



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNSDB-DR, FFT**
 MNETC, FFT

Introduction

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

1. An Order for the return of the security and pet damage deposits that the Landlords are holding without cause pursuant to Section 38 of Act; and,
2. Recovery of the application filing fee pursuant to Section 72 of the Act.

This hearing also dealt with the Tenants' cross application pursuant to the Act for:

3. An Order for compensation from the Landlords related to a Notice to End Tenancy for Landlord's Use of Property pursuant to Section 51 of the Act; and,
4. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlords and the Tenants attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

The Tenants testified that they served the Landlords with the Notice of Dispute Resolution Proceeding package-MNSD and evidence on May 19, 2022 by Canada Post

registered mail (the “NoDRP package-MNSD”). The Tenants referred me to the Canada Post registered mail receipt with tracking number submitted into documentary evidence as proof of service. I noted the registered mail tracking number on the cover sheet of this decision. The Landlords confirmed receipt. I find that the Landlords were deemed served with the NoDRP package-MNSD five days after mailing them on May 24, 2022 in accordance with Sections 89(1)(c) and 90(a) of the Act.

The Tenants testified that they served the Landlords with the Notice of Dispute Resolution Proceeding package-MNETC and evidence on July 16, 2022 by Canada Post registered mail (the “NoDRP package-MNETC”). The Tenants referred me to the Canada Post registered mail receipt with tracking number submitted into documentary evidence as proof of service. I noted the registered mail tracking number on the cover sheet of this decision. The Landlords confirmed receipt. I find that the Landlords were deemed served with the NoDRP package-MNETC five days after mailing them on July 21, 2022 in accordance with Sections 89(1)(c) and 90(a) of the Act.

The Landlords testified that they uploaded a 50-page file of additional evidence for their submissions. The Tenants referred to this evidence in their submissions as well. The Landlords stated they called the RTB twice to ensure their evidence had arrived. One person told the Landlords that their evidence had arrived, but it had not been “internalized or formatted”. Enquiries were made at the RTB about this missing evidence as only 10 pages of the Landlords’ evidence was available on the platform. A thorough review of the parties’ file was completed, and it was determined that no 50-page evidence package was successfully uploaded by the Landlords. If it exceeded 10 MB, this maybe the reason why the upload was unsuccessful.

The Landlords and Tenants referred to this evidence, and both parties’ viva voce testimony was taken as credible evidence in their submissions. I refer to their individual evidence in this Decision.

Issues to be Decided

1. Are the Tenants entitled to an Order for the return of the security and pet damage deposits that the Landlords are holding without cause?
2. Are the Tenants entitled to recovery of the application filing fee?
3. Are the Tenants entitled to an Order for compensation from the Landlords related to a Notice to End Tenancy for Landlord's Use of Property?
4. Are the Tenants entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions presented to me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this periodic tenancy began on October 1, 2017. Monthly rent was \$1,640.00 payable on the first day of each month. A security deposit of \$800.00 and a pet damage deposit of \$200.00 were collected at the start of the tenancy. The Landlords testified that they returned the deposits months ago. The Tenants confirmed they accepted a \$1,000.00 etransfer on May 5, 2022.

The parties testified that the tenancy ended on February 28, 2022.

The Tenants uploaded a 10 Day Notice to Move Out Early letter sent to the Landlords on February 11, 2022 by registered mail. On this letter, the Tenants provided the Landlords with their forwarding address. The Tenants also uploaded a Proof of Service Tenant Forwarding Address for the Return of Security and/or Pet Damage Deposit form #RTB-41 dated February 11, 2022. This document was included in the registered mail package. The Landlords confirmed receipt of the Tenants' forwarding address.

The Landlords did not apply to the RTB to keep the security and/or pet damage deposits.

The Landlords did not have an outstanding monetary order against the Tenants at the end of the tenancy.

The Tenants did not agree in writing at the end of the tenancy that the Landlords could keep some or all of the security deposit.

The Tenants testified that the Landlords neither completed a move-in nor a move-out condition inspection report with the Tenants.

The Landlords issued a Section 49 Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") on the Tenants on January 25, 2022. The reason to end tenancy as noted on the Landlords' Two Month Notice was that the

Landlord or the Landlord's spouse will occupy the unit. The effective date on the Two Month Notice was April 30, 2022.

After the Tenants vacated the rental unit, the Landlords did not actually move into the home. Instead, they were staying there while renovating the home preparing it for sale. The Tenants served registered mail packages on the Landlords all of which were sent to their home in another city. The Landlords confirmed receipt of all those packages.

On various dates ranging from April 25, 2022 to June 12, 2022, the Tenants would drive by the rental unit and take pictures of the home. They have uploaded these pictures. They stated the house was empty. On April 25, 2022, they noticed that a for sale sign was placed in front of the home.

The Tenants rely on some pictures from the Landlords' 50-page evidence submission. They submit that pictures P.42 and P.50 show that the Landlords were renovating the residential property and sometimes staying there. The Tenants uploaded a property detail page that shows that the residential property is now *"Off Market – This home last sold for \$720,000 on Aug 15, 2022."*

The Landlords testified that they had to move into the home to be able to complete the renovations to bring the house up to a good standard for sale. When the Tenants vacated the rental unit, the Landlords began the renovations. Both Landlords work and said they would be gone some days from 9:00 AM to 3:00 PM or from 3:00 PM to 9:00 PM. They submitted that this is the reason why the Tenants would not see a car at the residential property.

The male Landlord relies on documentary evidence uploaded by the Tenants. Specifically, a testimonial letter written by the downstairs tenant who remained in the basement suite after the Tenants vacated their rental unit. The male Landlord said he was residing at the rental unit and the downstairs tenant stated in his testimonial, *"During that time there [male Landlord] stayed a few nights a week at times up to 4 or 5 nights a week".* The male Landlord stopped reading the downstairs tenant's testimonial; however, it does continue stating, *"... but was often also staying at his [other city] residence due to appointments or work which seemed to be fairly often. ... During this time [male Landlord] stayed periodically for periods of 3 or 4 nights to work on the house as well [female Landlord] came by to help with the work that was being completed. They would also come by for just the day to work before heading back."*

The male Landlord further stated that he uploaded emails and notes written by his realtor and a friend which attest to him and his wife residing at the residential property. The male Landlord stated his neighbour across the road indicated that they were there many nights, he watches the house religiously and he noticed the male Tenant hanging around the property which bothered the Landlords. The male Landlord stated he uploaded in the 50-page evidence submission bank statements showing all the purchases he made while doing the renovations, some were restaurant purchases, and paying for gas. He maintained that he was there 10 to 15 days per month. The male Landlord confirmed that the home sold on August 15, 2022.

Analysis

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.

Return of Security Deposit

Section 38 of the Act sets out the obligations of a landlord in relation to a security deposit held at the end of a tenancy.

Section 38(1) requires a landlord to return the security deposit in full or file a claim with the RTB against it within 15 days of the later of the end of the tenancy or the date the landlord receives the tenant's forwarding address in writing. There are exceptions to this outlined in Sections 38(2) to 38(4) of the Act.

I accept the parties' testimonies about the end date of the tenancy and receipt of the Tenant's forwarding address. I find the following:

- The tenancy ended February 28, 2022.
- The Tenants' forwarding address was provided to the Landlord in writing on February 11, 2022 which the Tenants included on the 10 Day Notice to Move Out Early and was served by registered mail to the Landlords on March 11, 2022. I find the Landlords were deemed served with the forwarding address on March 16, 2022.

March 31, 2022 is the relevant date for the purposes of Section 38(1) of the Act. The Landlords had 15 days from March 16, 2022 to repay the security and pet damage deposits in full or file a claim with the RTB against the deposits.

I find the Landlord did not repay the security and pet damage deposits or file a claim with the RTB against the security and pet damage deposits within 15 days of March 16, 2022. Therefore, the Landlord failed to comply with Section 38(1) of the Act.

Sections 38(2) to 38(4) of the Act state:

38 ...

- (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...*

The Landlords did not offer to do a move-in or move-out condition inspection with the Tenants. Therefore, I find the Tenants did not extinguish their rights in relation to the security and pet damage deposits. Section 38(2) of the Act does not apply.

The Landlords did not have an outstanding monetary order against the Tenants at the end of the tenancy. Section 38(3) of the Act does not apply.

The Tenants did not agree in writing at the end of the tenancy that the Landlords could keep some or all of the security and pet damage deposits. Section 38(4) of the Act does not apply.

Given the above, I find the Landlords failed to comply with Section 38(1) of the Act in relation to the security and pet damage deposits and that none of the exceptions outlined in Sections 38(2) to 38(4) of the Act apply. Therefore, the Landlords are not permitted to claim against the security and pet damage deposits and must return double the security and pet damage deposits to the Tenants pursuant to Section 38(6) of the Act.

Interest is calculated only on the original deposit amount before any deductions and is not doubled. There is no interest owed on the security and pet damage deposits as the amount of interest owed between 2009 to 2022 has been 0%. The Landlords returned \$1,000.00 to the Tenants on May 5, 2022 representing the total deposits. The Landlords owe **\$1,000.00** to the Tenants representing the doubling of the deposits.

As the Tenants are successful in this part of their claim, they are entitled to recovery of the application filing fee. I grant the Tenants **\$100.00** from this part of their claim.

Compensation for the Section 49 Two Month Notice

Section 51 of the Act is the relevant section of the legislation for this matter. It states:

Tenant's compensation: section 49 notice

51 ...

- (2) *Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord or purchaser, as applicable, does not establish that*
 - (a) *the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and*
 - (b) *the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for*

at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

RTB Policy Guideline #50-Compensation for Ending a Tenancy addresses issues for resolving disputes of when a landlord does not fulfill their legal obligations after issuing a section 49 notice (e.g., the Two Month Notice). Policy Guideline #50 states:

...

C. ADDITIONAL COMPENSATION FOR ENDING TENANCY FOR LANDLORD'S USE OR FOR RENOVATIONS AND REPAIRS

A tenant may apply for an order for compensation under section 51(2) of the RTA if a landlord who ended their tenancy under section 49 of the RTA has not:

- *accomplished the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice to end tenancy, or*
- *used the rental unit for that stated purpose for at least six months beginning within a reasonable period after the effective date of the notice (except for demolition).*

The onus is on the Landlord to prove that they accomplished the purpose for ending the tenancy under Section 49 of the Act and that they used the rental unit for its stated purpose for at least 6 months. The Landlords honestly stated that they planned on selling the house, but first they needed to complete renovations to bring the residential property up to a good standard for sale. They testified that they stayed in the rental unit and worked on it preparing it for sale.

The Tenants uploaded a testimonial written by the downstairs tenant which speaks to the fact that the Landlords stayed a few nights a week, but he was also staying at his other residence due to appointments or work. The Tenants noted that they served the Landlords with their documents for this hearing at their other residence and the Landlords confirmed receipt of those packages.

The Tenants uploaded evidence that the Landlords' residential property is now "Off Market – This home last sold for \$720,000 on Aug 15, 2022." The Landlords confirmed that the house was sold on August 15, 2022.

The Tenants vacated the rental unit on February 28, 2022. Six months after this date was August 28, 2022 (the end of August). The stated purpose for ending the tenancy pursuant to Section 49 of the Act was that the Landlords would be residing in the rental unit. I find that the Landlords have not proven on a balance of probabilities that they accomplished the stated purpose for ending the tenancy. Staying in the rental unit 10 to 15 days per month while renovating it is not sufficient to prove that the Landlords were residing in the rental unit. The Landlords still used their home in the other city. I heard the male Landlord's evidence that he uploaded bank statements demonstrating all the purchases that went towards renovating the rental unit, restaurant purchases, and paying for gas. Ultimately, the Landlords sold the house before the end of the six-month timeframe, so they definitely were not residing in it after this time.

The Tenants are entitled to compensation in the amount of **\$19,680.00** pursuant to Section 51(2) of the Act.

As the Tenants are successful in this part of their claim, they are entitled to recovery of the **\$100.00** application filing fee.

The Tenants total monetary award is calculated as follows:

CLAIMS	AMOUNTS
Security deposit and pet damage deposit claim	\$1,000.00
Application filing fee	\$100.00
Compensation for Section 49 notice	\$19,680.00
Application filing fee	\$100.00
TOTAL:	\$20,880.00

Conclusion

I grant a Monetary Order to the Tenants in the amount of \$20,880.00. The Landlords must be served with this Order as soon as possible. Should the Landlords fail to comply

with this Order, this Order may be filed in the Small Claims Division of the Provincial Court of British Columbia 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 Act.

Dated: January 18, 2023

Residential Tenancy Branch