



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Landlord: FFT MNRL-S
Tenant: MNSDS-DR, FFT

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlords requested:

- a monetary order for money owed or monetary loss pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

JB (“landlord”) appeared as agent for the landlord in this hearing. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord confirmed receipt of the tenant’s application and evidentiary materials. In accordance with section 88 and 89 of the Act, I find the landlord duly served with the tenant’s application and evidence.

The landlord testified that they had sent the tenant their application and evidence package by way of registered mail on May 5, 2022 to the tenant’s forwarding address. The tenant testified that they had moved on May 1, 2022, and did not receive the package. After discussing the issue, both parties consented to the landlord emailing the tenant the package during the hearing. After reviewing the materials, the tenant

confirmed that they were okay with proceeding with the landlord's application as scheduled.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for losses arising out of this tenancy?

Is the tenant entitled to the return of their security deposit?

Are either of the parties entitled to recover the costs of their filing fees for their applications?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

The landlord testified that both parties had agreed to enter into a fixed-term tenancy beginning on January 1, 2022, and which was to end on December 31, 2022. Monthly rent was set at \$2,300.00, payable on the first of the month. The landlord submitted a copy of a written tenancy agreement with these terms, which was signed by the landlord on December 29, 2021.

The tenant disputes that a tenancy agreement exists, and submitted a document stating "NO TENANCY AGREEMENT. He did not make one or offer to make a signed contract of any sorts. Just gave me the keys for 4 days until I told him I was not moving in due to a family emergency. ".

Both parties confirmed that the tenant had paid the landlord \$2,000.00 towards the January 2022 rent, and a \$1,150.00 for the security deposit, which the landlord still holds. On January 5, 2022, the tenant called the landlord informing the landlord that they had a family emergency, and was no longer moving in. The tenant requested the \$3,150.00 to be returned. The tenant testified that the landlord had agreed to allow the tenant to cancel the tenancy agreement without penalty, and return the tenant's rent and deposit to them, but the landlord did not do so.

The tenant submitted proof of service to show that their forwarding address was provided to the landlord in writing on April 8, 2022, requesting that \$3,150.00 be returned to the tenant within 15 days. The tenant filed an application on June 2, 2022 for

the return of their security deposit, the \$2,000.00 rent paid for January 2022, as well as recovery of the \$100.00 filing fee.

The landlord also filed an application on April 22, 2022 to recover the lost rental income for the early end of the fixed-term tenancy. The landlord testified that they were able to mitigate their losses by re-renting the rental unit on March 15, 2022 for the same monthly rent. The landlord submitted a copy of the new tenancy agreement, as well as a copy of the text messages between the tenant and landlord. The tenant testified in the hearing that they had observed people at the home earlier than March 15, 2022, and believed that the home was already rented out. The tenant testified that they could not recall the exact dates that they observed this.

Analysis

The definition of a “tenancy agreement” is outlined in the following terms in section 1 of the *Act*:

“tenancy agreement” means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Section 16 of the *Act* states the following about when a tenancy agreement takes effect.

Start of rights and obligations under tenancy agreement

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

As stated in the legislation, a tenancy can exist in the absence of a written tenancy agreement, or whether or not a tenant ever occupies the suite. I find that in this case, it was undisputed by both parties that the tenant had paid the landlord \$2,000.00 towards the first month’s rent, as well as a security deposit on or about January 4, 2022. The tenant was also in possession of the keys, as noted in the tenant’s own evidence. Furthermore, both parties had agreed on the amount of the monthly rent, which was \$2,300.00 per month. I find all these actions show that a tenancy agreement existed between the parties, regardless of whether a written tenancy agreement was signed or not.

It is also undisputed that on or about January 5, 2022 ,the tenant communicated to the tenant that they were no longer going to move in and continue with the tenancy due to a family emergency.

Section 44 of the *Act* states how a tenancy may be ended:

How a tenancy ends

- 44** (1) A tenancy ends only if one or more of the following applies:
- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
 - (i) section 45 [*tenant's notice*];
 - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
 - (ii) section 46 [*landlord's notice: non-payment of rent*];
 - (iii) section 47 [*landlord's notice: cause*];
 - (iv) section 48 [*landlord's notice: end of employment*];
 - (v) section 49 [*landlord's notice: landlord's use of property*];
 - (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
 - (vii) section 50 [*tenant may end tenancy early*];
 - (b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
 - (c) the landlord and tenant agree in writing to end the tenancy;
 - (d) the tenant vacates or abandons the rental unit;
 - (e) the tenancy agreement is frustrated;
 - (f) the director orders that the tenancy is ended;
 - (g) the tenancy agreement is a sublease agreement.
- (2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Tenant's notice

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.

(2) 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.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 [*form and content of notice to end tenancy*].

Although the tenant's testimony is that the landlord had agreed to allow the tenancy to terminate the agreement without penalty, I am not satisfied the tenant's recollection to

be supported in evidence. Although I am sympathetic towards the fact that the tenant's circumstances had changed, and that they were no longer able to continue with the tenancy, I find that the landlord did not mutually agree to end this tenancy in writing, nor did the tenant obtain an order from the Residential Tenancy Branch for an early termination of this tenancy. No applications for dispute resolution have been filed by the tenant prior to this one.

I find that the tenant had terminated this tenancy in a manner contrary to Sections 44 and 45 of the *Act*. The evidence of the landlord is that they were able to re-rent the suite as of March 15, 2022 for the same monthly rent, as supported by the written tenancy agreement submitted in evidence. Although the tenant believed the home was occupied earlier than March 15, 2022, I do not find that the tenant had provided sufficient evidence to support that this is the case. In fact, the tenant could not provide any specific dates as to when these observations were made. On the other hand, the text message communication referenced the landlord's request to obtain the keys in order to show the home. Furthermore, a written tenancy agreement was submitted showing that the new tenant had the landlord and tenant had agreed on March 4, 2022 to enter into a fixed term tenancy agreement for March 15, 2022 to March 31, 2023.

I am satisfied that the landlord had made an effort to mitigate the tenant's exposure to the landlords' monetary loss of rent, as is required by section 7(2) of the *Act*, and therefore I find that the landlord is entitled to recover the lost rental income for the period of February 1, 2022 to March 15, 2022 due to the tenant's failure to comply with sections 44 and 45 of the *Act*.

Section 26 of the *Act*, in part, states as follows:

Rules about payment and non-payment of rent

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.

As noted above, I find that a tenancy agreement exists between the parties where the monthly rent is set at \$2,300.00, payable on the first of the month. I am not satisfied that the tenant had provided sufficient evidence to support that the landlord had agreed to reimburse the tenant the \$2,000.00, or allow the tenant to deduct any portion of the rent. Accordingly, I dismiss the tenant's application for the return of the January 2022 rent without leave to reapply. I also order that the tenant pay to the landlord the \$300.00 in unpaid rent for January 2022.

The tenant filed an application for the return of their security deposit pursuant to section 38 of the Act. Section 38(1) of the Act requires that a landlord, within 15 days of the end of the tenancy or the date on which the landlord receive the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the Act). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the Act also allows a landlord to retain an amount from a security or pet damage deposit if "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."

In this case, I am satisfied that the landlord had filed their application on April 22, 2022, 14 days after the tenant had provided their forwarding address to the landlord. Accordingly, I do not find that the landlord has contravened section 38 of the Act, and the tenant is not entitled to any compensation under this section. In accordance with the offsetting provisions of section 72 of the Act, I order the landlord to retain the tenant's security deposit plus applicable interest in satisfaction of the monetary awards granted to the landlord. As per the RTB Online Interest Tool found at <http://www.housing.gov.bc.ca/rtb/WebTools/InterestOnDepositCalculator.html>, over the period of this tenancy, \$1.97 is payable as interest on the tenant's security deposit from January 4, 2022 when the deposit was originally paid, until the date of this decision, February 1, 2023.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. Accordingly, I allow the landlord to recover the filing fee paid for this application. I dismiss the tenant's application to recover the filing fee without leave to reapply.

Conclusion

I issue a Monetary Order in the amount of **\$2,698.03** in the landlord's favour for the monetary orders granted in the table below:

Item	Amount
Rent owed for January 2022 (\$2,300-2,000)	\$300.00

1.5 months of lost rental income (February & March 2022)	3,450.00
Filing Fee	100.00
Less Security Deposit Held	-1,150.00
Security Deposit Interest	-1.97
Total Monetary Order	\$ 2,698.03

The landlords are provided with this Order in the above terms and the tenant must be served with a copy of this Order 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 and enforced as an Order of that Court.

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

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: February 01, 2023

Residential Tenancy Branch