Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **MNDL-S, FFL / MNDCT, FFT / MNSDB-DR, FFT**

This hearing dealt with three applications pursuant to the *Residential Tenancy Act* (the Act) for:

The Landlord's application for:

- authorization to retain all or a portion of the security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for damage to the rental unit in the amount of $5,088.30 pursuant to section 67; and
- authorization to recover the filing fee for this application from the Tenant pursuant to section 72.

The Tenant's first application (Application 047) for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $5,178.92 pursuant to section 67; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72.

The Tenant's second application (Application 106) for:

- monetary order for $2,340.00 representing the return of double the security deposit and pet damage deposit (collectively, the Deposits), pursuant to sections 38 and 62 of the Act; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72.

This matter was reconvened from a prior hearing on May 1, 2023, which itself was reconvened from prior hearing on October 21, 2022. I issued an interim decision following each prior hearing (on May 2, 2023, and October 22, 2022, respectively). This decision should be read in conjunction with these interim decisions.

Issues to be Decided

Is the Landlord entitled to:

1) a monetary order for $8,429.40;
2) recover the filing fee; and
3) retain the Deposits in partial satisfaction of the monetary orders made?

Is the Tenant entitled to:

1) a monetary order of $5,178.92 as compensation for damage suffered due to the Landlord's breach of the Act;
2) a monetary order of $2,340.00 representing the return of double the Deposits; and
3) recover the filing fee for each application?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The Tenant and the prior owner of the rental unit entered into a tenancy agreement starting November 1, 2017. On August 31, 2021, the Landlord purchased the rental unit from the prior owner and assumed the tenancy agreement. Monthly rent was $1,200 including utilities. The Tenant paid a security deposit of $585 and a pet damage deposit of $585 to the prior owner, both of which were transferred to the Landlord when he acquired the rental unit. The tenancy agreement contained an addendum which stated that no smoking is permitted in the rental unit.

On May 27, 2022, the Landlord served the Tenant with a two month notice to end tenancy for Landlord's use (the Two Month Notice). She disputed it on June 3, 2022, as part of Application 047 (the claim to cancel the Two Month Notice was withdrawn at a October 2022 hearing). On July 14, 2022, the Tenant gave the Landlord 10 days written notice of her intention to move out of the rental unit.

The Tenant moved out of the rental unit on July 22, 2022. She provided her forwarding address to the Landlord on July 23 via text message. On August 5, the Landlord made his application claiming against the security deposit and he returned the pet damage deposit on August 5. He continues to hold the security deposit in trust for the Tenant.

The Tenant testified that she and the prior owner did not conduct a move in inspection at the start of the tenancy. The Landlord did not dispute this.

The Landlord conducted a move out condition inspection of the rental unit on July 23, 2022. The Tenant did not participate.

1. The Landlord's Application

The Landlord testified that when he went into the rental unit to conduct the inspection there was an "extremely strong smell of smoke" and that it smelled like a bar. He testified that he is allergic to tobacco smoke as it causes him "goosebumps on the inside of his eyelids and eye sockets" which causes him difficulty to see. He stated that this is very uncomfortable, and the effect of exposure is cumulative over time.

The Landlord submitted a letter from a witness who accompanied him on the move out inspection. She wrote that "we entered the suite and there was a strong and unmistakable smell of cigarette smoke in the suite, even through the KN95 mask I was wearing. The smoke detector on the ceiling was not active when we toured the suite; [the Landlord] turned it on and tested it, and it worked when tested."

The Landlord also testified that the Tenant caused some minor damage to the rental unit that was beyond ordinary wear and tear. However, he stated that he is not seeking to recover any compensation for this damage.

The Landlord engaged in a two-step remediation plan to remediate the smoke odor. First, he hired a company to use air scrubbers and other cleaning methods to attempt to remove the smoke smell from the rental unit. The Landlord paid $2,778.30 and submitted an invoice dated September 23, 2022 showing this amount. He testified that this process did not remove the odor.

Second, he hired a contractor to seal and paint the walls of the rental unit in an effort to trap the odor at a cost of $2,310. He provided a quote and confirmation of payment for this amount.

The Tenant denied that she smoked in the rental unit. On cross examination of the Landlord, she suggested that the rental unit smelled the same at the end of the tenancy as it did when he purchased the rental unit in 2021. The Landlord denied this and stated that the smell of smoke was "negligible" in the rental unit when he did a walkthrough of it prior to purchasing it.

The Landlord provided a letter from his realtor who wrote that he accompanied the Landlord in 2021 to the rental unit and that too the best of his recollection there was "a

mild but negligible smell of smoke, as if someone had smoked outside and then come in wearing the same clothes."

The Tenant denied smoking in the rental unit. She testified that, had she been doing so during the tenancy, she would have received a notice to end from the Landlord given his sensitivity to cigarette smoke. She testified that she does smoke cigarettes, but only does so at the far end of the yard. On cross examination, the Landlord suggested that the relationship between him and the Tenant started to sour in May 2022 when the Tenant started smoking closer to the rental unit. He confronted her about this. He speculated that the Tenant started smoking inside the rental unit in retaliation to this confrontation.

The Tenant also testified that the rental unit had not been painted in 16 or 17 years. The Landlord did not dispute this assertion.

2. Application 047

The Tenant argued that the Landlord issued the Two Month Notice without the necessary good faith for it to be valid. She argued that the Landlord was motivated by a desire to evict her due her smoking in the back yard. She argued that this lack of the requisite good faith when issuing the Two Month Notice amounts to a breach of section 49(3) of the Act.

The parties gave testimony and provided documentary evidence relating to the circumstances which led to the breakdown of the relationship. The Tenant accused the Landlord of fabricating some of the text messages submitted with evidence. For the reasons set out below, it is not necessary for me to recount the details. In brief, the parties came into conflict as a result of the Tenant's smoking habits.

As stated above, she moved out shortly after receiving the Two Month Notice. She did not apply to the Residential Tenancy Branch dispute it.

The Tenant moved into a new rental unit on July 1, 2022 and entered into a fixed term tenancy for one year. Her new monthly rent is $1,475. She seeks to recover $3,300, representing the difference between the rental she paid for this new rental unit and the rent paid for the one she rented from the Landlord for the duration of the fixed term agreement ($1,475 - $1,200 = $275; $275 x 12 = $3,300).

Additionally, the Tenant claims moving and storage expenses of $1,147 which he says she incurred as a result of having to move. The Tenant also claims $141.92 in connection with BC Hydro expenses she has to pay at the new rental unit.

Finally, the Tenant seeks to recover $590 representing compensation for the additional travel time she has for work. The Tenant gave significant testimony relating to how this amount was calculated, however for the reasons set out below, it is not necessary for me to discuss this point further.

The Landlord argued that the Two Month Notice was issued in good faith, and he advised the Tenant at the time he purchased the residential property that he intended to make use of the rental unit at some point in the future to accommodate his growing family. He denied that the Tenant's smoking habits or a motivating factor for ending the tenancy.

3. Application 106

The Tenant argued that she is entitled to return of double the Deposits because the prior owner did not conduct a move-in condition inspection at the start of the tenancy and that she was never given two opportunities using the correct RTB form to conduct a move out condition inspection with the Landlord.

The Landlord argued that he conducted a diligent search for the move in condition inspection report, but could not find a copy of it among the documents the prior owner left him. Additionally, he argued that he gave the Tenant multiple opportunities to conduct a move out condition inspection via text message. He argued that if the Tenant is permitted to serve her forwarding address the attacks message, he should be able to request that a move out inspection be done in the same manner.

Analysis

1. Landlord's Application

The parties' evidence regarding the odor inside the rental unit at the end of the tenancy is diametrically opposed. The odor of a rental unit is particularly difficult to demonstrate to people who are not able to access it. As such, there is little in the way of direct evidence that demonstrate what the rental unit actually smelled like at the end of the tenancy. However, the Landlord has provided a significant amount of indirect evidence supporting his position.

He has provided invoices for two separate remediations of the rental unit to eliminate the odor. I cannot say why, if the odor did not exist, he would have incurred these expenses, or why the contractors would have performed the services. Additionally, the Landlord has provided two witness statements which describe the smell of the rental unit when it was purchased, and when the tenancy ended. These statements, taken together, indicate that be odor within the rental unit significantly worsened between the time the Landlord purchased the rental unit and the Tenant vacated it.

As such, where the Landlord and the Tenant 's testimony differs, I prefer that of the Landlord. I accept that at the end of the tenancy the rental unit smelled strongly of cigarette smoke. From this I conclude that the Tenant was smoking inside the rental unit, an activity which was explicitly prohibited by the tenancy agreement.

Accordingly, I find the Tenant breached the tenancy agreement and this breach caused the Landlord to suffer monetary loss. I find that the amount he incurred under the first step of the remediation process was reasonable and he should recover the full amount of it from the Tenant. I order the Tenant to pay the Landlord $2,778.30.

However, I do not find that he is entitled to recover the full amount of the second step of the remediation process, as a portion of that expense was for the repainting of the interior of the rental unit. It is not disputed that the interior painted the rental unit was 16 or 17 years old. Residential Tenancy Branch Policy Guideline 40 sets up the useful life of interior paint at five years. As such, the interior paint of the rental unit was past its useful life. The Landlord is not entitled to recover the cost of the repainting. The invoice for the sealing and repainting of the rental unit does not provide a breakdown of costs. In the circumstances, I find it appropriate to assign half the cost of the second step of remediation ($1,155) to sealing the walls of the rental unit and half to its painting. Accordingly, I also order the Tenant to pay the Landlord $1,155.

As the Landlord has been partially successful in his application, I order the Tenant to reimburse him the filing fee ($100).

2. Application 047

Application 047 is unusual. Ordinarily, compensation claims relating to a notice to end tenancy served pursuant to section 49(3) of the Act (in this case, the Two Month Notice) are made pursuant to section 51(2), which entitles a tenant to compensation if the rental unit is not used for the purpose stated on such a notice. It is most common that, if a

tenant has reason to believe that such a notice is issued without the required good faith, the tenant would dispute the validity of the notice.

However, in my interim decision dated October 24, 2022, I set out the basis upon which the Tenant may be entitled to compensation as a result of section 49(3) of the Act:

> Section 49(3) of the Act states:
>
> > 49(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.
>
> […]
>
> A tenant may apply to have a notice to end tenancy issued pursuant to this section, and the landlord bears the onus to prove that the notice was issued in good faith.
>
> Residential Tenancy Branch (the "**RTB**") Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:
>
> > The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
> > - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> > - loss or damage has resulted from this non-compliance;
> > - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> > - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.
> >
> > (the "**Four-Part Test**")
>
> If the Landlord breached section 49(3) of the Act (which the Landlord may bear the onus to disprove, per Policy Guideline 2A), then the Tenant may be entitled to compensation if she can prove she suffered a quantifiable loss as a result of the breach and that she acted reasonably to minimize her loss.

As such, I must determine whether:

1) the Landlord breached section 49(3) of the Act by failing to issue the Two Month Notice in good faith;

2) the Tenant suffered a loss as a result of this breach;
3) this loss is quantifiable; and
4) the Tenant acted reasonably to minimize her loss.

All of these steps must be satisfied in order for the Tenant to be successful.

The Tenant's seeks compensation for monetary loss that resulted from her moving out of the rental unit. Based on the Tenant's testimony, I do not find that she acted reasonably to minimize her loss. As such, it is not necessary for me to determine whether or not the Two Month notice was issued in good faith, as even it was not, the Tenant would not be successful in her application.

The Tenant had the statutory right to dispute the Two Month Notice if she believed it was not issued in good faith. She availed herself of this right. However, before the matter could be heard, the tenant vacated the rental unit.

Had she not vacated the rental unit, the question of the validity of the Two Month Notice would have been adjudicated. Had the arbitrator found it was not issued in good faith, it would have been cancelled, and her tenancy would have continued. This would have prevented her from incurring the costs she alleged.

If the Tenant was not successful, then there would have been a finding that the Two Month Notice was issued in good faith, and the Tenant would not be entitled to compensation. Under either result, the Tenant would not be entitled to the compensation she now seeks.

All the information the Tenant presented at the hearing upon which she relied to show that the Two Month Notice was not issued in good faith was available to her at the time she decided to vacate the rental unit. Accordingly, the Tenant could have reasonably proceeded with her application to cancel the Two Month Notice.

The Tenant was not required to move out of the rental unit when she did. It was her choice. The Act provided her with a process which she could have reasonably availed herself of prior to moving out to determine whether she could remain in the rental unit. She ultimately declined to do so.

As such, I find that she did not act reasonably to minimize her loss, and she has failed to satisfy the fourth part of the Four Part Test.

I dismiss this application, in its entirety, without leave to reapply.

3. Application 106

Based on the evidence before me, I find that the Tenant and the previous owner did not conduct a move in condition inspection. Section 23 of the Act requires that this be completed. If it is not, and a Landlord has not given the Tenant two opportunities to conduct such an inspection, section 24 states that the Landlord's right to claim against the security deposit is extinguished. There is no evidence to suggest that any such opportunities are given to the Tenant by the prior owner.

As such I find that the Landlord's right to claim against the security deposit was extinguished. The fact that it was the prior owner, and not the Landlord, who breached the Act does not relieve the Landlord of the consequences of this breach. When he purchased the rental unit from the prior owner and took over the tenancy agreement from him, the Landlord assumed this liability.

RTB Policy Guideline 17 states that unless a tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the Landlord's right to make such a claim has been extinguished under the Act.

In this case, the Tenant has not waived the doubling of the deposit. As such, and as the Landlord's right to claim against the security deposit is extinguished, I find that Landlord must pay the Tenant an amount equal to double the security deposit ($1,170). As the Landlord did not claim against the pet damage deposit, and as he returned it within 15 days of receiving the Tenant's forwarding address, he is not required to pay the Tenant an amount equal to double the pet deposit.

It is important to note that, despite this extinguishment and penalty, the Landlord retains the right to claim for monetary damages arising out of the tenancy, including damage to the rental unit. As such, the extinguishment does not act as a bar to the Landlord's application.

The Landlord must also pay the Tenant all interest accrued on the Deposits during the course of the tenancy. The RTB Deposit Interest Calculator shows that the pet damage deposit accrued no interest between November 1, 2017 and August 5, 2022. It shows

that the security deposit accrued $8.03 in interest between November 1, 2017 and the date of this decision.

As the Tenant has been successful in this application, she may recover its filing fee ($100) from the Landlord.

Conclusion

I dismiss Application 047 without leave to reapply.

I partially grant the Landlord's Application. Per sections 67 and 72 of the Act, I order the Tenant to pay the Landlord $4,033.30, representing the following:

Description	Total
First stage remediation	$2,778.30
Second stage remediation	$1,155.00
Filing fee	$100.00
	$4,033.30

I grant Application 106. Per sections 67 and 72 of the Act, I order the Landlord to pay the Tenant $1,278.03, representing the following:

Description	Total
Double the Security Deposit	$1,170.00
Interest on the Security Deposit	$8.03
Filing fee	$100.00
	$1,278.03

These two amounts should be offset against each other. Accordingly, I attach a monetary order of $2,755.27 ($4,033.30 - $1,278.03) in favour of the Landlord to this decision.

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: September 14, 2023

Residential Tenancy Branch