



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes For the landlords: MNRL-S, MNDL-S, MNDCL-S, FFL
For the tenants: MNSDB-DR, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear a cross application regarding the above-noted tenancy.

The landlords' application pursuant to the Act is for:

- a monetary order for unpaid rent, pursuant to section 26;
- a monetary order for loss under the Act, the regulation or tenancy agreement, pursuant to section 67;
- an authorization to retain the security and pet damage deposits (the deposits), under section 38; and
- an authorization to recover the filing fee, under section 72.

The tenants' application pursuant to the Act is for:

- an order for the landlord to return the deposits, pursuant to section 38; and
- an authorization to recover the filing fee, under section 72.

The landlords and the tenants attended the hearing. Both parties had a full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions.

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that

each party was served with the respective materials in accordance with section 89(1) of the Act.

Issues to be Decided

Is the landlord entitled to:

1. a monetary order for unpaid rent?
2. a monetary order for loss?
3. an authorization to retain the deposits?
4. an authorization to recover the filing fee?

Is the tenant entitled to:

1. a monetary order for the return of the deposits?
2. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlords' and tenants' claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the applicants' obligation to present the evidence to substantiate their application.

Both parties agreed the tenancy started on December 19, 2021 and ended on August 26, 2022. Monthly rent was \$2,400.00, due on the 19th day of the month. The landlord collected a security deposit of \$1,200.00 and a pet deposit of \$1,200.00 at the outset of the tenancy and currently holds them in trust. The tenancy agreement was submitted into evidence. It indicates the parties agreed to a fixed-term tenancy from December 19, 2021 to December 19, 2022.

The tenants registered mailed the forwarding address on September 13, 2022. The landlord confirmed receipt of the forwarding address a few days after it was mailed. The landlords applied for dispute resolution on September 30, 2022.

The tenants did not authorize the landlord to retain the deposits and claiming for the return of the deposits.

The 2 bedroom plus den 800 square feet rental unit was brand new when the tenancy started. The parties signed the move in and move out inspection report (the report).

The landlords are seeking \$1,890.00, as the tenants are responsible for 20 to 30 nail holes in the living room, bedrooms, bathroom and kitchen walls and the landlords paid the amount claimed to repair the walls. The landlord submitted an invoice into evidence indicating a total charge of \$1,890.00 to repaint the walls and 15 photographs taken on the move out date showing nail holes.

The tenant affirmed the 20 picture-hanging small nail holes are normal wear and tear and the tenants should not have to pay for the wall repairs.

The parties texted on August 24, 2022 about the nails on the walls:

Landlord: I showed the place to the perspective tenants. While I was there, I noticed there are still multiple nails in most the walls. I expect you to fix the walls and return the unit in the same condition (minus the normal wear and tear)

Tenant: We asked you when we saw the unit for the first time if we could hand pictures. You said yes. I said we will just leave the nails in the walls so it won't leave marks you said ok. That is what we did.

Landlord: I permitted you to hand pictures as that is what most people do but I never said you can leave nails as it. Considering you said you were going to live there for a few years, I was not going to tell you to not hang pictures. I am not talking about a single nail here but more than 20. Do you expect the new tenants to keep all those nails and may be trying to use them? You need to get it cleaned up or I will need to hire someone else to do it and it will be coming from the security deposit (I will provide you the invoice).

The move out report indicates that there were nail holes in the entry area, 11 in the living room, 3 in the bathroom, and a total of 10 in both bedrooms.

The landlords are seeking loss of rental income from September 19 to 30, 2022 in the amount of \$960.00 (monthly rent of \$2,400.00 divided by 30 days and multiplied by 12 days). The tenants paid rent until September 18, 2022 and the landlord only re-rent the unit on October 1, 2022.

The parties texted on July 19, 2022 about terminating the tenancy:

Tenant: [...] We have had something come up and we are going to have to look at breaking the lease unfortunately. [...] We are thinking it's probably going to be end of August that we have to leave.

Landlord: Hi [tenant] I am sorry to hear about your daughters situation. I am in the last two weeks of my final exams. Let us discuss after July 29. Thank you.

Tenant: Sounds good. Thank you. Good luck on your exams.

On August 2, 2022 the parties texted again:

Landlord: Hi [tenant] Thank you. Wrong my last exam on Friday and back to work now. If you can send me few pictures of different areas in the units, I can post the advertisement. Please let me know when you want me to mention as for the availability for the move in and also for the showings. I believe it is better if you do the showing as you are already there. Thank you.

Tenant: Sounds good. [...] Available September 1

The landlord stated that on July 19, 2022 he did not know when the tenants planned to move out, as they did not specify a date and that the message did not comply with section 45 of the Act, as it is not signed. The landlords learned the tenants planned to move out on September 1 when they received the message on August 2, 2022.

The tenant testified that she only informed the landlord that she planned to move out on September 1 on August 2, 2022 because the landlord instructed her to only communicate in August 2022. The landlord said that he did not instruct the tenant to only communicate in August.

The landlord stated advertising the rental unit on 2 websites on August 2, 2022 and re-rented it on September 12, 2022 for a tenancy starting on October 1, 2022 for \$2,400.00 per month.

The tenant affirmed the rental unit's market rate was \$2,200.00, as the tenant contacted other occupants of similar units in the same building. The tenant submitted a print screen of part of a listing on December 12, 2021 for \$2,200.00.

The landlord stated that the rental unit's market rate in August 2022 was \$2,400.00, as the listing submitted by the tenants was published on December 12, 2021 and for a unit on a lower floor.

The landlord submitted complete listings of 2 similar units posted on August 16, 2022 for \$2,650.00 and on August 15, 2022 for \$2,725.00 and the rental unit listing published on August 2 for \$2,400.00.

Analysis

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

Under section 67 of the Act, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. In this case, to prove a loss, the tenant must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the Act, Regulation or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the tenant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Wall damage

Section 37(2) of the Act states that when the tenancy ends “the tenant must leave the rental unit reasonably clean, and undamaged, except of reasonable wear and tear.”

Residential Tenancy Branch (RTB) Policy Guideline 1 states: “The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.” and that “The tenant is responsible for all deliberate or negligent damage to the walls.”

Based on the August 24, 2022 messages, I find the parties did not have an agreement about the number of nail holes allowed in the rental unit.

The photographs do not indicate the nail holes are excessive or large. Based on the report and the photographs, I find the tenants are responsible for 25 small nail holes. I find that 25 small nail holes is a reasonable amount of nail holes in a 2 bedroom plus den, 800 square feet rental unit. I find the landlords failed to prove, on a balance of probabilities, that the tenants are responsible for an excessive number of nail holes or deliberate damage to the walls.

Thus, I dismiss the landlords’ claim.

Loss of rental income

RTB Policy Guideline 3 sets conditions for loss of rental income claims. It states: “Where a tenant vacates or abandons the premises before a tenancy agreement has ended, the tenant must compensate the landlord for the damage or loss that results from their failure to comply with the legislation and tenancy agreement (section 7(1) of the RTA and the MHPTA). This can include the unpaid rent to the date the tenancy agreement ended and the rent the landlord would have been entitled to for the remainder of the term of the tenancy agreement.”

Further to that, Policy Guideline 5 provides that: “When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:

1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
2. re-rent the unit as soon as possible.”

Based on the July 19 and August 2, 2022 messages, I find the tenants only informed the landlords when they planned to move out on August 2 and the landlord did not prohibit the tenants from contacting him in July 2022.

Based on the landlord’s testimony and the July 19 and August 2 messages, I find the landlord accepted the tenants’ notice to end the tenancy on August 2, 2022, as the landlord started advertising the unit on that date.

The tenants ended the tenancy contrary to section 45(2), as they ended it prior to the end of the fixed-term. However, the tenants continue to be liable to pay rent when rent is due, per section 26(1).

Based on the undisputed testimony, I find that due to the tenants’ failure to pay rent until the end of the fixed term tenancy agreement the landlords suffered a loss of rental income from September 19 to 30, 2022.

Based on the landlord’s uncontested testimony, I find the landlords mitigated the losses, as they started advertising the rental unit on the same day the tenants informed the move out date. I find that landlords are not expected to advertise the unit when they do not know the exact day the tenant will moved out.

I find the print screen of a similar unit listing on December 12, 2021 does not prove that the rental unit’s market rate was \$2,400.00 in August 2022, as it was published 8 months prior to when the landlord listed the rental unit.

Based on the tenancy agreement and the landlord’s convincing testimony and considering that the landlord was able to re-rent the unit within 40 days, I find the rental unit’s market rate in August 2022 was \$2,400.00.

Thus, per section 67 of the Act and considering RTB Policy Guidelines 3, 5 and 16, I award the landlords loss of rental income from September 19 to 30, 2022 in the total amount of \$960.00 00 (monthly rent of \$2,400.00 divided by 30 days and multiplied by 12 days).

Deposits and filing fees

Section 38(1) of the Act requires the landlord to either return the deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

I accept the uncontested testimony that the tenants mailed the forwarding address on September 13, 2022 and the landlords received it a few days later.

I deem the landlords received the forwarding address on September 18, 2022, per section 90(a) of the Act.

As the tenancy ended on August 26, I deemed the landlords received the forwarding address on September 18 and the landlords applied on September 30, 2022, I find the landlords applied within the timeframe of section 38(1) of the Act.

Considering that I authorized the landlords to retain only a part of the deposits, the landlords must return the balance of the deposits.

According to the deposit interest calculator (available at <http://www.housing.gov.bc.ca/rtb/WebTools/InterestOnDepositCalculator.html>), the interest accrued on the deposit is \$24.62.

Under these circumstances, I find the tenants are entitled to a monetary award of \$1,464.62 (the deposits of \$2,400 plus the interest accrued minus \$960.00).

As both parties were partially successful with their applications, each party will bear their filing fee.

Conclusion

Pursuant to section 38 of the Act, I grant the tenants a monetary order in the amount of \$1,464.62. This order must be served on the landlords by the tenants. If the landlords

fail to comply with this order, the tenants may file the order in the Provincial Court (Small Claims) to be 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 *Residential Tenancy Act*.

Dated: July 12, 2023

Residential Tenancy Branch