



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding TRG REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

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

- a monetary order of \$2,650.00 for compensation under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenants' security deposit of \$2,650.00 in full satisfaction of the monetary order, pursuant to section 38; and
- authorization to recover the \$100.00 filing fee paid for this application, pursuant to section 72.

The two tenants did not attend this hearing, which lasted approximately 25 minutes. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

This hearing began at 1:30 p.m. with me present. The landlord's agent called in late at 1:33 p.m. This hearing ended at 1:55 p.m.

I monitored the teleconference line throughout this hearing. 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's agent and I were the only people who called into this teleconference.

The landlord's agent confirmed his name and spelling. He also confirmed the names and spelling of the two tenants. He provided his email address for me to send this decision to the landlord after the hearing.

The landlord's agent said that the landlord company ("landlord") named in this application is an agent for the owner, as per the tenancy agreement. He confirmed the names of the landlord and the owner. He explained that he is an assistant, employed by the landlord. He stated that he had permission to represent the landlord and owner at this hearing. He provided the rental unit address.

I informed the landlord's agent that he later claimed during this hearing, that he was unsure whether he had permission to represent the owner in this application at this hearing, since the agreement between the landlord and the owner was terminated in December 2021. The landlord's agent claimed that he did not know whether the landlord or owner was seeking the monetary order in this application, given that the above agreement was terminated.

For the purposes of this decision, I assume that the landlord's agent has permission to represent the landlord and owner at this hearing regarding this application, as per his original testimony. I also assume that both the landlord and owner are seeking the relief in this application against the tenants.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure ("Rules")* does not permit recording of this hearing by any party. At the outset of this hearing, the landlord's agent affirmed, under oath, that he would not record this hearing.

I explained the hearing process to the landlord's agent. He had an opportunity to ask questions, which I answered. He did not make any adjournment or accommodation requests. He confirmed that the landlord was still pursuing its application at this hearing.

The landlord's agent stated that both tenants were served with separate copies of the landlord's application for dispute resolution hearing package on December 10, 2021, both by way of registered mail to a forwarding address provided by the tenants on a move-out condition inspection report on November 30, 2021, a copy of which was provided for this hearing. In accordance with sections 89 and 90 of the *Act*, I find that both tenants were deemed served with the landlord's application on December 15, 2021, five days after their registered mailings, to the tenants' forwarding address on the move-out condition inspection report.

The landlord's agent said that no further evidence was served to the tenants regarding this application, after the above date.

Issues to be Decided

Is the landlord entitled to a monetary order for compensation under the *Act, Regulation* or tenancy agreement?

Is the landlord entitled to retain the tenants' security deposit in full satisfaction of the monetary order?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the landlord's documentary evidence and the testimony of the landlord's agent at this hearing, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The landlord's agent stated the following facts. This tenancy began on March 1, 2021 for a fixed term of one year, ending on February 28, 2022. Both parties signed a written tenancy agreement, which was provided for this hearing. This tenancy ended on November 30, 2021. Monthly rent in the amount of \$5,300.00 was payable on the first day of each month. The tenants paid a security deposit of \$2,650.00 and the landlord continues to retain this deposit in full. Move-in and move-out condition inspection reports were completed for this tenancy by both parties. The landlord did not have written permission to retain any amount from the tenants' security deposit. The landlord received a written forwarding address from the tenants on November 30, 2021, by way of the move-out condition inspection report. The landlord's application to retain the tenants' security deposit was filed on December 8, 2021.

The landlord's agent confirmed that the landlord seeks to retain the tenants' entire security deposit of \$2,650.00 for breaking the lease terms, plus the \$100.00 application filing fee.

The landlord's agent testified regarding the following facts. The landlord wants to keep the tenants' security deposit of \$2,650.00. The landlord is not looking for a monetary order for the months that the landlord was unable to find new tenants to rent the rental unit. The landlord was unable to find new tenants for November and December 2021. The tenants were still living at the rental property until November 30, 2021. Because of the covid-19 pandemic and the time of the year, the landlord was unable to find new

tenants for the rental unit, despite the fact that the tenants were cooperative in showing the rental unit to prospective tenants. The landlord is not asking for the missing months until the end of February 2022. The owner cancelled its agreement with the landlord in December 2021, the owner took the property back, and he does not know if the owner found new tenants to rent the unit.

The landlord's agent stated the following facts. He is unsure whether he has permission to represent the owner at this hearing regarding this application after the contract with the landlord was terminated by the owner in December 2021. The landlord provided emails with the tenants, showing that they were cooperative in showing the rental unit to prospective new tenants. The landlord does not want compensation for the loss of rent. The landlord wants to retain the tenants' security deposit because the tenants broke the lease terms. He does not know what provision of the tenancy agreement indicates the amount or the breach of lease terms.

Analysis

Burden of Proof

At the outset of this hearing, I informed the landlord's agent that as the applicant, the landlord had the burden of proof, on a balance of probabilities, to prove this application and monetary claim. The *Act, Regulation, RTB Rules*, and Residential Tenancy Policy Guidelines require the landlord to provide evidence of this application, in order to obtain a monetary order.

At the outset of this hearing, the landlord's agent confirmed that he served an application package from the RTB to the tenant, as required. The landlord was provided with a four-page document entitled "Notice of Dispute Resolution Proceeding" ("NODRP") from the RTB, which includes the phone number and access code to call into this hearing. The NODRP states the following at the top of page 2, in part (emphasis in original):

The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.

- *It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.*

- *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.*
- *Parties (or agents) must participate in the hearing at the date and time assigned.*
- *The hearing will continue even if one participant or a representative does not attend.*
- *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

The NODRP contains provisions that a legal, binding decision will be made in 30 days and that links to the RTB website and the *Rules* are provided in the same document. During this hearing, I informed the landlord's agent that I had 30 days to issue a written decision regarding this application.

The landlord received a detailed application package from the RTB, including the NODRP, with information about the hearing process, notice to provide evidence to support this application, and links to the RTB website. It is up to the landlord to be aware of the *Act*, *Regulation*, *RTB Rules*, and Residential Tenancy Policy Guidelines. It is up to the landlord, as the applicant, to provide sufficient evidence of its claims, since the landlord chose to file this application on its own accord.

Legislation, Policy Guidelines, and Rules

The following RTB *Rules* are applicable and state the following, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

- 1) Proof that the damage or loss exists;
- 2) Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
- 3) Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- 4) Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Residential Tenancy Policy Guideline 16 states the following, in part (my emphasis added):

C. COMPENSATION

*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.*

...

D. AMOUNT OF COMPENSATION

*In order to determine the amount of compensation that is due, the arbitrator may consider the value of the damage or loss that resulted from a party's non-compliance with the Act, regulation or tenancy agreement or (if applicable) the amount of money the Act says the non-compliant party has to pay. The amount arrived at must be for compensation only, and must not include any punitive element. **A party seeking compensation should present compelling evidence of the value of the damage or loss in question.** For example, if a landlord is claiming for carpet cleaning, a receipt from the carpet cleaning*

company should be provided in evidence.

I find that the landlord's agent did not properly present the landlord's evidence, as required by Rule 7.4 of the RTB *Rules of Procedure*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules of Procedure*.

This hearing 25 minutes so the landlord's agent had ample opportunity to present this application and evidence. Only the landlord's agent attended this hearing, as the tenant did not attend. During this hearing, I repeatedly asked the landlord's agent if he had any other information to present and provided him with multiple opportunities for same.

The landlord's agent did not explain the landlord's claims in sufficient detail during this hearing. The landlord did not review the landlord's documents in sufficient detail during this hearing. The landlord simply mentioned providing documents, such as emails and the move-out condition inspection report, as evidence for this hearing but did not point me to any specific pages or provisions or review them in any detail, during this hearing.

Findings

I do not know exactly what relief the landlord was claiming for in this application, and I found the landlord's agent's testimony to be confusing during this hearing, when I asked him to clarify same.

On a balance of probabilities and for the reasons stated below, I dismiss the landlord's application to retain the tenant's security deposit of \$2,650.00, in full satisfaction of the monetary order, without leave to reapply.

In its online RTB dispute details of its application, the landlord stated the following regarding its monetary claim for \$2,650.00:

"Tenant moved out from the place before the lease agreement expires, there was a breach of contract therefore owner would like to keep security deposit"

During this hearing, the landlord's agent stated that the landlord was not seeking a rent loss from the tenants. He said that due to the covid-19 pandemic and the time of year, the landlord was unable to find new tenants to rent the rental unit, despite cooperation from the tenants to show the rental unit to prospective tenants.

The landlord's agent claimed that the landlord was seeking compensation for the tenants breaking the lease terms. When I asked what this loss was for or which provision of the tenancy agreement applied, he said he did not know.

The written tenancy agreement provided by the landlord for this hearing, is on a standard RTB form. During this hearing, the landlord's agent did not point me to any pages or provisions in the tenancy agreement or addendum, requiring the tenants to compensate the landlord for any costs or to retain the deposit of \$2,650.00.

If the landlord was claiming for monetary compensation aside from rent loss, I find that the landlord failed to provide sufficient evidence of same. I find that the landlord failed the above four-part test, as per section 67 of the *Act* and Residential Tenancy Policy Guideline 16.

My findings regarding rent loss are noted below, as I assume this is what the landlord is seeking when it filed its application, based on the above online RTB dispute details.

Rent Loss

I find that the landlord and tenants entered into a fixed term tenancy for the period from March 1, 2021 to February 28, 2022. Both parties signed the written tenancy agreement and a copy was provided for this hearing.

Subsection 45(2) of the *Act* sets out how tenants may end a fixed term tenancy:

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.

The above provision states that tenants cannot give notice to end the tenancy before the end of the fixed term. If they do, they may have to pay for rental losses to the landlord.

I find that the tenants breached the fixed term tenancy agreement. As such, the landlord may be entitled to compensation for losses it incurred as a result of the tenants' failure to comply with the terms of the tenancy agreement and the *Act*.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss. I find that the landlord failed to show how it properly mitigated losses in efforts to re-rent the unit.

I find that the landlord failed to provide sufficient documentary or testimonial evidence including copies of rent advertisements, to show if or when it was advertised for re-rental, the rent amount per month, the term of length of the tenancy, how long the unit was advertised for, what details were given in the advertisement, and other such information. I find that the landlord failed to provide sufficient documentary or testimonial evidence to indicate how many inquiries were made for re-rental, how many showings were done, when any showings were done, how many applications were received, how many applications were accepted or rejected, and other such information. I find that the landlord failed to provide sufficient documentary or testimonial evidence regarding if or when the rental unit was re-rented to new tenants, the length of tenancy, the rent for the tenancy, whether a new tenancy agreement was signed and a copy of same, or other such information.

The landlord's agent stated that the landlord was unable to find new tenants to rent the unit for November and December 2021. I informed him that he testified that the tenants vacated the rental unit on November 30, 2021, so new tenants could not move in with the tenants who were still residing at the rental unit during the month of November 2021. I find that the landlord is not entitled to any compensation for the month of November 2021, as the tenants were still residing in the rental unit during that time, and the landlord's agent did not testify that the tenants failed to pay rent to the landlord for that month.

I notified the landlord's agent that he also testified that the agreement between the owner and the landlord was terminated in December 2021, and he did not know if or when the rental unit was actually re-rented to new tenants. I find that the landlord is not entitled to any monetary compensation for rent loss for the months of December 2021, January 2022, or February 2022, as per the fixed term tenancy agreement, as the landlord's agent does not know if or when the rental unit was re-rented to new tenants.

Further, the landlord did not indicate any claims or amounts or deductions from the tenants' security deposit in the move-out condition inspection report. The landlord stated "N/A missing FOB 1 key" on page 3 of the move-out condition inspection report. There is no reference to the \$2,650.00, the breach of the lease, rent loss, or any other costs. The landlord's agent did not explain the move-out condition inspection report during this hearing, except the date of inspection and the tenants' forwarding address, when I specifically asked questions about it.

As the landlord was unsuccessful in this application, I find that it is not entitled to recover the \$100.00 filing fee from the tenants.

Tenants' Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenants' security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenants' provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the deposit. However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

I make the following findings on a balance of probabilities, based on the landlord's undisputed documentary evidence and the affirmed testimony of the landlord's agent during this hearing.

The landlord continues to retain the tenants' entire security deposit of \$2,650.00. This tenancy ended on November 30, 2021. The landlord did not have written permission to retain any amount from the tenants' security deposit. The landlord received a written forwarding address on November 30, 2021, from the tenants, by way of the move-out condition inspection report. The landlord filed this application to retain the tenants' security deposit on December 8, 2021, which is within 15 days of the end of tenancy date and the written forwarding address date of November 30, 2021. The landlord completed move-in and move-out condition inspection reports for this tenancy.

I find that the tenants are not entitled to double the value of their security deposit for the above reasons. I am required to consider the doubling provision, as per section 38 of the *Act* and Residential Tenancy Policy Guideline 17, even though the tenants did not apply for it, since they did not waive their right to it.

No interest is payable on the tenants' security deposit during the period of this tenancy. In accordance with section 38 of the *Act*, I find that the tenants are entitled to the return of their entire security deposit of \$2,650.00. The tenants are provided with a monetary order for same.

I find that the landlord is not entitled to retain the tenants' security deposit, as noted above, since I dismissed its application without leave to reapply.

I find that the tenants are entitled to the return of their security deposit, even though they did not apply for it, as per Residential Tenancy Policy Guideline 17, which requires me to consider its return when the landlord has filed an application to retain it.

Conclusion

The landlord's entire application is dismissed without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of \$2,650.00 against the landlord. The landlord must be served with this Order as soon as possible. Should the landlord 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: July 14, 2022

Residential Tenancy Branch