



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes LL: MNRL-S, MNDL-S, MNDCL-S, FFL
 TT: MNDCT, MNSD, FFT

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (the “*Act*”).

The Landlord’s Application for Dispute Resolution was made on December 9, 2022, (the “Landlord’s Application”). The Landlord applied for the following relief, pursuant to the *Act*:

- a monetary order for damage, compensation, or loss;
- a monetary order for unpaid rent and utilities;
- an order to retain the security deposit; and
- an order granting recovery of the filing fee.

The Tenants’ Application for Dispute Resolution was made on August 9, 2023, (the “Tenants’ Application”). The Tenants applied for the following relief, pursuant to the *Act*:

- a monetary order for damage or compensation;
- an order granting the return of all or part of the security deposit; and
- an order granting recovery of the filing fee.

The Landlord and the Tenants attended the original hearing at the appointed date and time. At the beginning of the hearing, the parties acknowledged receipt of their respective application packages and documentary evidence. No issues were raised with respect to service or receipt of these documents during the hearing. Pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The original hearing was adjourned as we ran out of time. The hearing was reconvened on December 13, 2023 and was attended by the Landlord and the Tenants.

The parties were given an opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Is the Landlord entitled to a monetary order for unpaid rent and utilities, pursuant to Section 67 of the *Act*?
2. Is the Landlord entitled to a monetary order for damage, compensation, or loss, pursuant to Section 67 of the *Act*?
3. Is the Landlord entitled to an order granting recovery of the filing fee, pursuant to Section 72 of the *Act*?
4. Is the Landlord entitled to retain the Tenants' security deposit pursuant to Section 38 of the *Act*?
5. Are the Tenants entitled to a monetary order for damage or compensation, pursuant to Section 67 of the *Act*?
6. Are the Tenants entitled to an order granting the return of the security deposit, pursuant to Section 38 of the *Act*?
7. Are the Tenants entitled to an order granting recovery of the filing fee, pursuant to Section 72 of the *Act*?

Background and Evidence

The parties testified and agreed to the following terms of the tenancy; the tenancy started on July 15, 2021. During the tenancy, the Tenants were required to pay rent in the amount of \$3,900.00 which was due on the first day of each month. The Tenants paid a security deposit in the amount of \$1,950.00 which the Landlord continues to hold. The tenancy ended on November 30, 2022.

The Landlord's Claims

The Landlord submitted several monetary order worksheets. At the start of the hearing, it was determined that the Landlord submitted an updated monetary order worksheet on August 25, 2023 with additional monetary claims added for postage fees. The Landlord

confirmed that they had not amended their application to include additional claims. The Tenants stated that they did not receive the updated monetary order worksheet. As such, I find that the Landlord's additional claims for postage will not be considered.

The Tenants confirmed that they received the Landlord's June 28, 2023 Monetary Order Worksheet provided in the Application totalling \$19,766.07. The Landlord's claims have been reproduced below;

The Landlord is claiming \$17,550.00 for loss of rent as the Tenants ended the fixed term tenancy early. The parties agreed that a new fixed term tenancy began on July 1, 2022 and was meant to continue at least until June 30, 2023. The parties agreed that the Tenants provided the Landlord their written notice to end tenancy on October 19, 2022 with an effective move out date of November 30, 2022.

The Landlord stated that they listed the rental unit for \$4,200.00 per month, however, was unable to re-rent the rental unit until April 15, 2023. As such, the Landlord is seeking to recover \$3,900.00 for the 4.5 months that the rental unit was vacant.

The Tenants stated that the Landlord had altered the standard government tenancy agreement to read:

"the tenancy will continue only with another one year fixed term lease. The tenant or the landlord must provide notice of 2 clear months before the end of the term to renew for another 12 month fixed term lease"

The Tenants stated that they signed a new fixed term lease with the Landlord as they felt as though they were misled into believing that another fixed term tenancy was the only way to continue the tenancy, rather than continuing on a month to month basis. The Tenants stated that after serving their notice to end tenancy, the Landlord advertised the rental unit for rent with a January 14, 2023 availability date.

The Landlord acknowledged that she listed the rental unit for rent as of January 14, 2023. The Landlord stated that in her experience, no one rents large houses in the winter months. Furthermore, the Landlord stated that she had vacations booked and it was Christmas time. The Landlord stated that she always has the rental unit inspected at the end of each tenancy to test the gas appliances. The Landlord stated that the contractors she uses were also on holidays. As such, the Landlord stated that she made the rental unit available only after the holidays.

The Landlord is claiming \$325.50 to employ an agent to conduct a move out condition inspection with the Tenants on November 29, 2022. The Landlord stated that there was conflict between the Landlord and Tenants, therefore, the Landlord wished to have a neutral third part attend and conduct an impartial inspection of the rental unit. The Landlord provided an invoice in support. The Tenants stated that they do not feel as though they should be responsible for paying this cost and denied that they gave the Landlord reason to hire a third party.

The Landlord is claiming \$121.33 for the cost of purchasing a replacement lock and \$157.50 for the cost of labour associated with replacing the broken lock. The Tenants stated that the lock worked during the entire tenancy. The Tenants stated that the Landlord had use of the rental unit between November 24 and 29, 2022 and they suspect the lock broke during this time.

The Landlord is claiming \$48.05 for postage fees relating to the service of the Proceeding Package and evidence to the Tenants. The Tenants did not have a response.

The Landlord is claiming \$18.88 for advertising costs to list the rental unit for rent. The Landlord stated there was a lot of interest in the rental unit, therefore, she did not need to repost the advertisement on any other platform. The Tenants did not provide a response.

The Landlord is claiming compensation in the amount of \$1,268.27 for Fortis bills and \$176.54 for Hydro bills. The Landlord stated that these costs relate to usage during December to April when the rental unit sat vacant. The parties agreed that the Tenants had been responsible for paying 7/8 of the utility costs during the tenancy. The Tenants stated that they do not feel as though they should have to pay for utilities during the time that they did not occupy the rental unit.

Finally, the Landlords are seeking the recovery of their \$100.00 filling fee.

The Tenants' Claims

The Tenants have submitted a monetary order worksheet containing a list of monetary claims which have been reproduced below;

The Tenants are claiming \$471.66 relating to an overpayment of utilities. During the hearing, the Tenants confirmed that they were responsible for paying 7/8 of the utilities

while the Landlord was responsible for paying 1/8. The parties agreed that this formed part of the tenancy agreement. The Tenants are claiming for compensation as they do not feel as though the utilities were equally divided. Furthermore, the Tenants stated that the Landlord failed to reimburse them \$55.17 for the Landlord's portion during the last month of the tenancy. During the hearing, the Landlord agreed to compensation the Tenants \$55.17. The Landlord did not agree with the remaining charges as the parties had previously agreed to the division of utilities.

The Tenants are claiming for the return of the security deposit in the amount of \$1,950.00. The Tenants stated that they vacated the rental unit on November 24, 2022 and provided their forwarding address to the Landlord on November 29, 2022. The Tenants stated that they did not consent to the Landlord retaining their deposit. Furthermore, the Tenants stated that the Landlord did not provide them a copy of the condition inspection report until they received the Landlord's evidence. The Landlord stated that it was emailed on December 6, 2022. The Tenants stated that the email was recalled.

The Tenants are claiming for compensation in the amount of \$455.00 for loss of use of the driveway and half of the garage during the last month of their tenancy. The Tenants stated that near the end of the tenancy, the Landlord decided to build a wall in the garage to divide the space in half. Furthermore, the Landlord began parking in the driveway, whereas the Landlord was meant to park on the street. The Tenants stated that the Landlord did not serve them with a 30 day notice to terminate a service or facility.

The Landlord stated that the parties had shared use of the garage, and that the Landlord could access the garage at any time during the tenancy without notifying the Tenants. The Landlord stated she had a wall built to divide the space to protect her belongings as the Tenants were vacating the rental unit at the same time. The Landlord stated that she notified the Tenants in advance of the changes, and that they did not express any problems with the Landlord's work. The Landlord stated that the worker performing the renovation to the garage parked in the driveway temporarily while working. The Landlord stated that the Tenants were moving out and were not home often. The Landlord stated that the Tenants did not lose use of the garage or driveway, and that had if they had expressed concerns, the Landlord would have worked towards a compromise.

The Tenants are claiming \$750.00 for loss of use of the backyard from July 2022 to November 2022. The Tenants stated that the Landlord had previously indicated that the

Tenants had full use of the backyard. The Tenants stated that in July 2022 the Landlord began using the backyard and installed a firepit and chairs. The Tenants stated that the Landlord began hosting her friends who also made use of the backyard space, which was infringing on the Tenant's use of the back yard and their privacy. The Tenants stated that they did not want to complain to the Landlord as they did not want to be evicted.

The Landlord stated that the backyard was always a shared space, but that during the Covid-19 pandemic, the Landlord did not use the backyard. The Landlord stated that she notified the Tenants that she was making improvements to the backyard which they could also benefit from. The Landlord stated that the Tenants had a covered patio area which was for their own use, however, the rest of the yard was meant to be common area. The Landlord stated that the Tenants never brought forward their concerns.

Lastly, the Tenants claimed \$100.00 in recovery of the filing fee paid to make the Tenants' Application.

Analysis

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find:

Section 67 of the *Act* empowers me to order one party to pay compensation to the other if damage or loss results from a party not complying with the *Act*, regulations or a tenancy agreement.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the *Act*. An applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this case, the burden of proof is on the Applicant to prove the existence of the damage or loss, and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Respondent. Once that has been established, the Applicant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Applicant did what was reasonable to minimize the damage or losses that were incurred.

Landlord's Claims

The Landlord is claiming \$17,550.00 for loss of rent as the Tenants ended the fixed term tenancy early. I accept that the parties entered into a fixed term tenancy which as meant to continue at least until June 30, 2023, however, the Tenants provided their notice to end tenancy on October 19, 2022 for the end of November 2022.

The Landlord stated that they listed the rental unit for rent at a rate of \$4,200.00 per month, however, was unable to re-rent the rental unit until April 15, 2023. As such, the Landlord is seeking to recover \$3,900.00 for the 4.5 months that the rental unit was vacant.

While the Tenants stated that the Landlord altered the tenancy agreement, I find that the Tenants signed the agreement, agreeing to a further fixed term tenancy agreement. I find the Landlord's amendment of the tenancy agreement does not make it invalid.

According to Section 45 of the *Act*, 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.

45(3) of the *Act*; if a Landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

The Residential Tenancy Policy Guidelines (the “Police Guidelines”) offers some clarity around what constitutes a material term. According to Policy Guideline 8; a material term is a term that the parties both agree at the start of the tenancy, is so important that the most trivial breach of that term gives the other party the right to end the agreement.

In this case, I find that the Tenants provided insufficient evidence to demonstrate that they ended the fixed term agreement as a result of the Landlord breaching a material term of the tenancy agreement. As such, I find that the Tenants breached the Act by ending their fixed term tenancy early.

The Landlord acknowledged that she listed the rental unit for rent not earlier than January 14, 2023 and for \$4,200.00 rather than the \$3,900.00 that the Tenants were paying. The Landlord stated that in her experience, no one rents large houses in the winter months. Furthermore, the Landlord stated that she had vacations booked and it was Christmas time. The Landlord stated that she always has the rental unit inspected at the end of each tenancy to test the gas appliances. The Landlord stated that the contractors she uses were also on holidays. As such, the Landlord stated that she made the rental unit available only after the holidays.

While the Tenants breached the Act by ending the fixed term tenancy early, I find that the Landlord did not mitigate their loss by waiting until after the tenancy ended to conduct showings, by advertising the rental unit for more rent, and by advertising the rental unit’s availability for mid January 2023 instead of when the Tenant’s vacated the rental unit. I do not accept the Landlord’s argument that the rental unit would not rent during the winter months. As such, I dismiss the Landlord’s claim for compensation relating to loss of rent as the Landlord did not mitigate their loss.

The Landlord is claiming \$325.50 to employ an agent to conduct a move out condition inspection with the Tenants on November 29, 2022. The Landlord stated that there was conflict between the Landlord and Tenants, therefore, the Landlord wished to have a neutral third party attend and conduct an impartial inspection of the rental unit. I find that the Landlord is responsible for the costs associated with conducting their responsibilities as a Landlord. I find that the Landlord chose not to complete the condition inspection with the Tenants herself, therefore, did not mitigate her loss by employing the services of a third party. I therefore dismiss this claim without leave to reapply.

The Landlord is claiming \$121.33 for the cost of purchasing a replacement lock and \$157.50 for the cost of labour associated with replacing the broken lock. The Tenants stated that the lock worked during the entire tenancy.

Landlord and tenant obligations to repair and maintain

32 (1)A landlord must provide and maintain residential property in a state of decoration and repair that

(a)complies with the health, safety and housing standards required by law, and

(b)having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2)A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3)A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4)A tenant is not required to make repairs for reasonable wear and tear.

(5)A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

In this case, I find that the Landlord failed to demonstrate that the door lock was broken as a result of the action or neglect of the Tenants. As such, I find that it is the Landlord's responsibility to repair the door lock in the rental unit. I dismiss the claims to purchase and replace the lock without leave to reapply.

The Landlord is claiming \$48.05 for postage fees relating to the service of the Proceeding Package and evidence to the Tenants. I find that the cost of mailing is not recoverable by the Tenants and dismiss this claim without leave to reapply.

The Landlord is claiming \$18.88 for advertising costs to list the rental unit for rent.

According to the Residential Policy Guideline #4; 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 tenancy agreement between the parties lacks a liquidated damages clause which stipulates that the Tenants would be charged a pre estimate of the cost

associated with re-renting the rental unit if they breached the fixed term. As there is no liquidated damages clause, I find that the Landlord's claim for advertising is dismissed without leave to reapply.

The Landlord is claiming compensation in the amount of \$1,268.27 for Fortis bills and \$176.54 for Hydro bills. The Landlord stated that these costs relate to usage between December 2022 to April 2023 while the rental unit sat vacant.

After finding that the Landlord did not mitigate their loss with respect to re-renting the rental unit once it became vacant, I find that the Landlord is not entitled to compensation for utilities during the months that the rental unit sat vacant. I therefore dismiss this claim without leave to reapply.

As the Landlord was unsuccessful with their Application, I find that they are not entitled to the return of the filing fee.

The Tenants' Claims

The Tenants are claiming \$471.66 relating to an overpayment of utilities. During the hearing, the Tenants confirmed that they were responsible for paying 7/8 of the utilities while the Landlord was responsible for paying 1/8. The parties agreed that this formed part of the tenancy agreement. The Tenants are claiming for compensation as they do not feel as though the utilities were equally divided.

I find that the parties agreed to the division of utilities in the tenancy agreement. I find that the Landlord did not breach the Act or the tenancy agreement with respect to the utility charges. During the hearing, the Landlord agreed to compensate the Tenants \$55.17 for the remaining unpaid utility charges owed by the Landlord. As such, I award the Tenants **\$55.17**, however, dismiss the remaining balance of the Tenants claim without leave to reapply.

The Tenants are claiming for the return of the security deposit in the amount of \$1,950.00.

Section 38(1) of the *Act* requires a landlord to repay deposits or make an application to keep them by making a claim against them by filing an application for dispute resolution within 15 days after receiving a tenant's forwarding address in writing or the end of the tenancy, whichever is later. If a landlord fails to repay deposits or make a claim against

them within 15 days, section 38(6) of the *Act* confirms the tenant is entitled to receive double the amount of the deposits.

In this case, the Tenants argument that the Landlords extinguished their right to claim against the security deposit has no effect, as extinguishment under either sections 24 and 36 of the *Act* (failure to provide a copy of the report) only relate to claims for damage to the rental unit. In this case, the Landlord's claims also relate to loss, as a result, whether they extinguished or not has no bearing on the outcome of the current Application.

I find the Tenants provided the Landlord with their forwarding address in writing, which was received by the Landlord on November 29, 2022. I find that the tenancy ended on November 30, 2023, which was later than when the forwarding address was received. Therefore, pursuant to section 38(1) of the *Act*, the Landlords had until December 15, 2022, to repay the deposit or make a claim against it. I find that the Landlord submitted their Application on December 9, 2022, which is within the time limit permitted under the *Act*. Accordingly, I find the Tenants are not entitled to the return of double the amount of the deposit.

The Tenants are claiming for compensation in the amount of \$455.00 for loss of use of the driveway and half of the garage during the last month of their tenancy. The Tenants are also claiming \$750.00 for loss of use of the backyard from July 2022 to November 2022. I find that the Tenants provided insufficient evidence to demonstrate that they had exclusive use of the garage, driveway, or backyard. I find that the Tenants provided insufficient evidence to demonstrate that the Landlord terminated a service or facility. Lastly, I find that the Tenants did not mitigate their loss by not discussing their concerns with the Landlord. As such, I dismiss these claims for loss without leave to reapply.

As the Tenants were unsuccessful with their Application, I find that they are not entitled to the return of the filing fee.

I find the Tenants are entitled to a monetary award in the amount of \$1,986.42, which represents the balance of their security deposit with applicable interest currently being held by the Landlord, as well as \$55.17 which is the amount the Landlord agreed to compensate the Tenants.

Pursuant to section 67 of the *Act*, the Tenants are entitled to a monetary order in the amount of \$2,041.59 (\$1986.42 + \$55.17)

Conclusion

Neither the Landlord's nor the Tenants' Application were successful. As such, they are both dismissed without leave to reapply. The Tenants are entitled to monetary in the amount of \$2,041.59. The order should be served to the Landlord as soon as possible and may be filed in and enforced as an order of the Provincial Court of British Columbia (Small Claims).

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: December 14, 2023

Residential Tenancy Branch