Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Code **MNDCT, OLC, FFT**

MNDCL-S, FFL

Introduction
This hearing dealt with applications filed by both the landlord and the tenant pursuant the Residential Tenancy Act.

The tenant applied for:

- A monetary order for damages or compensation pursuant section 67;
- An order for the landlord to comply with the Act, regulations or tenancy agreement pursuant to section 62; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

The landlord applied for:

- An order to be compensated for a monetary loss or other money owed and authorization to withhold a security deposit pursuant to sections 67 and 38; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

Both parties attended the hearing. As both parties were present, service was confirmed. The parties each confirmed receipt of the application and evidence. Based on the testimonies I find that each party was served with these materials as required under RTA sections 88 and 89.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the Act.

Each party was administered an affirmation to tell the truth and they both confirmed that they were not recording the hearing.

Preliminary Issue

The landlord testified that she had filed an application for dispute and asked that it be brought forward and crossed with the tenant's dispute that was scheduled for today. The tenant did not object to the request, and I crossed the landlord's application and heard it with the tenant's application at this hearing. Both file numbers are recorded on the cover page of this decision.

Issue(s) to be Decided

Is either party entitled to be compensated?
Should the security deposit be kept or returned?
Can either party recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The tenancy began on July 1, 2022 with rent set at $3,495.00 per month, payable on the first day of each month. A security deposit of $1,747.00 was collected by the landlord and she continues to hold it. The landlord had hired a property management company to lease the rental unit on her behalf and the property management did not complete a written condition inspection report with the tenant at the commencement of the tenancy.

On the tenancy agreement, under part 3 (rent) the tenancy agreement notes the tenant has to pay a predetermined $195.00 cleaning fee and a $100.00 strata move in fee. The parties agree that the tenant paid these fees at the commencement of the tenancy.

When the tenant and former co-tenant first viewed the unit, renovations were being done to the “outer podium” of the building. Both parties agree that there were signs of the membrane of the building being remediated at the time. The tenant testified that the landlord failed to disclose that the inner courtyard of the building would be worked on at a later phase and the landlord testified that she told the tenant that the membrane for the building was being replaced throughout the building.

The tenant testified that the noise from the outer podium didn’t affect him that much, however when the construction crew began to remediate the inner courtyard, the noise was unbearable. He worked from home and the noise made it difficult if not impossible to continue. Moreover, the view from his unit was diminished and the use of facilities such as a communal courtyard and secondary ramp to the basement were discontinued. The disturbances began in early November 2022 and the landlord agreed to compensate the tenant with a $500.00 per month discount on his rent until the construction ceases. On November 28th, the tenant served the landlord with a notice to end tenancy on January 31, 2023.

The landlord testified that the tenant broke the fixed term lease 5 months early and that she sought to replace him by contracting again with the property management company at a cost of $1,864.62. The tenant verbally agreed to pay for the cost of finding a replacement tenant but the tenant did not know how much the company would charge. At first, the landlord advertised the unit at $4,000.00 per month but had to lower it to the same rate as the original tenant, $3,495.00.

The parties agree that they performed a “walkthrough” of the unit at the end of the tenancy however no condition inspection report was ever signed by the parties or given to the tenant.

Analysis

At the commencement and at the end of the tenancy, the landlord did not pursue a condition inspection of the rental unit with the tenant, as required by section 23 of the *Act*. Pursuant to section 24, the landlord’s right to claim against the security deposit **is extinguished** if the landlord does not offer the tenant at least two opportunities for inspection.

Section 38(1) of the *Act* addresses the return of security deposits.

(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.

Pursuant to section 38(4), the landlord may retain an amount from a security deposit if, at the end of the tenancy, the tenant agrees in writing that the landlord may retain the amount to pay a liability or obligation of the tenant.

The parties agree that the tenancy ended on January 31, 2023 and that the landlord received the tenant's forwarding address by the end of the following week by email. However, evidence indicates the parties verbally agreed that the landlord may retain the tenant's security deposit to cover the cost of advertising for a new tenant.

In the email dated January 29, 2023, the tenant advises that he acknowledges verbally that he said he would cover the advertising costs, but he was never fully informed or consented to forgo his whole deposit. As the exact amount of the advertising cost was not known to the tenant when he verbally agreed to his security deposit being retained, I find the verbal agreement did not constitute an agreement in writing that the landlord may retain an amount to pay an obligation of the tenant.

The landlord filed her application seeking to retain the tenant's security deposit within 15 days of the tenancy ending and receiving the tenant's forwarding address. Despite this, the landlord's right to claim against it was extinguished at the beginning of the tenancy for failing to conduct a condition inspection report with the tenant. As her right to claim against the security deposit was extinguished under section 24, the landlord's only option is to return the security deposit and I award it back to the tenant. The tenant is entitled to a monetary order in the amount of **$1,747.00.**

Next, the tenant seeks a return of a pre-determined move-out cleaning fee ($195.00) and strata move in fee ($100.00) charged to him at the beginning of the tenancy. section 7(f) of the Residential Tenancy Regulations allows the landlord to charge a non-refundable move in fee charged by a strata corporation to the landlord. I accept that this fee was charged by the strata to enter the tenant's information to the buzzer on the front door and do other administrative tasks as required by the strata. I decline to award a return of the $100.00 strata move in fee.

The $195.00 fee is a non-refundable fee that may not be charged by the landlord. This fee is not one of the allowable non-refundable fees under section 7 of the Regulations

and I find it unconscionable to charge an anticipated cleaning fee to a tenant when the condition of the rental unit upon move out is not known. Pursuant to section 6 of the Act, if a term of a tenancy agreement is unconscionable, it is unenforceable. The pre-paid fee of **$195.00** is ordered to be returned to the tenant.

Next, the tenant seeks a 33% reduction of the rent he paid while the inner courtyard was being fixed (approximately 3 months). According to the tenant and the evidence provided, the tenant suffered from ongoing noise disruption, vibrations to the unit, a loss of a view and use of the inner courtyard. The landlord compensated the tenant with a $1,500.00 rent reduction, $500.00 for each month the tenant was disrupted.

Residential Tenancy Branch Policy Guideline 6 [entitlement to quiet enjoyment] states in part B and C:

B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

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.

A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

Compensation for Damage or Loss

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the Manufactured Home Park Tenancy Act.(see guideline 16)

In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.

Based on the evidence before me, I find that the tenant's right to quiet enjoyment of the rental unit was adversely affected due to the construction being carried on directly outside his unit. While the tenant alleges that the landlord had full knowledge of the

extent of the construction about to take place outside his unit, I do not find sufficient evidence to satisfy me this is the case. I believe the landlord could not have anticipated what machinery would be used or how long it would take for the repairs to be completed. I accept that the landlord was not home during the day and was oblivious to the noise of the construction while she was away.

Despite this, the tenant is entitled to compensation for having his right to quiet enjoyment of the rental unit being adversely affected. The tenant seeks a 33% reduction; however I do not find sufficient evidence to support this amount. The tenant was able to continue using the entire unit as a living space and suffered no ill effects from the noise at night. I find that a 20% reduction of the tenant's rent for the period when the work on the inner courtyard commenced to the end of the tenancy would be an appropriate reduction. [$3,495.00 x 20% = $699.00]. For the 3-month period [November 1, 2022 to January 30, 2023] the tenant would be entitled to $2,097.00. The landlord has already compensated the tenant $1,500.00, so the tenant's compensation is reduced to **$597.00.**

I do not accept the tenant's argument that the landlord purposefully entered into a fixed term tenancy with the tenant with the objective of securing a tenancy while the construction was taking place. Though the timing of the tenancy may arouse the tenant's suspicion, I find the evidence does not support such a finding. As I stated earlier in this decision, the evidence does not lead me to believe that the landlord fully understood the extent of the disruption the construction to the inner courtyard would cause.

Section 1 defines a fixed term tenancy as a tenancy under a tenancy agreement that specifies the date on which the tenancy ends. The tenant ended this fixed term tenancy before the end of the fixed term. According to the legislation, neither the landlord nor the tenant may end a fixed term tenancy except for cause or by agreement by both parties.

There is no specified standard for compensating the landlord when a tenant ends the fixed term tenancy before the date specified in the tenancy agreement. However, the landlord is entitled to, at a minimum, the cost of re-renting the unit.

The landlord contracted with the same property management company she used initially to find another tenant when this tenant broke the fixed term lease. Although the tenant verbally agreed to pay for it when he gave notice to end the tenancy, he didn't know how much it would cost. I don't find it unreasonable that the landlord chose to use the

same property management company she used originally to find a new tenant for the unit. I find the cost paid by the landlord to find a new tenant to be reasonable and I award the landlord the full cost of **$1,864.62.** This amount will be deducted from the monetary award granted to the tenant.

I find both parties were successful in their applications and as such, both filing fees ought to be recovered from the other party; however these reciprocal fees cancel one another out. The effect of this is that neither filing fee will be ordered paid to the other party.

Item	**Amount**
Return of security deposit	$1,747.00
Move-out cleaning fee	$195.00
Compensation for loss of quiet enjoyment	$597.00
Landlord's cost to re-rent unit	($1,864.62)
TOTAL	**$674.38**

Conclusion

The tenant is granted a monetary order in the amount of $674.38.

The hearing of the landlord's application for dispute resolution scheduled for October 26, 2023 at 1:30 p.m. is cancelled.

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: June 05, 2023

Residential Tenancy Branch