Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Municipal Affairs

A matter regarding 491 9TH AVENUE HOLDINGS LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, LRSD, FFL / MNSDS-DR, FFT

Introduction

The hearing was convened following applications for dispute resolution (Applications) from both parties under the *Residential Tenancy Act* (the Act), which were crossed to be heard simultaneously.

The Landlord seeks:

- A Monetary Order for loss under the Act, *Residential Tenancy Regulation* (the Regulation), or tenancy agreement, under section 67 of the Act;
- Authorization to retain all or a portion of the Tenant's security deposit under section 38 of the Act; and
- To recover cost of the filing fee for their Application from the Tenant under section 72 of the Act.

The Tenant seeks:

- An order for the Landlord to return their security deposit under section 38 of the Act; and
- To recover cost of the filing fee for their Application from the Landlord under section 72 of the Act.

Service of Notice of Dispute Resolution Proceeding and Evidence

Both parties acknowledged receipt of the Notice of Dispute Resolution Proceeding (the Materials) for the other's Application. The Landlord also acknowledged receipt of the Tenant's evidence. Given this, I find these records were served in accordance with sections 88 and 89 of the Act.

The Landlord testified they served their evidence to the Tenant via email on December 3, 2024 to the email address given for service on the tenancy agreement. The Tenant's Advocates denied the Tenant received the Landlord's evidence.

The Landlord provided a record of the email containing their evidence. One piece of evidence, namely, a record of the Landlord's website was not attached to the email. I omit this evidence from consideration since the Tenant was not provided a copy ahead of the hearing. I omit the remainder of the Landlord's evidence from consideration as it was served outside of the deadline established in rule 3.14 of the *Rules of Procedure*. Further, based on the Landlord's submissions, I find this evidence was available to be served with the Materials and there was an unreasonable delay in service.

Issues to be Decided

- Is the Landlord entitled to the requested compensation?
- Is the Landlord entitled to retain the Tenant's security deposit?
- Is the Tenant entitled to the return of their security deposit?
- Are either party entitled to recover the filing fee for their respective Applications?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this Decision.

The parties agreed on the following regarding the tenancy:

- The tenancy began on November 1, 2023 for a fixed term ending October 31, 2024 and was set to continue on a month-to-month basis after that.
- The Tenant vacated the rental unit on August 27, 2024.
- Rent was $2,195.00 per month due on the first day of the month throughout the tenancy.
- A security deposit of $1,097.50 was paid by the Tenant which the Landlord still holds.
- There is a written tenancy agreement, a copy of which was entered into evidence.

The Landlord's claim

The Landlord's submissions are as follows. The Tenant sent a letter to the Landlord dated July 2, 2024 providing notice they would be ending the tenancy and vacating the rental unit on September 1, The Tenant's forwarding address was also provided in the letter. The Landlord acknowledged receipt of the letter shortly after July 2, though the precise date was not known.

The Landlord tried to find new tenants mainly by advertising on Facebook, which they testified was done "at some point in July". They held showings of the rental unit and though there was some interest in the rental unit, there were initially no suitable candidates owing to them having large pets or insufficient income levels. A tenant was ultimately found who started renting the rental unit from November 1, 2024. The Landlord seeks to recover loss of rental income from September and October, totalling $4,390.00.

The Tenant's response is as follows. There was no dispute the Tenant ended the tenancy before the end of the fixed term had been reached, but it was submitted that mitigating circumstances were present as the Tenant had regained custody of their child, and requirements imposed by the Ministry of Children and Family Development meant they had to relocate.

It was argued the Landlord did not establish reasonable steps were taken to mitigate their loss of rental income. It was also disputed showings of the rental unit took place while the tenancy was still ongoing.

Security deposit

Though a copy was not provided as evidence, the parties agreed that a condition inspection report was prepared at the start and the end of the tenancy, with the Tenant participating in both inspections.

The end of the tenancy inspection took place on September 1, 2024. The Landlord acknowledged there were no issues with the condition of the rental unit and that the Tenant had not authorized them to retain the security deposit. The Landlord also acknowledged the Tenant had requested the return of the security deposit, and they did not adhere to the request or submit their Application claiming against the deposit until October 7, owing to personal circumstances which they did not wish to discuss.

The Tenant took the position the Landlord had not complied with the 15 day timeframe set out in the Act and requested the return of double the security deposit.

Analysis

Rule 6.6 of the Residential Tenancy Branch *Rules of Procedure* states that 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.

Landlord's claim for unpaid rent

Section 26 of the Act requires tenants to pay rent on time unless they have a legal right to withhold some, or all, of the rent. It was undisputed by the parties that the Tenant paid rent when it was due for the first ten months of the tenancy, though vacated the rental unit on September 1, 2024, sought to end the tenancy before the fixed term had been reached, and rent for the last two months of the fixed-term went unpaid.

Fixed-term tenancies can be ended by a tenant before the end of the term is reached, but only in certain circumstances. Whilst one of these circumstances is if the tenant is fleeing family or household violence or when the tenant has been assessed as requiring long-term care or has been accepted into a long-term care facility, it was undisputed the Tenant had not provided notice in compliance with section 45.1 of the Act. No written evidence to support circumstances outlined in section 45.1 of the Act was provided.

Based on the above, I find the Tenant was not entitled to end this tenancy before the end of the fixed-term and has therefore breached the tenancy agreement by doing so. By failing to pay rent when it was due to the Landlord the Tenant has also breached section 26 of the Act. Per section 7(1) of the Act, the Tenant must therefore compensate the Landlord for this breach.

Section 67 of the Act states that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

I find that the Tenant provided written notice they would be vacating in a letter dated July 2, 2024 , which was acknowledged received soon after this date by the Landlord.

The Tenant indicates in the letter they would be vacating on September 1. Given this, I find it would likely have not been possible to find new tenants to begin a new tenancy by September 2 and some loss of rent would therefore be incurred by the Landlord.

As set out in section 7(2) of the Act, a party must mitigate their loss and whilst the Landlord testified they advertised the rental unit and received some interest, they stated none of the prospective tenants were suitable until a tenant was found to move in from November 1, 2024. The Landlord did not provide any evidence to support the notion there was a lack of suitable tenants, though from their testimony I accept they advertised the rental unit online at some stage, though the details on the date were unclear.

Given the notice period provided by the Tenant, I find that were the Landlord to have reasonably mitigated their losses, one month of rent would have been foreseeable losses, rather than the two requested. I am not satisfied the Landlord fully mitigated their losses and did not find their testimony as to why the prospective tenants were not suitable to be compelling or supported by any evidence.

Submissions were given regarding recent events in the Tenant's personal life which gave an explanation as to why the tenancy was ended before the fixed-term. Whilst I have sympathy for the Tenant and their situation, the Act does not allow me to consider these as valid reasons for ending the tenancy early in the absence of valid notice under section 45.1 of the Act and there are no provisions for this to be applied retrospectively.

Based on the evidence before me, I find that the Landlord has established a claim for unpaid rent, though am not inclined to grant the request for $4,390.00, and find $2,195.00 - the equivalent of one month's rent - to be appropriate compensation in this case.

Claims for the security deposit

Section 38(1) of the Act requires a landlord to either repay the security deposit to the tenant or make an application for dispute resolution claiming against the security deposit within fifteen days of the tenancy ending and receiving the tenant's forwarding address in writing, which ever is later.

A landlord may also retain the security deposit if they either have authority from an arbitrator, or written agreement from the tenant to do so as set out in sections 38(3) and 38(4) of the Act.

Sections 24 and 36 of the Act also states that a tenant may also extinguish their right to the return of a security deposit if they fail to attend an inspection of the rental unit at either the start or end of the tenancy after being given two opportunities to do so, unless the tenant has abandoned the rental unit.

Section 38(6) of the Act states that if a landlord does not take either of the courses of action set out in section 38(1) of the Act, the landlord may not make a claim against the security deposit and must pay the tenant double the amount of the security deposit.

Based on the evidence before me and the testimony of both parties, I find that the tenancy ended on September 1, 2024. The Tenant served their forwarding address on July 3 and the Landlord acknowledged receipt shortly after. In these circumstances and in the absence of clarity on the date of receipt, I apply the deeming provisions of section 90 of the Act. Therefore, the Tenant's forwarding address was deemed received by the Landlord on July 8, the fifth day after sending.

This means the Landlord would have had to either return the security deposit to the Tenant or make an application for dispute resolution claiming against the security deposit by September 16, 2024.

As the Landlord submitted their Application on October 7, 2024 I find they have failed to comply with the fifteen day timeframe set out in section 38 of the Act. I find no evidence that indicates to me the Landlord was entitled to retain the security deposit under either section 38(3) or 38(4) of the Act as the Landlord did not have an outstanding Monetary Order against the Tenant, or have written permission from the Tenant to retain the security deposit. Additionally, I find there is no evidence that the Tenant had extinguished their right to the return of the security deposit per section 38(2) of the Act as I find the Tenant attended the inspections of the rental unit.

Though the Landlord indicated personal circumstances caused the delay in acting regarding the security deposit on their part, they were not willing to expand on their reasons. I am therefore unable to determine if circumstances outside of the control of the Landlord prevented them from complying with the Act such as serious health

problems, for example, and if discretion to not apply the doubling provisions may be called for.

Given the above, I order the Landlord to return double the security deposit to the Tenant per section 38(6) of the Act, plus interest on the deposit.

Per section 4 of the Regulation, interest on security deposits is calculated at 4.5% below the prime lending rate. The amount of interest owing on the security deposit was calculated as $33.41 using the Residential Tenancy Branch interest calculator using today's date. The interest applies only to the original deposit and is not doubled. The Tenant is issued a payment order for $2,228.41 accordingly.

Filing fees

As both parties were at least partially successful with their Applications, each party will bear their own filing fee and I make no orders under section 72 of the Act.

Conclusion

The Landlord is issued a monetary award of $2,195.00 for unpaid rent. The Tenant is issued a monetary award of $2,228.41 for double their security deposit, plus interest.

In these circumstances, the amounts are set off against one another and the Tenant, having been awarded the greater sum, is issued a Monetary Order. A copy of the Monetary Order is attached to this Decision and must be served on the Landlord. It is the Tenant's obligation to serve the Monetary Order on the Landlord. The Monetary Order is enforceable in the Provincial Court of British Columbia (Small Claims Court). The Order is summarized below.

Item	**Amount**
Tenant's monetary award	$2,228.41
Less: Landlord's monetary award	($2,195.00)
Total	**$33.41**

This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: December 18, 2024