



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRL-S MNDCL-S FFL**

Introduction

This hearing was convened as a result of the Landlord's application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act") for:

- a monetary order for unpaid rent pursuant to section 38;
- a monetary order for compensation for monetary loss or other money owed by the Tenant pursuant to section 67;
- authorization to keep the Tenant's security deposit under section 38; and
- authorization to recover the Landlord's filing fee pursuant to section 72.

The Tenant did not attend this hearing scheduled for 1:30 pm. I left the teleconference hearing connection open for the entire hearing, which ended at 2:09 pm, in order to enable the Tenant to call into this teleconference hearing. The Landlord and the Landlord's legal counsel ("KN") attended the hearing and were 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 were provided in the Notice of Dispute Resolution Proceeding ("NDRP"). I also confirmed from the teleconference system that the Landlord, KN and I were the only ones who had called into this teleconference.

The Landlord stated the NDRP and Landlord's evidence (collectively the "NDRP Package") were served on the Tenant by email on March 11, 2022. The Landlord stated the NDRP Package was served by email pursuant to an order for substituted service issued by an adjudicator of the Residential Tenancy Branch ("RTB") on February 25, 2022. The Landlord submitted a copy of the email dated March 11, 2022 to corroborate her testimony that she served the NDRP Package on the Tenant by email. Pursuant to section 44 of the *Residential Tenancy Regulations* ("Regulations"), I find the Tenant was deemed to have received the NDRP Package on March 14, 2022.

KN stated the Tenant did not serve the Landlord with any evidence for this proceeding.

Preliminary Matter – Dismissal of Landlord's Claim for Compensation

The Tenant filed an amendment dated July 15, 2022 ("Amendment") to the Application to add a claim for compensation for monetary loss or other money owed by the Tenant for \$133.03. The Landlord made an application for substituted service with the RTB to serve the Amendment on the Tenant by email but, pursuant to a decision of an adjudicator of the RTB dated August 10, 2022, the application was dismissed. The Landlord stated she did not serve the Amendment on the Tenant by any other method. As the Amendment was not served on the Tenant, I dismiss the Landlord's claim for compensation for monetary loss or other money owed by the Tenant for \$133.03 without leave to reapply.

Issues to be Decided

Is the Landlord entitled to:

- a monetary order for unpaid rent?
- keep the Tenant's security deposit?
- recover the filing fee for the Application from the Tenant?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Application and my findings are set out below.

NG submitted a copy of the tenancy agreement dated July 24, 2021 ("Tenancy Agreement") between the Landlord and Tenant. The Tenancy Agreement states the tenancy commenced on July 20, 2021, on a month-by-month basis, with rent of \$1,550.00 payable on the 1st day of each month. The Tenancy Agreement indicates electricity was not included in the rent. The Landlord stated the rental unit the Tenant occupied had its own electrical meter. The Tenant was to pay a security deposit of \$775.00 by July 20, 2021. NG stated the Tenant paid the security deposit and that the Landlord was holding it in trust for the Tenant. Based on the foregoing, I find there was a tenancy between the Landlord and Tenant and that I have jurisdiction to hear the Application.

The Landlord stated:

1. the Tenant lived alone in the rental unit;
2. the Landlord lived on the upper floor and the rental unit was the only rental unit on the residential premises;
3. the Landlord did not schedule or perform a move-in or move-out condition inspection with the Tenant;
4. the Tenant never provided the Landlord with the Tenant's forwarding address for the return of the security deposit;
5. the Tenant did not pay the Landlord for the rent of \$1,550.00 due on January 1, 2022;
6. the Landlord asked the Tenant for the January rent on January 25, 2022;
7. the Tenant served the Landlord with a signed Notice ending Fixed-term Tenancy Confirmation Statement on Form RTB-49 on or about January 25, 2022;
8. the Tenant vacated the rental unit on January 31, 2022 without ever paying the rent for January 2022; and
9. the Tenant never served the Landlord with a written notice to end the monthly tenancy at least one clear month before the Tenant vacated the rental unit.

Analysis

Rule 6.6 Residential Tenancy Branch Rules of Procedure ("RoP") states:

6.6 The standard of proof and onus of proof

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 their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Based on Rule 6.6, the onus to prove his case, on a balance of probabilities, is on the Landlord.

Sections 23, 24(2), 26(1), 35, 36(2), 45(1) and 45.1 of the Act state:

- 23(1) *The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.*
 - (2) The landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day, if
 - (a) the landlord permits the tenant to keep a pet on the residential property after the start of a tenancy, and
 - (b) a previous inspection was not completed under subsection (1).
 - (3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
 - (4) The landlord must complete a condition inspection report in accordance with the regulations.
 - (5) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.
 - (6) The landlord must make the inspection and complete and sign the report without the tenant if
 - (a) the landlord has complied with subsection (3), and
 - (b) the tenant does not participate on either occasion.
-
- 24(2) The right of a 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 23 (3) [*2 opportunities for inspection*],
 - (b) having complied with section 23 (3), does not participate on either occasion, or
 - (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

- 26(1) *A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.*
- 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.
- (3) The landlord must complete a condition inspection report in accordance with the regulations.
- (4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.
- (5) The landlord may make the inspection and complete and sign the report without the tenant if
- (a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
 - (b) the tenant has abandoned the rental unit.
- 36(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.

- 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.
- (2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.
- (3) A landlord may retain from a security deposit or a pet damage deposit an amount that
- (a) the director has previously ordered the tenant to pay to the landlord, and
 - (b) at the end of the tenancy remains unpaid.
- (4) *A landlord may retain an amount from a security deposit or a pet damage deposit if,*
- (a) *at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant,*
or
 - (b) *after the end of the tenancy, the director orders that the landlord may retain the amount.*

- (5) *The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) [landlord failure to meet start of tenancy condition report requirements] or 36 (2) [landlord failure to meet end of tenancy condition report requirements].*
- (6) If a landlord does not comply with subsection (1), the landlord
 - (a) may not make a claim against the security deposit or any pet damage deposit, and
 - (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.
- (7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.
- (8) For the purposes of subsection (1) (c), 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.
- 45(1) A tenant may end *a periodic 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*, and
 - (b) 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.
- 45.1(1) In this section and section 45.2:
 - "family member" has the same meaning as in the [Family Law Act](#);
 - "family violence" has the same meaning as in the [Family Law Act](#);

"household violence" means violence, with or without an intent to harm a tenant or occupant, that has adversely affected a tenant's or occupant's quiet enjoyment, security, safety or physical well-being or is likely to adversely affect those if the tenant or occupant remains in a rental unit, including

- (a) physical abuse of the tenant or occupant, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of the tenant or occupant,
- (c) attempts to physically or sexually abuse the tenant or occupant,
- (d) psychological or emotional abuse of the tenant or occupant, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, the financial or personal autonomy of the tenant or occupant,
 - (iii) stalking or following the tenant or occupant, and
 - (iv) intentional damage to property, and
- (e) in the case of an individual under the age of 19, direct or indirect exposure to violence against the tenant or occupant;

"long-term care" means personal or health care provided in a long-term care facility to a person who is unlikely to return to living independently under a tenancy agreement;

"long-term care facility" means any of the following:

- (a) a community care facility under the *Community Care and Assisted Living Act*;
- (b) a facility that, under the *Continuing Care Act*, provides a program of continuing care in the form of residential care;

- (c) a hospital within the meaning of
 - (i) paragraph (c) of the definition of "hospital" in section 1 of the *Hospital Act*, or
 - (ii) section 5 of that Act;

"occupant" means an individual, other than a tenant, who occupies a rental unit.

- (2) A tenant is eligible *to end a fixed term tenancy* under this section if a statement is made in accordance with section 45.2 [*confirmation of eligibility*] confirming one of the following:
 - (a) if the tenant remains in the rental unit, the safety or security of
 - (i) either the tenant or a dependant of the tenant who lives in the rental unit is or is likely at risk from family violence carried out by a family member of the tenant, or
 - (ii) either the tenant or occupant is or is likely at risk from household violence;
 - (b) the tenant has been assessed as requiring long-term care;
 - (c) the tenant has been admitted to a long-term care facility.
- (3) A tenant under this section *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, and
 - (b) 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.
- (4) A notice to end a tenancy given under this section must comply with section 52 [*form and content of notice to end tenancy*].
- (5) For certainty, a reference in this section or section 45.2 to "occupant" includes a dependant of a tenant or occupant, if the dependant occupies the rental unit.

[emphasis in italics added]

The Landlord stated she did not schedule or perform a move-in or move-out condition inspection with the Tenant as required by sections 23(1) and 35(1) of the Act. Sections 24(2) and 36(2) provide that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not give the tenant two opportunities to schedule a move-in or move-out inspection, does not participate on either occasion, or does not complete the condition inspection report and give the

tenant a copy of it in accordance with the *Residential Tenancy Regulations*. The Landlord stated the Tenant did not pay the rent of \$1,550.00 for January 2022. As unpaid rent is not damage, the failure of the Landlord to comply with either sections 23(1) or 35(1) does not extinguish the Landlord's right to claim for the unpaid rent of \$1,550.00 owing by the Tenant to the Landlord.

The Landlord stated the Tenant served her with a Notice ending Fixed-term Tenancy Confirmation Statement on Form RTB-49 on or about January 25, 2022. Section 45(2) of the Act provides that a tenant is eligible to end a fixed term tenancy under that section if a statement is made in accordance with section 45.(2). Section 45(3) provides that a tenant may end a fixed term tenancy by giving the landlord a written notice, together with the Form RTB-49, at least one clear month before the end of the tenancy. The Tenancy Agreement states the tenancy was on a month-to-month basis. As such, I find the Tenant was not entitled to rely on 45(3) of the Act to end the tenancy as the tenancy was a periodic tenancy and not a fixed term tenancy.

The Landlord stated the Tenant vacated the rental unit on January 31, 2022. Section 45(1) states a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy at least one clear month before the end of the tenancy. The undisputed testimony of the Landlord was the Tenant did not serve her with a notice to end the tenancy at the end of January 31, 2022. As such, I find the Tenant did not give the Landlord notice she was vacating the rental unit on January 31, 2022.

Section 26(1) states a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent. The undisputed testimony of the Landlord was the Tenant did not

pay the rent of \$1,550.00 for the month of January 2020. I find the Landlord has satisfied the burden, on a balance of probabilities, of establishing her claim that the Tenant owes the Landlord \$1,550.00 for unpaid rent for January 2022.

The Landlord stated the Tenant did not serve her with a written notice that provided the Tenant's forwarding address. Paragraph 3 under the heading "D. Set Off" of Residential Tenancy Policy Guideline 17 ("PG 17") states

3. If a landlord does not return the security deposit or apply for dispute resolution to retain the security deposit within the time required, and subsequently applies for dispute resolution in respect of monetary claims arising out of the tenancy, any amount awarded will be set off against double the amount of the deposit plus interest.

I find, based on the undisputed testimony of the Landlord, that the Tenant did not serve the Landlord with written notice of her forwarding address. As the provisions of section 38(1) of the Act were not triggered, the Landlord was not required to return the security deposit to the Tenant, or alternatively, make an application for dispute resolution to make a claim against the security deposit. As such, the requirements of section 38(1) of the Act have not been triggered. Accordingly, the Tenant is not entitled to any amount awarded to the Landlord being set off against double the amount of the deposit plus interest pursuant to section 38(6) of the Act. Based on the foregoing, I order that, pursuant to section 38(4) of the Act, the Landlord may retain the Tenant's security deposit of \$775.00 to recover a portion of the unpaid rent owing by the Tenant.

The Landlord has been substantially successful in the claims made in the Application. As such, I award the Landlord \$100.00 for the filing fee of the Application pursuant to section 72 of the Act.

Conclusion

The Landlord is granted a Monetary Order for \$875.00, calculated as follows:

Purpose	Amount
Unpaid Rent Owed by Tenant to Landlord	\$1,550.00
Landlord's Filing Fee Owed by Tenant	\$100.00
Less: Tenant's Security Deposit	-\$775.00
Balance Owing to Landlord:	\$875.00

The Landlord is provided with this Monetary Order on the above terms and the Landlord must serve this Order on the Tenant as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court 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: November 4, 2022

Residential Tenancy Branch