Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes Landlord: MNRL-S, MNDCL-S, FFL
Tenant: MNSDS-DR, FFT

Introduction

This hearing dealt with applications made by the parties under the *Residential Tenancy Act* (the "Act").

The Landlord applied for:

- compensation of $1,650.00 for unpaid rent and/or utilities under sections 67 of the Act;
- compensation of $975.00 for monetary loss or other money owed pursuant to section 67 of the Act;
- authorization to retain the security and/or pet damage deposit under section 38 of the Act; and
- authorization to recover the Landlord's filing fee from the Tenant under section 72 of the Act.

The Tenant applied for:

- return of the security deposit and/or pet damage deposit in the amount of $775.00 under sections 38 and 38.1 of the Act; and
- authorization to recover the Tenant's filing fee from the Landlord under section 72 of the Act.

The Landlord and the Tenant attended this hearing and gave affirmed testimony.

Preliminary Matter: Service of Dispute Resolution Proceeding Packages and Evidence

The Tenant confirmed receipt of the Landlord's notice of dispute resolution proceeding package and evidence. The Landlord confirmed receipt of the Tenant's notice of dispute resolution proceeding package and evidence, except the Tenant's video evidence. The Tenant acknowledged that the videos were not served on the Landlord.
Under the Residential Tenancy Branch Rules of Procedure, evidence that is intended to be relied on by a party must be received by the other party and the Residential Tenancy

Branch not less than 14 days before the hearing if the serving party is an applicant, and not less than 7 days before the hearing if the party is a respondent. Digital evidence may be served on a memory stick, by email if the other party provided an email address for service, or by providing a link to a copy of the evidence stored on a file hosting service.

As discussed during the hearing, I have excluded the Tenant's videos from consideration for the purpose of the present applications, as those videos were not served on the Landlord prior to the hearing.

Issues to be Decided

1. Is the Landlord entitled to compensation for unpaid rent or utilities and monetary loss or other money owed?

2. Is the Landlord entitled to retain the security deposit?

3. Are the parties entitled to recover their filing fees?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the parties' applications and my findings are set out below.

This tenancy commenced on August 1, 2022. Rent was $1,550.00 due on the first day of each month. The Tenant paid a security deposit of $775.00 which is held by the Landlord.

The parties' tenancy agreement contains a handwritten clause which appears to state (portions cut off and name redacted for privacy): "Lease expires Aug 1, 2023, at which time it becomes a month-to-m[onth] agreement. I, [Tenant], specifically agree that if I vacate be[fore] this date, I will incur a penalty equivalent to half a month's rent." The Tenant acknowledged that she had signed next to this clause when signing this tenancy agreement.

The parties did not attend any move in or move out inspections of the rental unit and did not complete any condition inspection reports.

In September 2022, the rental unit was accessed by a fire inspection company for an annual fire inspection.

According to the Landlord, this inspection took place on September 13, 2022, and notices had been posted throughout the building a few days in advance to inform tenants. The rental unit failed the inspection because the smoke detector was disconnected and placed next to the bathroom, which had to be relocated to prevent triggering by shower steam. The Landlord and the building handyman moved the smoke detector into the living room.

The Tenant testified that there had been no communication from the Landlord prior to their entry, even though the Tenant was always available via text, phone, and email. There was no notice on the Tenant's door. The Tenant had seen a sign at the front of the building but was unsure when the inspection would take place and was unsure of the exact date. The Tenant went out grocery shopping and returned to find the Landlord and another man in the rental unit. The Tenant testified that this incident took place on September 12, 2022. Elsewhere in the Tenant's evidence, including in a letter to the Landlord dated October 20, 2022 and in an email to the Landlord dated October 21, 2022, the Tenant indicated that this incident had occurred on September 13, 2022.

The Tenant testified that this incident was a shocking violation of the Tenant's privacy. The Tenant subsequently texted the Landlord a "gentle warning" on September 13, 2022. The Tenant explained that she felt unsafe as a single female, and did not feel comfortable engaging with the Landlord as English is not her native language. Following this incident, the Tenant installed a security camera inside the rental unit.

On October 16, 2022, the Landlord and a handyman accessed the rental unit to service the radiator.

According to the Tenant, she had been away from home and received a notification from her camera app that a stranger had entered the rental unit. The Tenant saw it was the Landlord who had entered the unit and moved the Tenant's furniture. The Tenant subsequently received a text message from the Landlord asking if they could change the Tenant's radiator valve. The Tenant realized the Landlord had noticed her security camera. The Tenant replied asking if the Landlord went into her suite. The Landlord messaged the Tenant saying that they have been changing the air vent valves on the end of every radiator in the building, and had been unable to reach the Tenant the day before. The Landlord told the Tenant that it takes about 5 minutes and asked if they

could go ahead. The Tenant replied stating that she thinks the Landlord is already in the suite.

According to the Landlord, notices about changing the radiator valves were posted in the building a few days in advance. The Landlord stated that he had texted and emailed the Tenant with receiving any response and had knocked before entering.

On October 20, 2022, the Tenant emailed the Landlord two letters, one titled “Notice to Move Out” and the other titled “Landlord Entry Restricted”. In these letters, the Tenant advised that she was providing the Landlord with written notice to end her month-to-month tenancy effective October 31, 2022. The Tenant also indicated that the Landlord had trespassed into the rental unit twice contrary to section 29 of the Act, since the Tenant had not given the Landlord permission for entry. The Tenant explained that she did not feel safe staying in the rental unit anymore and requested to terminate the tenancy agreement.

The Landlord replied to the Tenant advising that the parties had signed a one year lease. The Landlord also informed the Tenant that she owed rent for the month of November 2022 and the provisions in the tenancy agreement for moving before the one year lease expiry date will apply.

On October 30, 2022, the Tenant vacated the rental unit. The Tenant emailed the Landlord a mutual agreement to end tenancy effective October 31, 2022, which was not signed or returned by the Landlord.

The Tenant sent her forwarding address via registered mail to the Landlord on January 27, 2023. Tracking records provided by the Tenant indicate the package was delivered on January 31, 2023. The Landlord testified that he received the Tenant’s forwarding address on February 2, 2023. The Landlord submitted his application on February 15, 2023.

The Tenant argued that the Landlord had received her forwarding address as part of a prior application for the return of the security deposit that had been dismissed with leave to re-apply. The Landlord stated that the prior application had listed the rental unit not the Tenant’s forwarding address.

The Landlord seeks compensation for November 2022 rent ($1,550.00), the lease penalty ($775.00), and the cost of cleaning the rental unit ($200.00). The Landlord submitted a cleaning invoice for “full clean including carpet shampoo”.

The Tenant testified that she had cleaned the rental unit before vacating, including wiping the walls. The Tenant submitted pictures of the rental unit into evidence.

Analysis

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.

1. Is the Landlord entitled to compensation for unpaid rent or utilities and monetary loss or other money owed?

Section 67 of the Act states that if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

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.

I will address the Landlord's claims in two parts: (a) loss of November 2022 rent and lease penalty, and (b) cleaning fee.

a. Loss of November 2022 Rent and Lease Penalty

I find this tenancy was to be for a one year fixed term ending on August 1, 2023, based on the handwritten clause in the parties' tenancy agreement.

As explained in Residential Tenancy Policy Guideline 30. Fixed Term Tenancies, neither the landlord nor the tenant may end the tenancy during the fixed term, except for

(i) cause, (ii) agreement of both parties, or (iii) the tenant fleeing family violence or entering into long-term care.

A tenant may end a fixed term tenancy for cause if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the Act.

Under section 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.

Residential Tenancy Branch Policy Guideline 8. Unconscionable and Material Terms ("PG 8") describes a "material term" as 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.

PG 8 states that 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.

PG 8 further states that 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.

While I am concerned by the evidence regarding the Landlord's entries into the rental unit, I do not find it is necessary for me to determine whether the Landlord had breached a material term of the tenancy agreement. This is because I find the Tenant did not give the Landlord a reasonable period after written notice to correct the alleged failure before terminating the tenancy.

I find the Tenant texted the Landlord on September 13, 2022 asking the Landlord to "please text or call [the Tenant] a few hours before coming in" and to let the Tenant

“know in advance” if the Landlord needs to “check something” in the rental unit. I do not find the Tenant to have informed the Landlord in this text message that she considered the Landlord’s entry on or around September 13, 2022 to have been a breach of a material term of the parties’ tenancy agreement. I find the Tenant also did not communicate to the Landlord in writing that she would terminate the tenancy if the Landlord did something similar in the future. Therefore, I do not find this text message to be sufficient notice of a breach of a material term.

I find the Tenant’s October 20, 2022 letter titled “Landlord Entry Restricted” might have served as a written notice of a breach of a material term. However, I find the Tenant gave her notice to terminate the tenancy at the same time as giving this letter to the Landlord. Therefore, I find the Tenant’s notice to terminate the tenancy was premature and did not comply with the requirements of section 45(3) of the Act.

I find the Landlord did not agree for the Tenant to terminate the tenancy by October 31, 2022. I find the Tenant also sent a mutual agreement to end tenancy to the Landlord, which the Landlord did not sign or return to the Tenant. I find the Tenant nevertheless vacated the rental unit by October 30, 2022. I find that in doing so, the Tenant breached the one-year fixed term and unilaterally ended the tenancy without proper notice to the Landlord under the Act.

I find the handwritten clause in the parties’ tenancy agreement in essence stipulates that if the Tenant vacates the rental unit prior to the expiry of the fixed term on August 1, 2023, the Tenant will pay to the Landlord an amount equal to a half month’s rent. I will consider whether this clause is an enforceable liquidated damages clause or an unenforceable penalty clause.

As explained in Residential Tenancy Branch Policy Guideline 4. Liquidated Damages (“PG 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. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

PG 4 further states that if a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally, clauses of this nature will only be struck down as penalty

clauses when they are “oppressive” to the party having to pay the stipulated sum. More importantly, “if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause” (emphasis underlined).

In this case, I find the handwritten clause to be a liquidated damages clause for compensation of a half month’s rent in the event that the Tenant breaches the one year fixed term. Although this clause uses the word “penalty”, I do not find the stipulated sum of a half month’s rent to be extravagant in comparison to the greatest loss that could follow a breach, nor do I find this clause to be oppressive to the Tenant. I find such a clause to be a genuine pre-estimate of loss at the time of entering into the tenancy agreement, because a landlord is likely to incur damages for loss of rental income and additional advertising costs where a tenant breaches a fixed term tenancy.

I accept that the Tenant’s breach of the fixed term and ending the tenancy prematurely on October 30, 2022 resulted in a loss of rental income for the Landlord for the month of November 2022.

However, I find that by virtue of the handwritten clause in the parties’ tenancy agreement, the stipulated sum of a half month’s rent functions as an upper limit on the damages payable by the Tenant for a breach of that clause. I note that as per PG 4, the result would be the same even if the clause were to be struck down as an unenforceable penalty clause.

Based on the foregoing, I conclude that the Landlord’s damages for the Tenant’s breach of the fixed term, as stipulated in the handwritten clause in the parties’ tenancy agreement, is capped at a half month’s rent, or $775.00.

Pursuant to section 67 of the Act, I order the Tenant to pay the Landlord $775.00 for breach of the fixed term. The remainder of the compensation sought by the Landlord under this part is dismissed without leave to re-apply.

b. Cleaning Fee

Under section 37(2)(a) of the Act, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

According to Residential Tenancy Branch Policy Guideline 1. Landlord & Tenant – Responsibility for Residential Premises, a tenant will generally be held responsible for steam cleaning or shampooing the carpets at the end of the tenancy:

- after a tenancy of one year;
- where the tenant has deliberately or carelessly stained the carpet, regardless of the length of tenancy; or
- if the tenant or another occupant had pets which were not caged or if they smoked in the premises, regardless of the length of the tenancy.

I find this tenancy was for a period of less than one year. I find there is insufficient evidence that the Tenant had carelessly stained the carpet, had uncaged pets, or smoked in the rental unit.

Furthermore, I find the pictures of the rental unit submitted by the Tenant show that the rental unit was reasonably clean at the end of the tenancy. I note that a landlord may require a deep clean in order to prepare the unit for the next tenant, which is a higher standard than that of reasonable cleanliness required of a vacating tenant under the Act.

I conclude that the Tenant has not breached the Act with respect to cleaning the rental unit at the end of the tenancy. I dismiss the Landlord's claim for cleaning fees without leave to re-apply.

2. Is the Landlord entitled to retain the security deposit?

Pursuant to sections 24 and 36 of the Act, landlords and tenants can extinguish their rights in relation to the security deposit if they do not comply with the Act and the regulations. Section 38 of the Act sets out specific requirements for dealing with security deposits at the end of a tenancy.

I find the Landlord did not offer the Tenant two opportunities for inspection, in accordance with prescribed regulations, at the start of the tenancy as required under section 23(3) of the Act. Therefore, I find the Landlord's right to claim against the security deposit for damage to the rental unit was extinguished under section 24(2)(a) of the Act.

As explained in Residential Tenancy Policy Guideline 17. Security Deposits and Set Off, extinguishment means that the Landlord may only apply to claim against the security deposit or obtain the Tenant's consent to deduct from the deposit for a claim other than damage to the rental unit. The Landlord may still file a monetary claim against the Tenant for damage to the rental unit after returning the security deposit.

Under section 38(1) of the Act, a landlord must (a) repay a security deposit to the tenant with interest or (b) make an application for dispute resolution claiming against the deposit, within 15 days after the later of:

- the tenancy end date, or
- the date the landlord receives the tenant's forwarding address in writing,

unless the landlord has the tenant's written consent to keep the deposit or a previous order from the Residential Tenancy Branch.

I find the Landlord has made a claim against the security deposit for a claim other than damage to the rental unit (e.g. loss of rental income, lease penalty). I find the Landlord received the Tenant's forwarding address in writing on January 31, 2023, after the tenancy ended, and submitted his application on February 15, 2023. I find the Landlord complied with the 15-day requirement under section 38(1) of the Act. As such, I find the doubling provision of section 38(6) of the Act does not apply.

I note that a forwarding address only provided by the tenant on the application for dispute resolution form does not meet the requirement of a separate written notice and is not to be deemed as providing the landlord with the forwarding address in accordance with section 88 of the Act. Landlords who receive the forwarding address in the application may believe that because the matter is already scheduled for a hearing, it is too late to file a claim against a deposit.

I have found above that the Landlord is entitled to compensation from the Tenant equal to the security deposit held by the Landlord.

Under section 38(4)(b) of the Act, a landlord may retain an amount from a security deposit if after the end of the tenancy, the director orders that the landlord may retain the amount. Additionally, under section 72(2)(b) of the Act, if the director orders a tenant to pay any amount to a landlord, the amount may be deducted from a security deposit due to a tenant.

Pursuant to sections 38(4)(b) and 72(2)(b) of the Act, I authorize the Landlord to retain the Tenant's security deposit in full satisfaction of the amount awarded to the Landlord in this decision.

3. Are the parties entitled to recover their filing fees?

The Landlord has been partially successful in this application and has established a claim for compensation equal to the security deposit held by the Landlord. Therefore, pursuant to section 72(1) of the Act, I order the Tenant to reimburse the Landlord for the Landlord's filing fee, and I dismiss the Tenant's claim for reimbursement of the Tenant's filing fee without leave to re-apply.

Conclusion

The Landlord's claims for compensation and recovery of the filing fee are partially granted for a total amount of $875.00. The remainder sought by the Landlord is dismissed without leave to re-apply. The Landlord is authorized to retain the Tenant's $775.00 security deposit in full.

Pursuant to sections 67 and 72(1) of the Act, I grant the Landlord a Monetary Order of **$100.00** for the balance, calculated as follows:

Item	**Amount**
Liquidated Damages for Breach of Fixed Term Tenancy	$775.00
Filing Fee	$100.00
Subtotal	**$875.00**
Less Security Deposit	- $775.00
Total Monetary Order for Landlord	**$100.00**

This Order may be served on the Tenant, filed in the Small Claims Division of the Provincial Court of British Columbia, and enforced as an order of that Court.

The Tenant's application is dismissed in its entirety without leave to re-apply.

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 02, 2023

Residential Tenancy Branch