Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #310059070: MNDL-S, MNRL, MNDCL, FFL
File #310059140: MNSDB-DR, FFT

Introduction

The Landlord seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- A monetary order pursuant to 67 for damages to the rental unit that are said to have been caused by the Tenant;
- A monetary order pursuant to s. 67 for unpaid rent;
- A monetary order pursuant to s. 67 for compensation or other money owed; and
- Return of her filing fee pursuant to s. 72.

The Landlord advances her monetary award by claiming against the deposits.

The Tenant files a cross-application in which she seeks the following relief under the *Act*:

- Double the return of her deposits pursuant to s. 38; and
- Return of her filing fee pursuant to s. 72.

The Tenant's application was filed as a direct request but was scheduled to a participatory hearing due to the Landlord's application.

H.M. appeared as the Landlord. She was joined by C.M.. A.W. appeared as the Tenant.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other's application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the Act that the parties were sufficiently served with the other's application materials.

Issues to be Decided

1) Is the Landlord entitled to a monetary award for damages to the rental unit?
2) Is the Landlord entitled to a monetary award for unpaid rent?
3) Is the Landlord entitled to a monetary award for compensation or other money owed?
4) Is the Tenant entitled to the return of double her deposit?
5) Are either the Tenant or the Landlord entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant took occupancy of the rental unit on July 6, 2021.
- The Landlord obtained vacant possession of the rental unit on December 28, 2021.
- Rent of $2,500.00 was payable on the 1st day of the month.
- The Tenant paid a security deposit of $1,250.00 and a pet damage deposit of $250.00 to the Landlord.

A copy of the tenancy agreement was put into evidence. The tenancy agreement indicates that it was set for a fixed-term ending on July 31, 2022 after which point the tenancy would continue on a month-to-month basis.

The Landlord testified at the hearing that the rental unit is a condominium within a larger multi-unit property. I was advised by the Landlord that common areas of the property were renovated beginning in November 2021 and ending on or about December 31, 2021. The Tenant denied that the renovations ended on December 31, 2021 and says they are ongoing. The Landlord testified that the repairs included renovations to the

building envelope, replacement of windows, and replacement of doors to the units. I was told that the rental unit had two windows replaced and a door, though some additional work was required to address some rot near the door.

The Landlord testified that the Tenant was informed of the renovation at the outset of the tenancy. The Landlord's evidence includes an email dated July 5, 2021 between her and the Tenant in which the Landlord advises of the property was going to be going through renovations. I was directed by the Landlord to a text message exchange between her and the Tenant in early July 2021, which I reproduce below:

> Landlord: …I'll keep you up to date with the reno plan, again I'm really sorry it wasn't mentioned when you first looked at the apartment! And if anything needs tending to or fixed just let me know :)
>
> Tenant: Oh no worries it's all good!

The Tenant testified to disturbances from the construction, including various instances in which she alleges the contractors entered the rental unit without giving proper notice. The Tenant testified to her child's sensitivity to the construction noise and an incident in which her dog had been barricaded by a piece of plywood in the kitchen while the contractors did their work in the rental unit.

The Landlord denies there were any instances of unauthorized entry. In the Landlord's evidence, there is an email with the contractor in question outlining their standard practice and including a blank copy of the notice attached to the unit doors.

The Landlord testified that the Tenant gave notice to vacate the rental unit on December 19, 2021. The parties include in their evidence copies of the relevant text message exchange on December 19, 2021:

> Tenant: Hi [Landlord], I wanted to let you know that I will be moving out the end of December. My son is not doing well with everything going on, he is terrified of loud noises and the construction it is really hard on him. I wish you would have told me about all the construction I would not have moved in. I will have the unit professionally cleaned and we can set up a time to meet so I can give you the keys. Thanks

Landlord: Hi [Tenant], I'm sorry to hear that but I do understand. With the rental agreement, notice has to be given a minimum of 30 days so therefore the tenancy will end January 31st 2022. Le me know when you'd like to meet up.

Tenant: I will be moving Dec 31.
I'm not putting my son through any more thanks.

I have removed personal identifying information from the reproduction above. The Tenant confirms giving notice to the Landlord on December 19, 2021, though argued that she would have never rented the rental unit had she known of the extent of the renovations being undertaken at the building.

The Landlord says that she had a property manager for the move-in inspection and that she was not present. However, she was advised that a move-in inspection form was filled and completed but that the Tenant indicated to the property manager that she was in a rush and that she would sign and return the move-in inspection at a later date. The Landlord says that Tenant did not do so. The Tenant denies that there was a move-in inspection at all and denies that she was in a rush during the move-in walkthrough. The Landlord confirmed that no written move-out inspection was conducted though attempts were made by the Landlord to arrange a move-out inspection. The Landlord says she called the Tenant regarding the move-out inspection but received no response.

The parties confirmed that the Tenant provided her forwarding address to the Landlord on January 5, 2022.

The Landlord submitted at the hearing that she was claiming one month's rent for January 2022 due to the Tenant's failure to provide adequate notice. The Landlord also seeks utilities for January 2022 though confirmed at the hearing that she did not submit utility statements in her evidence.

The Landlord also claims $1,500.00 for damages to the rental unit. The Landlord testified to a series of holes throughout the rental unit and scratches to the flooring. The Landlord's evidence includes photographs of large nails in the walls, drywall anchors, and scratches in the flooring.

The flooring was never repaired and is not claimed. However, the Landlord indicates that she was given and estimate of $1,600.00 to repair the holes in the walls and roof.

She indicates that the repairs were undertaken and that the cost of the repairs was the same as the estimate. The Landlord submitted that she was only seeking damages equivalent to the combined security deposit, or $1,500.00, and abandoned the claim exceeding this amount.

The Landlord testified that the rental unit was listed for sale in late February or early March 2022 and that the repairs were required upon the recommendation of her realtor. The Landlord's evidence includes an email from the realtor recommending the repairs to the walls and roof.

The Tenant admitted at the hearing that she hung pictures on the walls though denied that they were large or excessive.

The Landlord also claims a $150.00 move-in fee levied against her by the strata. The Landlord testified that this was pair to the strata's property manager and the Landlord's evidence includes a copy of the strata bylaws.

The Landlord confirmed that none of the security deposit or pet damage deposit have been returned to the Tenant.

Analysis

The Landlord advances various monetary claims against the deposits. The Tenant requests for the double return of her deposits.

Dealing first with the Landlord's monetary claims, under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

Looking first at the claim for lost rent, I note that a tenant may end a tenancy pursuant to s. 45 of the *Act*. For fixed term tenancies, such as here, s. 45(2) of the *Act* applies such that a tenant may not end the tenancy earlier than the date specified as the end of the tenancy in the fixed-term tenancy agreement. It is undisputed that the Tenant gave notice to vacate on December 19, 2021 and did vacate on December 28, 2021. This is in contravention of the notice requirements under s. 45(2) and those imposed by s. 45(1) as well requiring at least one month's notice.

The Tenant argued that she would not have moved into the rental unit had she known of the renovations. The text message exchange between the parties seems to suggest that the Tenant was not fully informed of the extent and nature of the renovations prior to signing the tenancy agreement. However, the messages reproduced above shows she was informed in early July 2021 about the renovations, which was well before the renovations began November 2021. She responded to the Landlord that it was not an issue. Presumably if there were an issue about an alleged misrepresentation by the Landlord, the Tenant would have raised it sooner. She did not do so.

Section 45(3) of the *Act* permitted the Tenant to issue a notice to end tenancy on the basis of an alleged breach of a material term of the tenancy agreement, which in this case could conceivably involve a breach of her quiet enjoyment to the rental unit. However, s. 45(3) requires a tenant to give written notice of the breach to the landlord and give them a reasonable period of time to correct the breach before issuing notice to vacate. That did not occur here.

I find that the Tenant failed to give proper notice to end the tenancy in contravention of her obligation to do so under s. 45 of the *Act*. I accept that the short notice provided by the Tenant resulted in the Landlord suffering lost rental income for January 2022 and that the Landlord could not have mitigated her damages under the circumstances given how little time there was between the Tenant giving notice and her vacating the rental unit. I find that the Tenant is entitled to $2,500.00 for lost rental income for January 2022.

The Landlord has failed to provide utility statement quantifying her claim for utilities for January 2022. As the Landlord failed to quantify her claim for utilities, I find that she is not entitled to this portion of her claim.

Looking at the damages to the rental unit, s. 37(2) of the *Act* imposes an obligation on tenants to leave the rental unit in a reasonably clean and undamaged state, except for reasonable wear and tear, and to give the landlord all keys in their possession giving access to the rental unit or the residential property.

Policy Guideline #1 provides the following guidance with respect to nail holes:

> 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.

The Tenant does not deny putting pictures on the walls, though denies the holes were large or excessive. I have reviewed the Landlord's picture evidence, which comprises of large nails and drywall anchors (both in the wall and in the ceiling). Some of the nail holes go through wallpaper, which would make it difficult to repair. Based on the Landlord's picture evidence, I have little difficulty in finding that the holes are large and excessive in number. As is clear from the guidance in Policy Guideline #1, the Tenant is responsible for repairing this damage.

I find that the Tenant breached her obligation under s. 37(2) to return the rental unit in an undamaged state. The Landlord claims the cost of repairing the walls to be $1,600.00, though limits her claim to the security deposit of $1,500.00. The Landlord testified that she incurred the expense in the amount set out in the estimate. The extent of the damage, including to wallpaper and the roof, would support that the cost, though high, is not unreasonable under the circumstances. I find that the Landlord mitigated her damages under the circumstances. I find that the Landlord is entitled to an award for $1,500.00 for the damage to the walls and roof.

Looking at the final aspect of the Landlord's monetary claims, s. 15 of the *Act* prohibits landlords from charging a person an application or processing fee, which includes under s. 15(d) a fee accepting a persona as a tenant. I accept that the strata bylaws impose a $150.00 fee for residents to move into the building and I accept that the Landlord did pay this fee when the Tenant took occupancy of the rental unit. However, I find that charging a fee for the simple act of taking occupancy of the rental unit runs contrary to the prohibition under s. 15(d) of the *Act*. As the fee is strictly prohibited by the *Act*, I find that it would be inappropriate to charge the fee to the Tenant.

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38.

Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Landlord filed her application on January 8, 2022. As the parties confirmed that the Tenant provided her forwarding address on January 5, 2022, I find that the Landlord filed her application within the 15 days permitted to her under s. 38(1) of the *Act*. The doubling provision under s. 38(6) of the *Act* does not apply.

I have turned my mind to the issue of the condition inspection reports. However, I make no findings on whether the formal requirements of s. 23 or 35 were met or whether the parties' right to the deposits are extinguished as the issue is not relevant to the dispute.

Policy Guideline #17 provides guidance on how deposits are to be handled and states the following:

> 9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
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> - to obtain the tenant's consent to deduct from the deposit any monies owing for other than damage to the rental unit;
> - to file a claim against the deposit for any monies owing for other than damage to the rental unit;
> - to deduct from the deposit an arbitrator's order outstanding at the end of the tenancy; and

- to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.

As is clear from Policy Guideline #17, regardless of whether the Landlord's right to the deposits was extinguished, she was both entitled to claim against the deposits for monies owing other than damage to the rental unit and may still seek a monetary claim for damages arising out of the tenancy. The Landlord did claim against the security deposit for compensation other than damage to the rental unit. Regardless of whether the Landlord's right to claim against the deposits was extinguished, she was still permitted to claim for damages to the rental unit caused by the Tenant.

Finally, given the damages awarded, whether the Tenant's right to the security deposit has been extinguished is similarly irrelevant as the amounts granted above exceed the total for the deposits.

The Tenants claim for the return of the security deposit and pet damage deposit are dismissed. I direct that the Landlord retain the security deposit and pet damage deposit in partial satisfaction of the amounts owed by the Tenant.

As the Landlord was largely successful in her application, I find that she is entitled to the return of her filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Tenant pay the Landlord's $100.00 filing fee.

As the Tenant was unsuccessful in her application, I find that she is not entitled to the return of her filing fee. Her claim for its return under s. 72 is dismissed.

Taking the amounts order above into account I find that the Landlord is entitled to a total monetary award as follows:

Item	**Amount**
Lost rent from January 2022	$2,500.00
Damages to the rental unit	$1,500.00
Landlord's filing fee	$100.00
Less the security deposit to be retained by the Landlord	-$1,250.00
Less the pet damage deposit to be retained by the Landlord	-$250.00
Total	$2,600.00

Conclusion

I dismiss the Tenant's claims for the return of her security deposit, pet damage deposit, and for the return of her filing fee without leave to reapply.

I grant the Landlord's application in part and pursuant to ss. 67 and 72, I order that the Tenant pay **$2,600.00** to the Landlord.

It is the Landlord's obligation to serve the monetary order on the Tenant. If the Tenant does not comply with the monetary order, it may be filed by the Landlord with 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: August 19, 2022

Residential Tenancy Branch