



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes

Landlord: MNRL-S, MNDCL, FFL
Tenant: MNDCT, MNSD, 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 landlord requested:

- a monetary order for unpaid rent, 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:

- a monetary order for money owed or monetary loss pursuant to section 67;
- 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.

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.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch’s teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties confirmed that they understood.

Both parties confirmed receipt of each other's applications for dispute resolution hearing package ("Applications") and evidence packages. In accordance with sections 88 and 89 of the *Act*, I find that both the landlord and tenant duly served with each other's the Applications and evidentiary materials.

Issue(s) to be Decided

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

Is the tenant entitled to a monetary order for monetary 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 the applications before me, and my findings around it are set out below.

On July 24, 2022, both parties entered into a fixed-term tenancy agreement that was to start on September 1, 2022, and end on August 31, 2023. Monthly rent was set at \$4,800.00, payable on the first of the month. The tenant paid a security deposit of \$2,400.00, which the landlord still holds.

The tenant confirmed that they never moved in, citing "unsafe conditions" in the rental unit. The tenant returned the keys on September 2, 2022, which the tenant submits that the landlord had agreed to. The tenant testified that due to the landlord's negligence, the tenant was not able to move in, and incurred an extraordinary amount of losses due to being homeless for the entire month of September 2022. The tenant filed an application for the following monetary orders:

Item	Amount
Return of security deposit plus compensation	\$4,800.00
Return of half of September Rent paid	2,400.00
Non-refundable internet set-up fee	56.00
Extended Rental for Moving Box Rental	89.60
Airbnb Stay-Sept. 12-20, 2022	2,046.08
Airbnb September 21, 2022	177.00
Airbnb September 30-October 2, 2022	435.64
Airbnb October 2-9, 2022	1,889.09
Moving and Storage	1,062.47
Stop payment fees for cheque cancellations	137.50
Canada Post Registered Mail Cost for request of security deposit	11.36
Canada Post Registered Mail for Dispute Resolution Package	13.59
Hours spent looking for a new home - 55.25 hours x \$85/hour	4,696.25
Hours spent going to see rentals 35 hours x \$65/hour	2,975.00
Loss of quiet enjoyment due to loss of home	2,500.00
Emotional distress and anxiety sleeping on friend's couches during pandemic	2,500.00
Hours spent completing application and organizing evidence package	6,375.00
Loss of time with dying father due preparing for dispute resolution	2,835.42
Total Monetary Order Requested by Tenant	\$35,000.00

The tenant testified that they went to view the house on July 24, 2022, and provided the landlord with their security deposit that day. The tenant testified that the home was still tenanted at the time and was a complete mess.

The tenant testified that they received a text message from the landlord on August 18, 2022 that they were on vacation from August 24, 2022 to August 31, 2022, and to collect the keys from the previous tenant, and that the landlord would meet the tenant

later on the 31st or 1st. The tenant submits that the landlord had failed to perform a move-out inspection with the previous tenant to ensure that they had left the home in reasonably clean and undamaged condition.

The tenant waited for the landlord to return and agreed to meet up at 7:00 p.m. on August 31, 2022 for the move-in inspection. The tenant requested that the landlord provide the tenant with an inspection report, and was told by the landlord to just take photos. The tenant as uncomfortable and called a friend to attend the inspection, and filled out an inspection report with that friend.

The tenant discovered that the room in the basement had flooded, smelled, and showed signs of mould. The tenant called the landlord and sent photos of the home and mould to the landlord, and emailed the landlord a copy of the move-in inspection report. The tenant testified that the landlord refused to return a signed copy back to the tenant.

The tenant informed the landlord by text message on September 1, 2022 that they would be cancelling the movers if the home was not properly dealt with. At 7:14 p.m. on September 1, 2022 the tenant sent the landlord an email that they were cancelling the movers, and since the home was not safe for occupation, the tenancy agreement was no longer valid. The tenant expressed concern that their dad has lung cancer, and cannot be around mould.

The tenant sent a text message on September 2, 2022 about when they could return the keys, and the landlord agreed to meet the tenant at 1:00 p.m. at the house. The tenant testified that the landlord has not refunded the rent and security paid by the tenant, nor did the landlord return the tenant's post-dated cheques. As a result, the tenant had to pay a fee to put a stop payment on the cheques. The tenant submits that the landlord never attempted to assist the tenant find new housing even though the landlord is a contractor. The tenant submitted receipts for the airbnbs that the tenant had to book on a last minute basis, and submits that they were homeless for the entire month. The tenant requests compensation for the monetary losses associated with not being able to move in as noted on the tenant's monetary order worksheet, as well as compensation for the time and suffering by the tenant dealing with the matter. The tenant testified that they were not able to find new housing until October 4, 2022.

On September 14, 2022, the landlord had filed an application for monetary losses associated with this tenancy as set out in the table below:

Item	Amount
Penalty for breaking lease as set out in tenancy agreement	\$4,800.00
Remaining Unpaid rent for September 2022	2,400.00
Total Monetary Order Requested by Landlord	\$7,200.00

The landlord testified that the tenant failed to end the fixed-term tenancy in a manner required by the Act, and therefore is subject to the penalty clause in the tenancy agreement. The landlord testified that they were able to find a new tenant for September 16, 2022 for the same monthly rent but suffered a monetary loss in filling the last minute vacancy.

The landlord confirmed that there was a flood in the laundry room where, but disputes that the home was mouldy, and testified that the black marks were from socks. The landlord feels that that the tenant failed mitigate the losses claimed, and decided to end the tenancy instead.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the party making the claim to prove, on a balance of probabilities, that the other party had caused damage and losses in the amounts claimed in their application.

Was There a Tenancy Between the Parties?

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 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 \$2,400.00 towards the first month's rent, as well as a security deposit of \$2,400.00 on July 24, 2022. I find that both parties were bound by the fixed-term tenancy agreement that was to start on September 1, 2022.

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

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

45 (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.

Is the Tenancy Frustrated?

Residential Tenancy Policy Guideline 34 states the following about a Frustrated Tenancy:

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.

In this case, although the tenant believed that the home was full of mould, and not safe for occupation, I find that the tenant failed to provide sufficient evidence, whether that be in the form of expert testimony, or in the form of a report following a proper inspection or testing by an accredited company specializing in mould. In this case, although the evidence shows that some water damage may have taken place, I find that the tenant failed to establish that the home was not safe for occupation, and therefore cannot be considered a frustrated tenancy.

In the case where a fixed-term tenancy is not considered frustrated, the tenant is required to give the landlord proper notice in accordance with section 45 (2) of the Act as noted above. The tenant did not give the landlord at least one month's notice in writing.

Although the landlord did agree to meet up with the tenant for the key return, 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 previous applications for dispute resolution have been filed by the tenant in regard to this tenancy. The evidence is clear that the tenant did not comply with the *Act* in ending this, and I therefore, find that the tenant vacated the rental unit contrary to section 45 of the *Act*.

Sections 23 and 35 of the *Act* require the landlord to perform both move-in and move-out inspections, and fill out condition inspection reports for both occasions. The consequence of not abiding by these sections of the *Act* is that “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”, as noted in sections 24(2) and 36(2) of the *Act*.

As noted in Residential Policy Guideline #17:

The right of a landlord to obtain the tenant’s consent to retain or file a claim against a security deposit for damage to the rental unit is extinguished if:

- *the landlord does not offer the tenant at least two opportunities for inspection as required (the landlord must use Notice of Final Opportunity to Schedule a Condition Inspection (form RTB-22) to propose a second opportunity); and/or*
- *having made an inspection does not complete the condition inspection report.*

I must note, however, that the above does not exclude the landlord from being able to file a monetary claim for damages as noted in the policy guideline:

A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:

- *to obtain the tenant’s consent to deduct from the deposit any monies owing for other than damage to the rental unit;*
- *to file a claim against the deposit for any monies owing for other than damage to the rental unit;*
- *to deduct from the deposit an arbitrator’s order outstanding at the end of the tenancy; and*
- *to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.*

In this case, the landlord requested a monetary order for the unpaid rent for the remainder of September 2022. Residential Tenancy Policy Guideline #5 addresses a claimant’s duty to minimize loss and states the following:

“Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation),

the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss¹. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation². Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."

I note that the landlord was able to re-rent the rental unit for the second half of September 2022, and therefore did not suffer a loss of rent for the remainder of the tenancy. Accordingly, I dismiss the landlord's claim for loss of rental income for September 2022.

The landlord also requested \$4,800.00 as a penalty for breaking the lease. Although the landlord testified to losses associated with filing the vacancy, I find that this loss is not sufficiently supported in evidence. Furthermore, Residential Tenancy Branch Policy Guideline #4 includes the following guidance about the inclusion of a liquidated damages clause in a tenancy agreement.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering

whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum...

In this case, the landlord specifically referenced a “penalty” clause for breaking the lease. As noted in the Policy Guideline, the amount stipulated in the tenancy agreement must be a genuine pre-estimate of the loss associated with the early end of a fixed term tenancy, and cannot be a penalty. In this case, I find that the landlord is simply attempting to penalize the tenant, and therefore this clause is unenforceable. The landlord’s monetary claim for the penalty is therefore dismissed without leave to reapply.

As the landlord’s claims were unsuccessful, I also dismiss the landlord’s application for recovery of the filing fee without leave to reapply.

I will now consider the tenant’s monetary claims. As noted above, I do not find that the tenant had established that the home was unsafe for occupation. Rather than move out temporarily, and file an application for dispute resolution for the landlord to perform proper repairs, for a rent reduction, or to end the tenancy early, the tenant decided to end the tenancy early instead, and in a manner that does not comply with the Act. As a party making a claim is obligated to mitigate their losses, I find that the tenant has failed to do this by deciding to end the tenancy permanently. In review of the testimony and evidence, I do find that the landlord failed to ensure that the previous tenants had left the home in reasonably clean and undamaged condition. I accept that the tenant was unable to move in on September 1, 2022 due to the state of the home. Section 65(1)(c)

and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been “a reduction in the value of a tenancy agreement.”. Although the landlord was on their first vacation in four years, the landlord had an obligation to ensure that the home was ready for occupation by the tenant at the beginning of the tenancy. As the landlord failed to do this themselves, or ensure an agent acted accordingly on their behalf, I find that the tenant suffered a loss in the value of the tenancy agreement. I find that the reimbursement of the September 2022 rent paid by the tenant to be reasonable as the tenant was prepared to move in, but was not able to. Accordingly, I order that the landlord provide the tenant with \$2,400.00 for reimbursement of the September 2022 rent paid.

The tenant also 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 September 14, 2022, which is within the 15 days required. 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. As the landlord was not successful with their claims against the tenant’s security deposit, I order that the landlord return the tenant’s security deposit to them in full, plus applicable interest. 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, \$24.62 is payable as interest on the tenant’s security deposit from July 24, 2022 when the deposit was originally paid, until the date of this decision, July 11 2023.

As stated above, a claimant must not only support the amounts claimed, and that it was due to the other party’s contravention of the *Act* and tenancy agreement, the claimant has a duty to mitigate these losses. As stated earlier, I find that the tenant made the

decision to end this tenancy early, in a manner that is in contravention of the Act, rather than take the proper steps to provide the landlord an opportunity to address the issues raised by the tenant, such as performing proper repairs, or by applying for an order from the Residential Tenancy Branch. I am not satisfied that the tenant had made an effort to mitigate the landlord's exposure to the monetary losses claimed in this application, and therefore I dismiss the remaining monetary claims without leave to reapply.

I also note that the tenant attempted to recover costs associated with preparing and filing this application. As section 72 of the Act only allows the tenant to recover the filing fee, and not other costs associated with filing and application, I allow the tenant to recover only the \$100.00 filing fee as the tenant's application had some merit. The remaining costs and losses are dismissed without leave to reapply.

Conclusion

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

I issue a Monetary Order in the amount of **\$4,924.62** in the tenant's favour for the monetary orders granted in the table below:

Item	Amount
Refund of rent paid for September 2022	\$2,400.00
Return of security deposit plus applicable interest	2,424.62
Recovery of Filing Fee	100.00
Total Monetary Order to Tenant	\$ 4,924.62

The tenant is provided with this Order in the above terms and the landlord must be served with a copy of this Order as soon as possible. Should the landlord 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.

I dismiss the remaining claims 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: July 11, 2023