



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MNDL-S, MNDCL-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:

- an order of possession under a One Month Notice to End Tenancy for Cause (the Notice), pursuant to sections 47 and 55;
- a monetary order for loss under the Act, the regulation or tenancy agreement, pursuant to section 67;
- an authorization to retain the security deposit (the deposit), under section 38; and
- an authorization to recover the filing fee for this application, under section 72.

I left the teleconference connection open until 10:10 A.M. to enable the tenant to call into this teleconference hearing scheduled for 9:30 A.M. The tenant did not attend the hearing. The landlord, represented by property manager ES (the landlord), attended the hearing and 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.

At the outset of the hearing the attending party affirmed he understands the parties are not allowed to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5,000.00."

I accept the landlord's testimony that the tenant was served with the application and evidence (the materials) by registered mail on February 23, 2022, in accordance with section 89(2)(b) of the Act (the tracking number is recorded on the cover of this decision). The landlord mailed the package to the rental unit's address.

Section 90 of the Act provides that a document served in accordance with Section 89 of the Act is deemed to be received if given or served by mail, on the 5th day after it is mailed. Given the evidence of registered mail the tenant is deemed to have received the materials on February 28, 2022, in accordance with section 90 (a) of the Act.

Rule of Procedure 7.3 allows a hearing to continue in the absence of the respondent.

Preliminary Issue – Vacant Rental Unit

At the outset of the hearing the landlord affirmed the tenant moved out on March 31, 2022.

The application for an order of possession is moot since the tenancy has ended and the tenant left the rental unit.

Section 62(4)(b) of the Act states an application should be dismissed if the application or part of an application for dispute resolution does not disclose a dispute that may be determined under the Act. I exercise my authority under section 62(4)(b) of the Act to dismiss the application for an order of possession.

Issues to be Decided

Is the landlord entitled to:

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

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending party, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below. I explained rule 7.4 to the attending party; it is the landlord's obligation to present the evidence to substantiate the application.

The landlord affirmed the parties entered into a fixed-term tenancy from July 01, 2021 to June 30, 2022. Monthly rent of \$1,550.00 was due on the first day of the month. At the outset of the tenancy a deposit of \$775.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence:

36. SMOKING. The tenant hereby agrees that the rental unit is a non-smoking unit. [...] If the tenant or any visitors or invitees of the tenant are discovered or reasonably believed to be smoking in the rental unit, the tenant hereby relinquishes to the landlord its security deposit on first offence and acknowledge and agrees that it will be responsible to pay any fees relating to the elimination of the odor.

The tenant emailed the landlord on March 31, 2022 stating that she moved out. The tenant did not serve her forwarding address.

The landlord received the first complaint stating that the tenant smoked in the rental unit on July 05, 2021. The landlord served letters to the tenant on July 11 and September 11, 2021 warning the tenant to stop smoking and referencing section 36 of the tenancy agreement (letters submitted into evidence). The landlord received new smoking complaints on October 18, 2021 and served the Notice on November 29, 2021.

The landlord submitted a copy of the Notice into evidence: "The tenant received two warning notices in the last 6 months (1st one in July and 2nd one in September) regarding the smoking inside her unit. The tenant failed to comply, therefore this one month notice was issued."

The landlord submitted this application on February 14, 2022. The tenant disputed the Notice and a hearing was scheduled for March 24, 2022. On March 23, 2022 the Residential Tenancy Branch (RTB) contacted the landlord and informed him that the tenant withdrew the application submitted to dispute the Notice. The tenant's file number is recorded on the cover page of this decision.

The landlord is claiming painting expenses in the amount of \$775.00, as the landlord paid \$1,950.00 to paint the 550 square feet, one bedroom rental unit. The landlord stated it was necessary to paint the rental unit because of the smoking odour. The landlord touched up the painting before the tenancy started. The landlord submitted a quote into evidence:

Scope of work: clean all surfaces with solution of TSP and water, KILTZ prime all surfaces including door, frames, paint all surfaces two coats of latex acrylic paint. Price would be \$1,950.00.

The landlord did not ask for the painting cost of \$1,950.00 because he did not know if he would be successful in the application.

The landlord is claiming loss of rental income in the amount of \$3,390.00, as two neighbouring rental units moved out because the tenant continuously smoked in the rental unit. The landlord testified that rental units *5** (monthly rent of \$1,819.00) and *4** (monthly rent of \$1,573.00) had periodic tenancies and the tenants moved out on February 28, 2022. The landlord re-rented unit *5** on March 01, 2022 for \$1,800.00. The tenant from unit *4** moved to another rental unit in the same building and

continued to pay the same amount of rent. The rental units' numbers are recorded on the cover page of this decision.

The landlord submitted a monetary order worksheet indicating a total claim in the amount of \$4,165.00.

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.

Painting expenses

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."

Residential Tenancy Branch Policy Guideline 1 states:

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.

[...]

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.

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.

(emphasis added)

Based on the landlord's convincing testimony, the tenancy agreement, the warning letters and the Notice, I find the tenant was not authorized to smoke in the rental unit, the tenant continuously smoked in the rental unit and the smoke pollution damaged the rental unit's painting.

Based on the landlord's convincing testimony and the quote, I find the tenant breached section 32(3) of the Act by failing to paint the damaged walls and the landlord suffered a loss of \$1,950.00.

The landlord claimed \$775.00. I award the landlord compensation in the amount of \$775.00.

Loss of rental income

The landlord was able to re-rent unit *5** the day after the tenant moved out. The landlord continued to receive the same amount of rent from the tenant that occupied unit *4**, as he moved to another unit in the same rental building. Both rental units had periodic tenancy agreements.

Based on the landlord's convincing testimony, I find the landlord failed to prove, on a balance of probabilities, that he suffered a loss of rental income.

Thus, I dismiss the landlord's claim.

Filing fee, deposit and summary

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

As explained in section D.2 of Policy Guideline #17, 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.

I order the landlord to retain the deposit of \$775.00 in partial satisfaction of the monetary award.

In summary, the landlord is entitled to:

Expenses	\$
Painting expenses	775.00
Filing fee	100.00
Subtotal	875.00
Minus deposit	775.00
Total	100.00

Conclusion

Pursuant to sections 38, 67 and 72 of the Act, I authorize the landlord to retain the \$775.00 deposit and grant the landlord a monetary order in the amount of \$100.00.

The landlord is provided with this order in the above terms and the tenant must be served with this order in accordance with the Act. Should the tenant fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: May 25, 2022

Residential Tenancy Branch