Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL
MNSDS-DR, FFT

Introduction

This hearing was convened by way of conference call on 2 separate dates concerning applications made by the landlord and by the tenant. The landlord has applied for a monetary order for money owed or compensation for damage or loss under the *Residential Tenancy Act*, regulation or tenancy agreement; an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of the application. The tenant has applied by way of the Direct Request process for a monetary order for return of all or part of the pet damage deposit or security deposit and to recover the filing fee from the landlord. The tenant's application was referred to this participatory hearing, joined to be heard with the landlord's application.

The hearing was originally scheduled for July 21, 2022, at which time an agent for the landlord, the tenant and the tenant's Advocate attended. The landlord's agent gave affirmed testimony and the tenant's Advocate was given the opportunity to question the landlord's agent.

The hearing did not conclude within the time scheduled and I adjourned it for continuation to September 14, 2022 and my Interim Decision was provided to the parties.

On September 14, 2022 the tenant attended the hearing, with the tenant's Advocate, and gave affirmed testimony, however the line remained open while the telephone system was monitored for 10 minutes prior to hearing any testimony and no one for the landlord joined the call. The hearing continued in the absence of the landlord or the landlord's agent, and the tenant also called 1 witness who gave affirmed testimony.

At the commencement of the first day of the hearing the landlord's agent indicated that the tenant's late evidence was received by the landlord on July 8, 2022, however the landlord's agent's agent was not able to open the mp3 file. The tenant's Advocate submitted that the Advocate was not able to have a conversation about whether or not the landlord could open it, which was disputed by the landlord's agent. The onus is on the tenant to ensure that the landlord could open the digital evidence, and I decline to consider the mp3 recording.

Issue(s) to be Decided

- Has the landlord established a monetary claim as against the tenant for money owed or compensation for damage or loss under the *Residential Tenancy Act,* regulation or tenancy agreement, to wit: costs for advice, a Writ of Possession, costs of the Court Bailiff; cleaning costs and aggravated damages?
- Should the landlord be permitted to keep the security deposit in full or partial satisfaction of the claim?
- Has the tenant established a monetary claim as against the landlord for return of all or part or double the amount of the security deposit?

Background and Evidence

The landlord's agent testified that this bi-weekly tenancy began on November 1, 2003. Rent in the amount of $500.00 per month was payable, which was increased to $600.00 per month in May, 2014, and, commencing in January, 2021 rent was due on the 1st day of each month. There are no rental arrears. On October 23, 2003 the landlord collected a security deposit from the tenant in the amount of $250.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a basement suite and the landlord resided in the upper level of the home. A copy of the tenancy agreement has been provided for this hearing.

The tenant vacated the rental unit on September 10, 2021 and the landlord received the tenant's forwarding address in writing by registered mail on September 30, 2021.

The landlord has provided a Monetary Order Worksheet setting out the following claims, totaling $5,310.89:

- $178.50 for advice and costs for Writ;

- $1,117.64 for taking legal possession of the rental unit;
- $414.75 for cleaning costs;
- $3,600.00 for aggravated damages for 3 individuals; and
- $100.00 for recovery of the filing fee.

The landlord's agent further testified that a hearing was held on September 2, 2021 before the Residential Tenancy Branch and the landlord obtained an Order of Possession on September 7, 2021, which is dated September 5. The landlord's agent served the Order of Possession the same day it was received. The tenant moved out on September 10, 2021, leaving some property behind, such as a coffee table, an area rug, a mechanical garbage can, a type of lantern, some plates hanging on a wall and a flashlight. The key was located in a mailbox that hangs on the fencing. The landlord's agent spoke to a Bailiff who said that in order to get possession it would be best to get a Bailiff.

The landlord's agent spoke to Integrated Services on the day of the hearing who said that once the landlord's agent obtained an Order of Possession, for a cost of **$178.50** they would be able to help the landlord obtain a Writ of Possession. There were 11 steps, such as to serve the Order of Possession, then confirm with the Residential Tenancy Branch that no Review Application was filed, and if none had been filed, the landlord could swear an Affidavit to that effect. Then there was a fee to pay the Commissioner of Oaths and complete paper work to apply for the Writ of Possession, and filing fees. A copy of the Invoice dated 09/07/2021 in the amount of $178.50 has been provided for this hearing.

The Court Bailiff arrived at the rental unit, took a $1,200.00 deposit on September 10, 2021. The Court Bailiff walked through and took a video of what was there and said that in order to get legal possession, the Bailiff would have to put a notice on the door. Since there were belongings in the rental unit the Bailiff had to determine it was worthless, but didn't tell the landlord's agent what the items were worth, but said later that it was okay to throw it away. The landlord's agent could not estimate the value of the property; an area rug remained which can be expensive and the landlord's agent did not want to make that decision. A copy of the Court Bailiff's Invoice dated September 14, 2021 for **$1,117.64** has been provided for this hearing.

The landlord's agent also testified that the tenant did not clean the rental unit at move-out. The landlord's agent called, but the tenant refused to return. The fridge was not cleaned, and the tenant had a cat so the litter box was stuck to walls, counters were not wiped, the toilet, tub and windows had not been cleaned, nor cabinets and dead flies

were on window sills. The landlord has provided an invoice dated 9/15/2021 for cleaning costs of **$414.75.**

With respect to the landlord's claim for aggravated damages for 3 individuals, the landlord's agent testified that a Two Month Notice to End Tenancy for Landlord's agent's Use of Property took almost a year to have the tenant move out, who had previously said she wouldn't move out without an order. The landlord's agent's mother had surgery which required 6 weeks in intensive care, the landlord had a heart issue and the landlord's agent is getting cancer treatments. Since the tenant claimed that the landlord was not acting in good faith, it caused a lot of stress.

The parties attended a hearing on September 2, 2021 and the Arbitrator gave the tenant an option, because the landlord had offered the tenant funds to assist with moving of $1,000.00, and $600.00, being 1 month's rent as well as return of the security deposit and a moving truck. The tenant refused saying it wasn't enough. The Arbitrator asked if that offer still stood, and the tenant would have until September 30, 2021 to move out, but the tenant refused. The landlord was successful in obtaining an Order of Possession dated September 5, 2021, on 2 days notice to the tenant. The tenant was served with the Order of Possession on September 7, 2021 and should have moved out by the 9th.

After the hearing the landlord's agent found out that the tenant and Advocate had filed a dispute for $21,000.00 for aggravated damages and loss of quiet enjoyment. The landlord received it on September 10, 2021, the same day the tenant moved out, or may have moved out prior to that. The hearing was not completed so the Arbitrator said that the tenant's Advocate was to put it in writing and the landlord's agent would have the opportunity to respond by August 2, and the Decision will be rendered sometime in September.

On the second day of the hearing the tenant's Advocate submitted that after the first day of the hearing the landlord's agent was sent an email with the mp3 file, which is a conversation with the Bailiff who could only answer some questions.

The tenant's Advocate also applied to amend the tenant's application to include a claim of $400.00 for aggravated damages, being $15.00 per month for 10 months; a person can search public information on Court Services Online about what the hearing was about. The Writ of Possession was not necessary, and the tenant moved out and

returned the key, and the information on Court Services Online was meant to shame the tenant.

The tenant also applies to amend the claim to include $25.00 per month for 10 months from September, 2021 to July, 2022. The tenant had paid rent at the end of August for the month of September. The tenant's application to cancel the Two Month Notice to End Tenancy for Landlord's agent's Use of Property was dismissed, and the Notice was upheld. The landlord should have returned a portion of September's rent, but that's another claim. This application to amend is for aggravated damages.

The Residential Tenancy Branch Rules of Procedure allow amendments after a hearing commences:

> **4.2 Amending an application at the hearing** In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.
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> **4.7 Objecting to a proposed amendment** A respondent may raise an objection at the hearing to an Amendment to an Application for Dispute Resolution on the ground that the respondent has not had sufficient time to respond to the amended application or to submit evidence in reply. The arbitrator will consider such objections and determine if the amendment would prejudice the other party or result in a breach of the principles of natural justice. The arbitrator may hear the application as amended, dismiss the application with or without leave to reapply, or adjourn the hearing to allow the respondent an opportunity to respond.

Considering that the tenant did not apply to amend the application during the first day of the hearing, and neither the landlord nor the landlord's agent attended on the 2nd day of the hearing, I find that the respondent has not had sufficient notice or time to respond or object to the proposed amendment, and the amendment is not permitted.

The tenant's witness (LR) testified that she provided a letter dated October 29, 2021 for this hearing, which states, in part that she assisted the tenant at move-out and

observed the tenant cleaning while the witness believed it already looked clean, and the landlord had said he would have it professionally cleaned because of COVID.

The witness testified that when the witness arrived at the rental unit, which is a small basement suite, there was small furniture in the unit. The tenant was organized and clean. The witness saw the tenant cleaning mostly in the kitchen and living room area.

The witness has been a friend of the tenant for a couple of years, and the tenant is an honest person.

The tenant testified that the landlord did not complete a move-in or a move-out condition inspection report with the tenant. The tenant cleaned the rental unit at move-out, and no one said anything about doing an inspection, not even when the tenant returned the key to the landlord.

There was a mailbox that the tenant put up years ago for the purpose of having newspaper delivered, and the tenant would not have thought to drop the key in it. The tenant had no ill will toward the landlord, and gave him possession.

During the tenancy the tenant received 3 notices to end the tenancy and disputed all of them. The paperwork the landlord's agent did was so shoddy and misleading the tenant thought it was necessary to dispute them. The paperwork showed that the landlord's agent was moving in, and claimed that possession was for the purpose of setting up an office in the suite. But that was not the case because she had her own home, so the Decision was in the tenant's favour; the landlord was not acting in good faith. The second notice was for the mother of the landlord's agent, and for hoarding and causing all sorts of problems for the landlord, such as ants, also not found to be in good faith. On the third attempt, the landlord obtained an Order of Possession claiming that the landlord's wife needed to move in to recover from surgery and was not able to walk upstairs. The physician attended and made it sound like there was no possibility that the landlord's wife would ever recover from surgery because of other issues she had after surgery.

The tenant complied with the Order of Possession, and the landlord allowed an extra half day to finish moving and cleaning and said he wouldn't change the locks. The tenant told the landlord that there were a few items that the tenant couldn't fit in her car, and evidently it looked like the tenant left more than she thought, but the landlord said it was fine and would deal with it later. The area rug was provided to the tenant in 2017

or 2018 by the landlord's son-in-law to protect new flooring. Some renovations were completed during the tenancy such as new flooring, windows and carpet but the rental unit had not been painted for 18 years. The landlord received the key to the rental unit sometime after 11:00 on September 10 and the tenant thanked the landlord and said that the tenant would not be returning. The value of the items left behind was not more than $500.00, and the area rug did not belong to the tenant.

The tenant provided the landlord with a forwarding address in writing by registered mail which was received by the landlord on September 30, 2021. The tenant was hoping to use the security deposit for the next rental suite, but didn't receive it from the landlord and had to ask her boss for an advance.

After the tenant returned the key to the landlord, the landlord's agent's agent called the tenant at work asking if the tenant was going to return, saying she was disappointed she wasn't there and thought she should have been.

The tenant did not receive one month's rent as compensation and has not received any portion of the security deposit.

SUBMISSIONS OF THE TENANT'S ADVOCATE:
The landlord was not required to call the Bailiff. The landlord filed for the Writ of Possession on September 13, but the tenant had already moved out 3 days earlier. The value of the property left behind was less than $25.00 and a Court Bailiff shouldn't arrive just for that.

The bulk of the landlord's $3,600.00 aggravated damage claim is because it took too long to evict the tenant causing undue stress, but the tenant had the right to dispute the notices. The landlord's claim is frivolous and vexatious. On September 10, 2021 the landlord's agent put a deposit down to retain the Bailiff. On September 13 the landlord went to the Supreme Court of British Columbia to enforce the Order of Possession and obtained a Writ of Possession to have a Bailiff remove the tenant, in retaliation specifically because the landlord and landlord's agent were upset that the tenant filed a claim for loss of quiet enjoyment. The Bailiff arrived on the 14th. However, the landlord had to swear an Affidavit deposing that the tenant was still in the rental unit. The tenant didn't know the Bailiff was even there until served with the evidence and the landlord's Application for Dispute Resolution.

Analysis

Firstly, dealing with the landlord's application, the onus is on the landlord to satisfy the 4-part test for damages:

1. that the damage or loss exists;
2. that the damage or loss exists as a result of the tenant's failure to comply with the *Residential Tenancy Act* or the tenancy agreement;
3. the amount of such damage or loss; and
4. what efforts the landlord made to mitigate any damage or loss suffered.

In this case, the landlord seeks compensation in the amount of $178.50 for advice and the costs to obtain the Writ of Possession. There is no provision in the *Act* to recover costs of obtaining legal advice and I dismiss that portion of the landlord's claim.

The landlord also claims $1,117.64 for the Bailiff fees, however I am satisfied in the evidence that whether or not the landlord's agent was aware, the landlord was aware by the return of the key that the tenant had vacated the rental unit prior to obtaining the Writ of Possession on September 13, 2021. The landlord's agent testified that she was not certain of the value of the items that had been left behind by the tenant and waited for the Bailiff to provide that advice. The tenant testified that she told the landlord that there were items left that would not fit in the tenant's car and the landlord said it was fine and would deal with it later. The area rug was provided to the tenant in 2017 or 2018 by the landlord's agent's son-in-law to protect new flooring. Neither the landlord nor the landlord's agent attended the second day of the hearing, and therefore did not cross examine the tenant, and I have no reason to disbelieve the tenant's testimony. I am not satisfied that the landlord has established that any loss to the landlord in obtaining the Bailiff's service was a result of the tenant's failure to comply with the *Act* or the tenancy agreement. I dismiss the landlord's claim for Bailiff fees.

With respect to cleaning costs, I accept the undisputed testimony of the tenant and the tenant's witness that it was a small rental unit and the tenant completed the cleaning. I also accept the undisputed testimony of the tenant that there was no move-in or move-out condition inspection reports completed. The *Act* states that the reports are evidence of the condition of the rental unit at the beginning and end of the tenancy. Therefore, I am not satisfied that the landlord has established that the tenant failed to comply with the *Act*, and the claim for cleaning is dismissed.

With respect to the landlord's claim of $3,600.00 for aggravated damages, the landlord's agent testified that it took almost a year to obtain possession. The tenant had the right to dispute the notices to end the tenancy given by the landlord, and it is not unlawful for a tenant to make a claim for loss of quiet enjoyment. The landlord has failed to establish that any stress or damages was a result of the tenant's failure to comply with the *Act* or the tenancy agreement, and I dismiss the claim.

The law also specifies that the onus is on the landlord to ensure that move-in and move-out condition inspection reports are completed, and the regulations go into detail of how that is to happen. The *Act* also states that if a landlord fails to ensure the reports are completed, the landlord's right to make a claim for damages against the security deposit is extinguished. In this case, there were no move-in or move-out condition inspection reports, and therefore I find that the landlord's right to claim against the security deposit for damages is extinguished. However, the landlord's right to make a claim for anything other than damage to the rental unit is not extinguished.

A landlord is required to return a security deposit in full to a tenant within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing, or must make a claim against the security deposit within that 15 day period. If the landlord fails to do either, the landlord must repay the tenant double the amount of the security deposit. In this case, I find that the tenancy ended on September 10, 2021 and the landlord received the tenant's forwarding address in writing on September 30. The landlord filed the Application for Dispute Resolution on October 19, 2021, clearly after the 15 day period. Therefore, the landlord must repay double the amount. The security deposit that the landlord collected is $250.00 on October 23, 2003. Using the Residential Tenancy Branch deposit interest calculator, interest has accumulated on that totalling $8.85. The interest portion is not doubled, and I find that the tenant has established a claim of $508.85 ($250.00 x 2 = $500.00 + $8.85 interest = $508.85).

Since the tenant has been successful with the application the tenant is also entitled to recovery of the $100.00 filing fee.

I grant a monetary order in favour of the tenant as against the landlord in the amount of $608.85. The tenant must serve the landlord with the order, which may be filed for enforcement in the Provincial Court of British Columbia, Small Claims division as a judgment.

Conclusion

For the reasons set out above, the landlord's application is hereby dismissed in its entirety without leave to reapply.

I hereby grant a monetary order in favour of the tenant as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $608.85.

The tenant's application to amend the application is not permitted, however the tenant is at liberty to make an application for compensation required under Section 51 of the *Residential Tenancy Act.*

This order is final and binding and may be enforced.

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: September 24, 2022

Residential Tenancy Branch