Order** in the amount of **$860.00** for the return of his security deposit pursuant to section 38 of the *Act.* The tenant is 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 e 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: February 2, 2022

Residential Tenancy Branch