Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding HAROB HOLDINGS LTD. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes

Landlord's application: MNRL-S FFL
Tenants' application: MNDCT MNSD FFT

Introduction

This dispute relates to an Application for Dispute Resolution (application) by both parties seeking remedy under the *Residential Tenancy Act* (Act) for the following:

1. $647 for the landlord for unpaid rent or loss of rent,
2. Retain the $547 security deposit towards any amount owing for the landlord,
3. $11,981.52 for the tenants,
4. Return of tenants' security deposit,
5. Filing fees for both parties of $100.

The hearing began on December 20, 2022 and was adjourned after 54 minutes. On May 2, 2023, the hearing continued and after an additional 18 minutes, the hearing concluded. The described on the cover page of this decision attended at the teleconference hearing and gave affirmed testimony. During the hearing the parties were given the opportunity to provide their evidence orally. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

After service was addressed, the hearing continued. Words utilizing the singular shall also include the plural and vice versa where the context requires.

Preliminary and Procedural Matters

On December 20, 2022, an Interim Decision was issued, which should be read in conjunction with this decision.

The parties confirmed their respective email addresses at the outset of the hearing. The parties were advised that the decision would be emailed to the parties as a result.

Issues to be Decided

- Is either party entitled to a monetary order, and if so, in what amount?
- What should happen to the tenants' security deposit?
- Is either party entitled to the recovery of the filing fee?

Background and Evidence

A fixed-term tenancy began on July 1, 2018. Monthly rent in the amount of $1,095 was due on the first day of each month and by the end of the tenancy was $1,138 per month as agree by the parties during the hearing. The tenants paid a security deposit of $547 at the start of the tenancy, which the landlord continues to hold. The interest will be calculated on the security deposit later in this decision. The parties agree that the tenants vacated the rental unit on April 3, 2022.

Landlord's claim

The landlord's monetary claim of $647, is comprised of the following:

ITEM DESCRIPTION	**AMOUNT CLAIMED**
1. ½ of April 2022 lost rent	$547
2. Filing fee	$100
TOTAL	**$647**

The landlord presented an email from the tenants dated March 31, 2022, (Tenants' Notice), which does not state the date the tenants are vacating the rental unit yet demands that their security deposit be returned that day or the following day. In addition, in the Tenants' Notice they have failed to include their written forwarding address.

The landlord is seeking $547 in loss of "½ of April 2023 rent" plus the filing fee. I note that the $547 is not ½ of April 2023 rent which is actually $569, which is ½ of $1,138.

The tenants claim that the tenancy ended by way of frustration due to construction noise, which was not agreed upon by the landlord. The landlord filed their application on April 13, 2022, claiming against the tenants' security deposit using the written forwarding address provided on April 3, 2022 on the outgoing Condition Inspection Report.

Tenants' claim

The tenants' monetary claim of $11,981.52 I find includes an addition error and actually totals $11,334.52 and is comprised as follows:

ITEM DESCRIPTION	**AMOUNT CLAIMED**
1. GB's loss of work	$737.76
2. Moving expenses, Papa's Moving deposit and bill	$729.75
3. Moving expenses, Uhaul moving supplies	$135.20
4. Moving expenses, Uber ride	$44.61
5. TA's loss of work	$1,405.20
6. Difference in rent for a year – lease term	$6,457
7. First month rent	$1,725
8. Filing fee	$100
TOTAL	**$11,334.52**

The tenants submitted a 36-page document, which has been reviewed in its entirety. In that document the tenants confirmed that a notice was posted to the front door of the building on February 2, 2022, regarding building exterior upgrade.

GB writes that because they work for Service BC and are off on Tuesdays and Wednesdays every week, that they had hoped for a solution where construction activities would take place on days they were not taking calls.

GB also writes that on February 12, 2022 that they sent an email requesting that construction be wrapped by the 16th as they were off work on the 15th and 16th. A response was received by the tenant explaining that construction could last up to 4 months and that it could not be done overnight and that weekly notices will be posted regarding updates to the project.

The tenants submitted some emails and argue that the tenancy is a commercial tenancy because they work from home, which I informed the tenants I disagreed with during the hearing, and which I will address later in this decision. The first email sent to the landlord complaining of noise was on March 18, 2022 at 2:44 pm, which reads in parts as follows:

> Hello there
>
> This is to let you know that the construction activity is affecting my work.
> I take calls for BC Services every day except on Tuesdays and Wednesdays.
> I have tried to reach out to you earlier regarding the construction activities, but haven't received a valid response.
> I received a notice earlier that the construction activity will be carried out in our unit from March 21st to March 25th.
> But since morning, construction has been going on.
>
> Today, I was reprimanded by my supervisor for the tremendous noise level while on a call, and had to log out for the rest of the day, for which I will not be paid.
> I will send the exact dollar amount of monetary loss to you for the day, which I need to be deducted from the month's rent.
> Also, I would really appreciate if the work is done on Tuesdays and Wednesdays only, since I do not work on those days.
>
> This is the second time I am requesting for help on this matter.
> My supervisor has asked for a definitive explanation by the end of the day whether or not I will be available to work next week.
>
> Looking forward to your assistance.
>
> Regards,

A majority of the emails supplied were between GB and their employer, which I find are not relevant and will be addressed later in this decision. The landlord responded on March 24, 2022 as follows:

> Thank you for your email.
> We are sorry to hear that you are having difficulty with your employer.
>
> We have informed all our residents of this project in advance and have provided weekly updates.
> These are necessary projects, and as landlord, we have an obligation to maintain the building. This is only temporary; we hope to complete the project sometime in August or September at the latest.
>
> Unfortunately, the temporary inconvenience does not equal compensable disturbance of quite enjoyment.
>
> Please refer to the RTB policy guideline #6 which states:
> ***"Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment."***
> ***"In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises."***
>
> Thank you for your attention.

The tenants claim they had to move out of the rental unit due to the noise.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what is reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the applicant to prove the existence of the damage/loss and that it stemmed directly from a violation of the Act, regulation, or tenancy agreement on the part of the respondent. Once that has been established, the applicant must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the applicant did what is reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Landlord's claim

I will first address the landlord's claim. I find the tenants breached section 45(1) of the Act by failing to provide the required one-month notice under that section of the Act. While the tenants may have been frustrated by the noise, I disagree that the tenancy was "frustrated" as claimed by the tenants. Therefore, I find the tenants ended the tenancy without the proper notice and owe ½ of April 2022 rent. I also find that the landlord claimed less than was owed, however, based on the Principles of Natural Justice, I will not grant more than what the landlord has claimed for.

RTB Policy Guideline 34 – *Frustration* states the following:

> A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.
>
> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.
>
> The *Frustrated Contract Act* deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the *Frustrated Contracts Act*, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

Given the high test to meet in terms of frustration, I find the tenants failed to provide sufficient evidence to support any frustration of the tenancy before me. I find that repairs to the outside of the rental building were not only required but were of a timeframe that was reasonable, so I dismiss the tenant's argument that the tenancy ended due to frustration.

Given the above, I find the landlord has met the burden of proof and I award the landlord **$547** of ½ of April 2022 rent owing.

I also grant the landlord the **$100** filing fee as the landlord's application had merit. Therefore, I find the landlord's total monetary claim is **$647.**

Tenants' claim

I will first address the tenants' claim that the tenancy was a commercial tenancy. RTB Policy Guideline 14 – *Type of Tenancy: Commercial or Residential* includes the following:

> **Generally**
>
> Neither the *Residential Tenancy Act* nor the *Manufactured Home Park Tenancy Act* applies to a commercial tenancy. Commercial tenancies are usually those associated with a business operation like a store or an office. If an arbitrator determines that the tenancy in question in arbitration is a commercial one, the arbitrator will decline to proceed due to a lack of jurisdiction. For more information about an arbitrator's jurisdiction generally, see Policy Guideline 27 - "Jurisdiction."
>
> Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement. The *Residential Tenancy Act* provides that the *Act* does not apply to "living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement.[1]
>
> To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the "predominant purpose" of the use of the premises is.[2] Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, and visible evidence of the business use being carried on at the premises.[3]

I find the tenants signed a residential tenancy agreement and I find at no time did the tenancy become commercial because the tenant chose to work from home. Working from home is a choice and it is not the fault of the landlord that the tenant worked from home and expected silence during their working from home hours. I find that silence cannot be expected in a multi-unit building and the normal noises from other tenants and required upkeep of the residential structure can be expected. I agree with the letter from the landlord describe above that RTB Policy Guideline 6 – *Entitlement to Quiet Enjoyment* states the following:

> Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

I also find that section 32(1) of the Act requires landlords to maintain the residential property in a state or decoration that when outside siding needs to be replaced, that it **must be done** as the Act states:

Landlord and tenant obligations to repair and maintain

32(1) A landlord **must** provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

[emphasis added]

As such, I find none of the tenants' claim has merit and is dismissed in its entirety as a result, without leave to reapply due to insufficient evidence. I find the tenants are not entitled to loss of work costs as the tenancy is not a commercial tenancy. I also find that as the tenants provided notice to end the tenancy, which was not frustrated, that the tenants are not entitled to any moving expenses or rent differential. As the tenants' claim has no merit, I decline to award the filing fee.

I will now calculate the interest on the $547 security deposit being held by the landlord. Under the Act, the interest is **$4.35.** Therefore, I find the landlord is holding $551.35 in the combined security deposit including interest. I authorize the landlord to retain the tenant's entire $551.35 security deposit including interest, in partial satisfaction of the landlord's monetary claim.

The landlord is granted a monetary order pursuant to section 67 of the Act for the balance owing by the tenants to the landlord in the amount of **$95.65.**

Conclusion

The landlord's application was fully successful. The tenants' application is dismissed in full, without leave to reapply.

The landlord has established a total monetary claim of $647 which has been offset with the security deposit including interest of $551.35. The landlord has been granted a monetary order for the balance owing by the tenants to the landlord of $95.65.

Should the tenants fail to pay that amount, the landlord must serve the monetary order on the tenants with a demand for payment letter. Then the landlord may enforce the monetary order as an order of the Provincial Court of British Columbia, Small Claims Division. The tenants are reminded that they may be held responsible for the costs related to enforcing the monetary order including court fees.

The decision will be emailed to the parties. The monetary order will be emailed to the landlord only for service on the tenants.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: May 30, 2023

Residential Tenancy Branch