Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVONSHIRE PROPERTIES INC and [tenant name suppressed to protect privacy]

FINAL DECISION

Dispute Codes MNDL-S, MNDCL-S, FFL; MNDCT, MNSD, FFT

Introduction

Both hearings dealt with the landlord's application, filed on March 24, 2022, pursuant to the *Residential Tenancy Act* ("*Act*") for:

- a monetary order of $1,883.00 for damage to the rental unit and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*"), or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's security deposit of $887.50, pursuant to section 38; and
- authorization to recover the $100.00 filing fee paid for its application, pursuant to section 72.

Both hearings also dealt with the tenant's application, filed on October 27, 2022, pursuant to the *Act* for:

- a monetary order of $10,202.26 for compensation for damage or loss under the *Act*, *Regulation,* or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of double the amount of the tenant's security deposit of $887.50, totalling $1,775.00, pursuant to section 38; and
- authorization to recover the $100.00 filing fee paid for her application, pursuant to section 72.

The landlord's agent, landlord IN ("landlord's agent"), the tenant, and the tenant's advocate attended both hearings and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord's agent, "landlord PL," attended the second hearing only.

The first hearing on July 24, 2023, lasted approximately 129 minutes from 9:30 a.m. to 11:39 a.m., which is 2 hours and 9 minutes.

The second hearing on October 27, 2023, lasted approximately 93 minutes from 9:30 a.m. to 11:03 a.m.

Both hearings lasted approximately 222 minutes total, which is 3 hours and 42 minutes, which is more than the 60-minute maximum hearing time.

At both hearings, all hearing participants confirmed their names and spelling. At both hearings, the landlord's agent and the tenant provided their email addresses, for me to send copies of my decisions to both parties.

At both hearings, the landlord's agent stated that she is an assistant property manager, employed by the landlord company ("landlord") named in both applications. At both hearings, she said that she had permission to represent the landlord, she confirmed that the landlord owns the rental unit, and she provided the rental unit address.

At the second hearing, landlord PL confirmed that she is a property manager, employed by the landlord, and she had permission to represent the landlord.

At both hearings, the tenant confirmed that her advocate, who she said is her grandfather, had permission to represent her. At both hearings, she identified her advocate as her primary speaker.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure ("Rules")* does not permit recordings of any RTB hearings by any participants. At the outset of both hearings, all hearing participants separately affirmed that they would not record both hearings.

Preliminary Issue – Hearing and Settlement Options

At both hearings, I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. At both hearings, I informed them that I could not provide legal advice to them. At both hearings, they had an opportunity to ask questions, which I answered. At both hearings, neither party made any adjournment or accommodation requests.

At both hearings, both parties affirmed that they were ready to proceed, they wanted me to make a decision, and they did not want to settle both applications. Both parties were given multiple opportunities to settle during both hearings but declined to do so.

At both hearings, I cautioned the landlord's agents that if I dismissed the landlord's application without leave to reapply, the landlord could receive $0 and may have to pay the tenant double the amount of her security deposit. At both hearings, the landlord's agent affirmed that the landlord was prepared to accept the above consequences if that was my decision.

At both hearings, I cautioned the tenant and her advocate that if I granted the landlord's entire application, the tenant would be required to pay the landlord the full amount of the landlord's application. At both hearings, the tenant affirmed that she was prepared to accept the above consequences if that was my decision.

At both hearings, I cautioned the tenant and her advocate that if I dismissed the tenant's application without leave to reapply, the tenant could receive $0, and the landlord may be entitled to retain the full amount of the tenant's security deposit. At both hearings, the tenant affirmed that she was prepared to accept the above consequences if that was my decision.

At both hearings, I cautioned the landlord's agents that if I granted the tenant's application, the landlord could be required to pay the tenant the full amount of her application. At both hearings, the landlord's agent affirmed that the landlord was prepared to accept the above consequences if that was my decision.

Preliminary Issue – Previous RTB Hearings, Interim Decisions, and Orders

At the first hearing and as noted in my interim decision, both parties agreed that they attended two previous RTB hearings both before one different RTB Arbitrator.

At the first hearing and as noted in my interim decision, the previous first hearing was held on November 22, 2022, and the previous first interim decision was issued by the other Arbitrator on December 2, 2022. The previous second hearing was held on April 21, 2023, and the previous second interim decision was issued by the other Arbitrator on April 21, 2023.

At the first hearing and as noted in my interim decision, I informed both parties that the other Arbitrator that conducted their previous two hearings and issued two previous interim decisions, was not available to continue any future hearings or decisions regarding both parties' applications. I notified them that I was the new Arbitrator that would be conducting any future hearings, and making any future decisions regarding both parties' applications. Both parties affirmed their understanding of same.

At the first hearing and as noted in my interim decision, as per section 64(2) of the *Act*, I informed both parties that I was not bound by any other Arbitrator's findings, hearings, or decisions. Both parties affirmed their understanding of same.

Preliminary Issue – Adjournment of First Hearing

At the first hearing and as noted in my interim decision, I informed both parties that the maximum hearing time was 60 minutes. Both parties stated that the RTB told them that they would be provided with 120 minutes (2 hours) for the first hearing.

At the first hearing and as noted in my interim decision, I notified both parties that if the first hearing did not finish within 60 minutes, it could be adjourned to a later date, based on my availability and administrative scheduling, and I could not guarantee any hearing dates. Both parties affirmed their understanding of same.

At the first hearing and as noted in my interim decision, both parties' monetary applications are not urgent or priority claims, such as an order of possession claim, so an expedited second hearing date may not be available.

At the first hearing and as noted in my interim decision, I stated the following:

> *This hearing did not conclude after 129 minutes (2 hours and 9 minutes) and was adjourned for a continuation. The tenant's advocate affirmed that he and the tenant almost completed the tenant's application and estimated another 30 minutes at the next hearing. The landlord's agent estimated 10 to 15 minutes in reply to the tenant's application. The landlord's agent estimated 15 to 30 minutes to present the landlord's application. The tenant's advocate estimated 15 to 20 minutes in reply to the landlord's application. I informed both parties that the reconvened hearing is only to hear the above testimony, submissions, and evidence. Both parties affirmed their understanding of same.*
>
> *I informed both parties that I am seized of this matter and the hearing will be reconvened as a conference call hearing. I notified them that a copy of the Notice of Reconvened hearing with the calling instructions would be included with this decision. Both parties affirmed their understanding of same.*
>
> *I informed both parties that they would have full opportunities to present their testimony, submissions, and evidence, and they were not required to rush through same. Both parties affirmed their understanding of same.*

I informed both parties that no witnesses are permitted to testify at the reconvened hearing because neither party wanted to call any witnesses at this hearing, and the next hearing is only a continuation to hear the above remaining submissions. Both parties affirmed their understanding of same.

I informed both parties of the following information during this hearing. Both parties are directed not to submit any further evidence, prior to the reconvened hearing. No witnesses are permitted to testify at the reconvened hearing. Neither party is permitted to file any new applications after this hearing date of July 24, 2023, to be joined and heard together with both parties' applications, at the reconvened hearing. Neither party is permitted to file any amendments to their applications, after this hearing date of July 24, 2023, and prior to the reconvened hearing. Both parties affirmed their understanding of same.

I verbally reviewed the above information with both parties during the second hearing and they affirmed their understanding of same.

At the second hearing, both parties confirmed receipt of my interim decision and the notice of reconvened hearing.

Preliminary Issue – Service of Documents

At the first hearing and as noted in my interim decision, both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 88 and 89 of the *Act*, I found that both parties were duly served with the other party's application.

At the first hearing and as noted in my interim decision, in accordance with sections 88 and 89 of the *Act*, I found that the landlord was duly served with the tenant's evidence. I notified them that I would consider the tenant's evidence from April 14, 2023, because the landlord did not object to it, and the landlord had a chance to review and respond to it.

Issues to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit?

Is either party entitled to a monetary order for compensation for damage or loss under the *Act*, *Regulation,* or tenancy agreement?

Is the landlord entitled to retain the tenant's security deposit?

Is the tenant entitled to the return of double the amount of her security deposit?

Is either party entitled to recover the filing fee paid for their application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties at both hearings, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of both parties' claims and my summaries and findings are set out below.

Both parties agreed to the following facts at the first hearing. This tenancy began on April 12, 2021 with a different tenant ("former tenant"), and there was a "lease takeover" by the tenant on March 1, 2022. This tenancy ended on March 12, 2022. Monthly rent in the amount of $1,775.00 was payable on the first day of each month. A security deposit of $887.50 and a pet damage deposit of $887.50 were paid by the tenant. The landlord continues to retain the entire security deposit of $887.50. The landlord returned the tenant's entire pet damage deposit of $887.50, to the tenant, by March 18, 2022. A written tenancy agreement was signed by the landlord and the tenant. The tenant provided a written forwarding address to the landlord, by email, on March 14, 2022. A move-in condition inspection report was completed with the former tenant in April 2021, but not with the tenant when she moved in on March 1, 2022. A move-out condition inspection and report were completed by the landlord only, but the tenant was not present. The landlord did not provide the tenant with 2 opportunities to schedule a move-out condition inspection, one using the approved RTB form. The tenant did not provide written permission for the landlord to retain any amount from her security deposit.

Tenant's Application

The tenant testified regarding the following facts at the first hearing. In December 2021, the tenant wanted a smoke-free apartment because she has asthma, and a pet-friendly building because she has a cat. She was living out of town at the time. The landlord posted an advertisement saying that there was no smoking, and it was a pet friendly building. The tenant called the landlord on January 12, 2022 and was told the rental unit was available as a lease takeover. The tenant wanted her friend, who lived locally, to view the rental unit on her behalf. The tenant was not copied on any of emails

between her friend and the landlord to arrange an in-person inspection of the rental unit. The tenant only found out in April 2023, when she received the landlord's evidence. The tenant was told by the landlord that she needed to view the rental unit virtually, since she was out of town, so she did so on January 15, 2023, where she could not smell the smoke. The tenant called the landlord and told them that there was smoke, she wanted to move to another apartment, and she had asthma. There was a neighbour who was smoking, and the tenant had to purchase an air purifier. The landlord did not care about the tenant's health and the tenant moved out on March 12, 2022. The tenant was not told about move-out charges, there was no elevator booked by the landlord, and the tenant asked for her money back from the landlord. The tenant received an abusive call from landlord PL, who was yelling at her. The tenant was not contacted for a move-out inspection and the landlord wanted April rent, even though they received offers from other tenants to rent the unit. The landlord demanded $3,147.50 or threatened to go to the RTB. The landlord abandoned their demand for $3,147.50 and instead asked for a discount rent incentive of $1,883.00. The tenant was only at the rental unit for 11 days, she could not unpack, and she slept on the couch with a blanket. The landlord kept the tenant's March rent and security deposit, and wanted $1,883.00. The tenant got asthma, she was working on the floor, and she was induced to enter the lease. The tenant seeks $3,550.00 plus damages for wrongful acts, moving expenses, and other costs of $1,427.26 for having to work on the floor. This would shock the conscience of reasonable people. The tenant wants $7,000.00 for harm-based, moral damages. The tenant was 22 years old and an intern and had never signed a lease before.

The tenant's advocate made the following submissions at the first hearing. The tenant was induced to form a contract with the landlord, who knowingly falsely represented through fraud, deceit, and dishonesty. The landlord represented a no-smoking building. The tenant refused to sign to give up her security deposit. The lease was nullified as the tenant did not break it. The tenant does not agree with the landlord's liquidated damages. The landlord acknowledged a smoke-free lease and said some units were allowed smoking because they were grandfathered through management for 20 years. The tenant has provided an overwhelming body of evidence. The landlord has not disputed the tenant's claims in their evidence. The tenant wants a finding under section 62 of the *Act* under common law, which is judge-made law, not statutory law. A recission remedy is available when the other party falsely misleads and represents. The contract was nullified and justifiably rescinded.

The tenant's advocate stated the following at the second hearing. The tenant provided a case of Pearson, which is a House of Lords case. The landlord made false

representations from March 1 to 3, 2022. On March 8, the landlord did nothing. On March 11, the tenant rescinded the agreement by email. On March 12, the tenant provided notice to leave the building. On March 14, the landlord acknowledged the smoke-free status was false. The tenant was entitled to exercise her unilateral right to rescind the agreement. The tenant seeks the following remedies:

1) restitution for property of $3550:
    a. the tenant paid $1,775.00 for security and pet damage deposits;
    b. the tenant paid one month rent of $1775;
    c. the landlord returned the tenant's pet damage deposit of $887.50 within the deadline;
    d. the tenant wants double the amount of her security deposit of $887.50, totalling $1,775.00;
2) tort-based damages for dishonesty, which includes compensatory special damages of $1,427.26:
    a. moving costs of $883.17;
        i. the tenant provided notice to move on March 11, and on March 12, she provided notice to move at 9:00 a.m.;
        ii. the tenant asked if the elevator was available, the landlord did not provide a response, and the movers were there before 9:00 a.m. but did not get access to the cleaner or to book the elevator until 11:00 a.m. or 12:00 p.m.;
    b. air purifier and filters of $529.31;
        i. the tenant purchased an air purifier on the advice of her mother, who is a doctor;
        ii. the landlord said that they were ok with that and did not object to it;
    c. a bank transfer fee of $45.00;
        i. the tenant seeks the bank transfer amount for having to transfer her security deposit and rent deposit to the landlord;
    d. hydro utility costs of $19.18;
        i. the tenant paid for start-up costs for hydro in the building and wants the money back;
3) compensatory general damages estimated between $3,000.00 to $4,500.00 for the inconvenience and impact on the tenant’s lifestyle;
    a. health deterioration for 11 days, due to the smoke which permeated from the adjacent unit, of $1,000.00 to $1,500.00;
    b. adverse living and working conditions for 11 days estimated between $1,000.00 to $1,500.00;

i. the tenant was unable to unpack her linens, it was ruined with smoke;
ii. the tenant was living there, which was awkward for her new job with a new company, as she was working remotely and had to manage her work conditions for 11 days;
iii. the tenant had to search for habitable accommodation after March 3, got a place on March 11, and provided notice, and this is estimated between $1,000.00 to $1,500.00;

4) punitive, intentional tort, moral, symbolic, no-harm damages of $2,500.00 to $4,000.00;
    a. a marked departure for the conduct of the wrongdoer compared to a reasonable person;
    b. the tenant provided cases between $4,000.00 to $8,000.00;
    c. the tenant provided a case for invasion of privacy, where a picture was taken of a person jogging and in exercise mode, and they were given $4,000.00 for a no-harm award;
    d. this was due to the behavior of the landlord in mid-January 2022, where the landlord said the tenant's security deposit was forfeited and then the landlord filed an application;
    e. the landlord received 30 offers to rent the unit, they were asking for higher rent of $2,400.00 per month, they could have found someone to take over the unit in mid-March;
    f. the landlord got $2,400.00 in rent, made a lot of money from the former tenant of $16,270.00 plus the lease takeover, plus the security and pet damage deposits from the tenant;
    g. the landlord has a mitigation surplus.

The landlord's agent made the following submissions at the second hearing. There were no preliminary questions or concerns from the tenant regarding smoke before she rented the unit. There is no single written complaint from the tenant that she was unhappy or there was a problem with the rental unit. Rent is due on the first day of the month and the tenant owes rent for March. The tenant did not provide proper notice to move out, she only gave a few hours notice on March 11, when she called the office. On March 11, the tenant sent an email saying she wanted to book the elevator, but the office was closed. The landlord needs at least 1 month written notice that the tenant is moving out and she provided less than 24 hours notice. The tenant is not entitled to moving costs because she did not provide proper notice to move out. The landlord's hours are posted on their website. The landlord only works business hours and between 10:00 a.m. to 4:00 p.m. on Saturday. The tenant asked for the elevator

booking when the office was closed. The landlord disputes the air purifier and filter costs because the tenant did not provide any written notice that there were any problems. The tenant placed the order on March 3, but why did she not tell the landlord. The tenant's own evidence says that there is a grandfather clause for smoking and new tenants were not allowed to smoke.

The landlord's agent stated the following at the second hearing. The landlord's advertisements are for the unit, not the building, and new rental units are not allowed smoking. The landlord did not post any advertisements for a smoke-free building, only smoke-free specific units. The tenant is not entitled to hydro electricity costs because she used the electricity while she was in the unit, the property was in her possession, and it says on the local hydro website that if you use electricity and you are in possession of the property that you have to pay it. From March 1 to 12, the tenant was inside the rental unit and occupying and used the utilities. The tenant is responsible to apply the hookup and pay for the utility account. The tenant's wire transfer fee and security deposit are her own cost, and the landlord is not responsible for it. The landlord offered a debit payment option, which was free. The landlord cannot control the tenant's bank fees. The tenant could have paid on-site, as her friend lived locally and secured the apartment for her. The tenant is not entitled to compensatory damages because the landlord was not given any time to solve the issue, there was no written notice, and the tenant did not provide a notice for breach of a material term of a tenancy agreement by way of a written notice. The tenant has to give a reasonable deadline to the landlord to solve the problem and if it is not done, she can end the tenancy. The landlord had no time to investigate or solve the issue. The tenant did not provide any prescriptions or doctor's notes, except a note from her family member. Her mother is a plastic surgeon, and this has nothing to do with the medical issue claimed by the tenant. There were no medical receipts or medications, despite the tenant claiming she went to see an allergist. The landlord disputes the tenant's entire application.

Landlord PL made the following submissions at the second hearing. The tenant referred to a Supreme Court of British Columbia case, but the tenant did not provide any evidence of physical or mental distress, that is similar. There were no prescriptions, receipts, or doctor's notes from any non-family members. The tenant should have provided something from someone specializing in pulmonary disease.

The tenant's advocate stated the following in reply at the second hearing. The landlord's advertisements were for no smoking under the building column of the advertisement. Section 91 of the *Act* incorporates common law, and the tenant did not have a lease, since it was null and rescinded. The landlord cannot represent a smoke-

free building when smoking is allowed. The landlord has to spell out the areas that smoking is allowed and tell new tenants where the smoking units are in relation to their own units. The tenant agreed that she did not provide written notice, but the landlord wrote the information down.

The tenant stated the following in reply at the second hearing. She told the landlord by phone about her complaints. She did not think that she needed to give written notice regarding smoking to the landlord. This information is in the landlord's own evidence, but they pretended they did not know.

Landlord's Application

The landlord's agent made the following submissions at the second hearing. The landlord seeks liquidated damages of $887.50. They had to re-rent the unit, as per their evidence at clause 5. The tenant breached the agreement and vacated before the end of the fixed term. This is not a penalty, as the landlord had to work to re-rent the unit. They tried to re-rent, they provided advertisements, they did showings and they screened applications. They provided salary information for housekeeping, the leasing agent, and maintenance to fix the unit. The government website gives information on how to properly end a tenancy and provide a notice to end tenancy. The landlord seeks $255.00 for move out charges. The landlord provided evidence including photographs, a move-out report, and move-out charges. The landlord seeks $75.00 for drape cleaning, $180.00 for cleaning of 4 hours at $45.00 per hour. The landlord provided evidence of window cover cleanings, which is required in the policy guideline. The tenant is required to pay for professional cleaning. The landlord seeks $1,628.00 for a discount rent incentive for $148.00 per month for 11 months.

The tenant's advocate made the following submissions at the second hearing. There was rescission of the contract, so the effective date the lease was entered into is invalid, null, and void. The document is dead and there are no terms. The tenant was induced into the contract by fraud, so it is a nullity. The landlord is required to schedule an inspection and the claims are extinguished. This was a lease takeover, the landlord provided photographs, but the former tenant had the place. This is only if there is an existing lease. The tenant left on March 12 and the landlord tried to squeeze the release of the security deposit. On March 15, the landlord gave move-out charges. The landlord refused the keys on a Saturday and wanted rent and cleaning. On February 15, the landlord had offers to rent the unit for April. The landlord claimed before mitigation. The rent claim was replaced by a discount claw back clause.

The tenant testified regarding the following facts at the second hearing. The landlord did not ask her to do a move-in inspection. The previous tenant did a move-in inspection, as per the landlord's evidence.

The landlord's agent stated the following in reply at the second hearing. The move-in inspection was emailed to the tenant. The keys were not received because it was a delicate situation.

Analysis

Burden of Proof

Both parties, as the applicants, have the burden of proof, on a balance of probabilities, to prove their applications and monetary claims. The *Act, Regulation*, RTB *Rules*, and Residential Tenancy Policy Guidelines require both parties to provide evidence of their applications and claims, in order to obtain monetary orders.

Both parties received application packages from the RTB, including instructions regarding the hearing process. They received documents entitled "Notice of Dispute Resolution Proceeding" ("NODRP") from the RTB, after filing their applications and receiving the other party's application. These documents contain the phone number and access code to call into both hearings.

The NODRP states the following at the top of page 2, in part (my emphasis added):

> ***The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.***
>
> - ***It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.***
> - ***Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.***
> - *Parties (or agents) must participate in the hearing at the date and time assigned.*
> - *The hearing will continue even if one participant or a representative does not attend.*

- ***A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.***

The NODRP states that a legal, binding decision will be made and links to the RTB website and the *Rules* are provided in the same document.

Both parties received detailed application packages from the RTB, including the NODRP documents, with information about the hearing process, notices to provide evidence to support their application, and links to the RTB website. It is up to both parties to be aware of the *Act, Regulation*, RTB *Rules*, and Residential Tenancy Policy Guidelines. It is up to both parties to provide sufficient evidence of their claims, since they chose to file their applications on their own accord.

Legislation, Policy Guidelines, and Rules

The following RTB *Rules* are applicable and state the following, in part:

> *6.6 The standard of proof and onus of proof*
>
> *The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.*
>
> *The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.*
> …
> *7.4 Evidence must be presented*
> *Evidence must be presented by the party who submitted it, or by the party's agent…*
> …
> *7.17 Presentation of evidence*
> *Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence…*
>
> *7.18 Order of presentation*

> *The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof…*

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicants to establish the claims. To prove a loss, the applicants 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 respondents 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 applicants followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Residential Tenancy Policy Guideline 16 states the following, in part (my emphasis added):

> *C. COMPENSATION*
> *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.*
>
> …
> *D. AMOUNT OF COMPENSATION*
> *In order to determine the amount of compensation that is due, the arbitrator may consider the value of the damage or loss that resulted from a party's non-compliance with the Act, regulation or tenancy agreement or (if applicable) the amount of money the Act says the non-compliant party has to pay. The amount arrived at must be for compensation only, and must not include any punitive element.* ***A party seeking compensation should present compelling***

evidence of the value of the damage or loss in question. For example, if a landlord is claiming for carpet cleaning, a receipt from the carpet cleaning company should be provided in evidence.

Landlord's Application

I find that the landlord did not sufficiently present its application, claims, and evidence, as required by Rules 6.6 and 7.4 of the RTB *Rules*, despite having multiple opportunities to do so, as per Rules 7.17 and 7.18 of the RTB *Rules.* The landlord's agents failed to sufficiently review and explain the landlord's claims and the documents submitted in support of its application.

Both hearings lasted approximately 222 minutes total, which is 3 hours and 42 minutes, which is more than the 60-minute maximum hearing time. The landlord had ample time and multiple opportunities to present its application and evidence. I repeatedly asked the landlord's agents if they had any other information to present. Two landlord agents attended the second hearing to present the landlord's application.

The landlord submitted numerous documents with its application, but the landlord's agents failed to review or explain them in sufficient detail.

The landlord had ample time of over 1 year and 7 months, from filing its application on March 24, 2022, to the first hearing date of July 24, 2023, to the second hearing date of October 27, 2023, to provide sufficient evidence and prepare for both hearings.

On a balance of probabilities and for the reasons stated below, I dismiss the landlord's application for $2,770.50, without leave to reapply. This includes $180.00 for general cleaning, $75.00 for drape cleaning, $887.50 to retain the tenant's security deposit for liquidated damages, and $1,628.00 for a discount rent incentive. I find that the landlord failed the above four-part test, as per section 67 of the *Act* and Residential Tenancy Policy Guideline 16.

Cleaning

The landlord stated the following on the online RTB dispute access site, regarding its claim for damages:

"4 hour charge for $45 per hour: $180.00 Drape cleaning: $75.00"

I dismiss the landlord's application for $180.00 for general cleaning and $75.00 for drape cleaning, without leave to reapply.

The landlord failed to complete a move-in condition inspection report, as required by section 24 of the *Act*, when the tenant took over the lease and moved in on March 1, 2022, relying instead on a report with a different tenant who moved in on April 12, 2021, almost one year earlier. While the landlord claimed that the tenant agreed to the condition of the rental unit "as is," when she moved in, I find that the landlord did not meet the requirements of the move-in condition inspection and report under the *Act*, as outlined above. Therefore, I cannot determine what damages and cleaning, if any, were present when the tenant moved into the rental unit.

The landlord failed to complete a move-out condition inspection report, as required by section 36 of the *Act*, with the tenant present. The landlord failed to provide 2 opportunities to complete a move-out condition inspection, to the tenant, one using an RTB approved form, as required by section 17 of the *Regulation*. Therefore, I cannot determine what damages and cleaning, if any were caused by the tenant during her tenancy.

I find that the landlord failed to provide sufficient evidence of cleaning or damages beyond reasonable wear and tear, as per Residential Tenancy Policy Guideline 1. The landlord's agents failed to sufficiently present and explain these claims and failed to sufficiently reference the landlord's documents submitted in support of same.

Liquidated Damages

I dismiss the landlord's application to retain the tenant's security deposit for liquidated damages of $887.50, without leave to reapply.

Residential Tenancy Policy Guideline 4 provides information regarding liquidated damages. 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.

I find that the cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants, numerous times.

The landlord's agents did not provide sufficient testimonial evidence regarding liquidated damages, to show how the $887.50 was a genuine pre-estimate of the loss.

I find that the landlord's agents failed to provide sufficient testimonial evidence about if, when, or how the rental unit was advertised for re-rental, the rent amount per month, the term or length of the tenancy, how long the unit was advertised for, what details were given in any rent advertisements, and other such information.

I find that the landlord failed to provide sufficient testimonial evidence to indicate if or how many inquiries were made for re-rental, how many showings were done, when any showings were done, if or how many applications were received, how many applications were accepted or rejected, and other such information.

I find that the landlord failed to provide sufficient testimonial evidence to indicate if or when the rental unit was re-rented to new tenants, the rent amount per month, the term or length of the tenancy, any tenancy agreement to confirm same, or other such information.

Discount Rent Incentive

The landlord stated the following on the online RTB dispute access site, regarding its claim for compensation for damage or loss:

> *"Discounted rent, incentive. Clause 46. $148 per month for 11 month as it was a lease takeover= $1628"*

I dismiss the landlord's application for a discount rent incentive of $1,628.00, without leave to reapply.

Both parties agreed that the tenant paid $1,775.00 per month in rent to the landlord and this amount is indicated in the lease. Both parties agreed that while a discount rent of $1,627.00 was referenced in the lease, the tenant did not pay this discount rent to the landlord.

The landlord's agents did not provide sufficient testimonial evidence regarding the rent incentive. They simply claimed that the tenant was given a discount rent incentive of $148.00 per month for 11 months, totalling $1,628.00.

However, the tenant did not occupy the rental unit for 11 months, she only occupied it for 12 days between March 1 and 12, 2022. While the tenant was offered a rent incentive by the landlord, the tenant did not occupy the rental unit for 12 months, nor did she pay any advance of rent to the landlord for a 12-month period.

The tenant was not given an advance discount rent incentive of $1,628.00 from the landlord, that she would be required to repay to the landlord. Therefore, I find that the landlord has not suffered any losses for this rent incentive.

Further, it is the landlord's obligation to mitigate its damages, as per section 7(2) and section 67 of the *Act*, and find new tenants to occupy the rental unit, since the tenant moved out on March 12, 2022.

Filing Fee

As the landlord was unsuccessful in its application, I find that it is not entitled to recover the $100.00 filing fee paid for its application, from the tenant. This claim is also dismissed without leave to reapply.

Tenant's Application

Both hearings lasted approximately 222 minutes total, which is 3 hours and 42 minutes, which is more than the 60-minute maximum hearing time. The tenant and her advocate had ample time and multiple opportunities to present the tenant's application and evidence. They both attended both hearings to present the tenant's application. I repeatedly asked them if they had any other information to present. They spoke for the majority of both hearings. They were given ample and additional time during both hearings to look for, search through, and organize their documents. The tenant submitted numerous documents with her application.

The tenant had ample time of approximately 1 year, from filing her application on October 27, 2022, to the first hearing date of July 24, 2023, to the second hearing date of October 27, 2023, to provide sufficient evidence and prepare for both hearings.

On a balance of probabilities and for the reasons stated below, I dismiss the tenant's application for compensation for damage or loss, without leave to reapply.

The tenant applied for $10,202.26 in her application. At both hearings, the tenant asked for higher monetary amounts and ranges, which were not formally amended to be

added in her application. This includes tort-based damages of $3,550.00, compensatory special damages of $1,427.26, compensatory general damages between $3,000.00 and $4,500.00, and punitive damages between $2,500.00 and $4,000.00. I find that the tenant failed the above four-part test, as per section 67 of the *Act* and Residential Tenancy Policy Guideline 16.

Monetary Compensation

Residential Tenancy Policy Guideline 8 defines material terms (my emphasis added):

> ***A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.*** *To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach.* ***It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.***
>
> ***The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question****. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the* ***true intention of the parties in determining whether or not the clause is material.***
>
> ***To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:***
>
> ***• that there is a problem;***
> ***• that they believe the problem is a breach of a material term of the tenancy agreement;***
> ***• that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and***
> ***• that if the problem is not fixed by the deadline, the party will end the tenancy.***

> *Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action**, the party alleging the breach bears the burden of proof.** A party might not be found in breach of a material term if unaware of the problem.*

Section 28 of the *Act* deals with the right to quiet enjoyment (my emphasis added):

> *28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
>
> *(a) reasonable privacy;*
>
> *(b) freedom from **unreasonable disturbance**;*
>
> *(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
>
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference.*

Residential Tenancy Policy Guideline 6 “Entitlement to Quiet Enjoyment” states the following, in part (my emphasis added):

> *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.***

The tenant stated the following on the online RTB dispute access site, regarding her claim for compensation for damage or loss:

> *"Restitution of funds advanced to the landlord: $3,550.00 Out-of-pocket expenses: $1,427.26 (air purifier & filter $529.31; moving costs $883.17; electronic transfer of funds $45.00; BC Hydro $19.18) Compensatory damages for suffering, loss of enjoyment of life, inconvenience and punitive, moral and/or symbolic damages for the landlord's intentional misconduct in a combined total of $7,000.00"*

I dismiss the tenant's application for compensation for damage or loss, without leave to reapply.

I find that the tenant chose to move out of the rental unit of her own volition. I find that the tenant's "lease takeover" agreement was not nullified or rescinded. The tenant chose to sign the lease document and view the rental unit by way of a virtual tour, despite the fact that she lived out of town, and she was not personally present to view the rental unit. If the tenant's asthma and smoking concerns were that significant, she could have ensured that she could personally view the rental unit, or at the least, have someone else do so, on her behalf. The tenant claimed that she was not given any emails about her friend communicating with the landlord about dates to view the rental unit. However, the tenant could have obtained this information from her friend. The tenant is not a minor, she is over 19 years old, she has the capacity to sign legal documents, and she could have carefully read and understood the lease, or obtained legal advice or other assistance, prior to signing any documents, if she required. The tenant claimed that the landlord did not direct her attention to clauses in the lease, such as the "as is" condition of the rental unit. However, it is up to the tenant to obtain legal advice or other assistance if she required, prior to signing any documents. The tenant was able to bring an advocate, her family member, to attend both hearings and assist her, and submitted voluminous documents, including case law and detailed legal information, supporting her application.

I find that the tenant failed to provide sufficient evidence of the amounts claimed, as they were based on unrelated, irrelevant case law, and large monetary estimated ranges. I find that the tenant failed to provide written notice of the smoke issue to the landlord. I find that the tenant failed to prove a loss of quiet enjoyment. I find that the tenant failed to provide written notice of the smoking as a breach of material term of the tenancy agreement, as required by the *Act*, in order to end her tenancy. I find that the tenant did not provide the landlord with a reasonable period of time to correct the

smoking as a material breach, as required by the *Act.* Therefore, I find that the landlord did not have sufficient time to correct any smoke issues during the tenant's short 12-day tenancy in the rental unit.

Accordingly, I find that the tenant is responsible for her own moving costs, health costs, hydro costs, work and living costs, special costs, searching for new accommodation, and any other costs.

Security Deposit

The tenant stated the following on the online RTB dispute access site, regarding her claim for the return of double the amount of her security deposit:

> *"My tenancy agreement was justifiably rescinded. I am entitled to the doubled statutory value of the withheld security of $887.50 for the reasons described in the Application. The $1,775.00 is included in the Restitution component of my claim totalling $3,550.00. Supporting evidence; entire Dispute Information section & SD consisting of pages 4-32, SD1-167, including paragraphs 82-84 related to advance payments and paragraphs 207-209 related to the doubling of the withheld security."*

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the security deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

This tenancy ended on March 12, 2022. The tenant provided a written forwarding address to the landlord by email on March 14, 2022. Email service is permitted by section 88 of the *Act* and section 43 of the *Regulation*. The landlord confirmed receipt of the tenant's email. The landlord did not have written permission to retain any amount from the tenant's security deposit.

The landlord filed its application on March 24, 2022, which is within 15 days of March 14, 2022, the later forwarding address date. I find that the landlord's right to claim against the tenant's security deposit for damages was extinguished for failure to provide the tenant with 2 opportunities to conduct a move-out condition inspection, one using the approved RTB form, as required by section 36 of the *Act* and section 17 of the *Regulation.* However, the landlord applied for other costs aside from damages, including a rent incentive and cleaning.

Therefore, the tenant is not entitled to the return of double the amount of her deposit of $887.50, totalling $1,775.00.

In accordance with section 38 of the *Act* and Residential Tenancy Policy Guideline 17, I find that the tenant is entitled to receive the original amount of her security deposit of $887.50, from the landlord.

Interest is payable on the tenant's security deposit of $887.50, during the period of this tenancy. No interest is payable for the years from 2021 to 2022. Interest of 1.95% is payable for the year 2023. Interest is payable from January 1 to October 27, 2023, since the date of the later second hearing was October 27, 2023. Although the date of this decision is November 24, 2023, this is not within either party's control. This results in $14.28 interest on $887.50, based on the RTB online deposit interest calculator.

I find that the tenant is entitled to receive the original amount of her security deposit of $887.50, plus $14.28 in interest, totalling $901.78. The tenant is provided with a monetary order for $901.78 total.

Filing Fee

As the tenant was only partially successful in her application, I find that she is not entitled to recover the $100.00 filing fee paid for her application, from the landlord. This claim is also dismissed without leave to reapply.

Conclusion

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

I issue a monetary order in the tenant's favour in the amount of $901.78 against the landlord. The landlord must be served with 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.

The remainder of the tenant's application is dismissed 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: November 24, 2023

Residential Tenancy Branch