Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRL-S, FFL (landlord); MNDCT, MNSD, FFT (tenant)**

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;
- Authorization to recover the filing fee for this application pursuant to section 72.

This hearing also dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for the landlord to return the security deposit pursuant to section 38;
- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

Both parties attended the hearing which lasted 113 minutes. They had opportunity to provide affirmed testimony, present evidence and make submissions. The hearing process was explained.

Preliminary Issue: Service of Notice of Hearing and Application for Dispute Resolution by Landlord

The landlord testified he served the Notice of Hearing and Application for Dispute Resolution including all evidence upon the tenant by registered mail sent the day he filed his application, that is, January 6, 2020, or shortly thereafter, and deemed received by the tenant under section 90, five days later, that is, on January 11, 2020. The landlord provided the tracking number in support of service which is referenced on the first page.

The tenant acknowledged receipt of the registered mail. However, the tenant denied receiving the landlord's materials. She testified that the only document inside the envelope was the Notice to End Tenancy which she had served on the landlord to confirm the date she was vacating the unit.

The tenant submitted a video which she testified showed her opening the sealed envelope. Her name and address are visible on the envelope as well as the landlord's return address and the tracking number. The video showed the tenant removing the contents, which consist solely of her own Notice to End Tenancy.

Section 90 of the *Act* sets out when documents that are not personally served are considered to have been received. *Unless there is evidence to the contrary*, a document is considered or 'deemed' received on the fifth day after mailing if it is served by mail (ordinary or registered mail).

Residential Policy Guideline 12. Service Provisions provides guidance on determining deemed receipt, as follows:

> *The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done.*
> *…*
> *A party wishing to rebut a deemed receipt presumption should provide to the arbitrator* ***clear evidence*** *that the document was not received or evidence of the actual date the document was received…It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.*
>
> *The decision whether to make an order that a document has been sufficiently served in accordance with the Legislation or that a document not served in accordance with the Legislation is sufficiently given or served for the purposes of the Legislation is a decision for the arbitrator to make on the basis of all the evidence before them.*

The parties provided contradictory testimony and took adverse positions. I therefore turn to a determination of credibility.

I have considered the parties' testimonies, their conduct during the hearing and the extent to which their testimony is consistent with a reasonable interpretation of the events and evidence.

Considering the totality of these factors, I found the tenant to be the more credible witness. The tenant provided consistent, logical testimony which was supported by documentary evidence in all key aspects. The tenant's submissions were well-organized and reasonable. The tenant was calm and forthright, carefully and clearly describing the events between the parties.

The tenant meticulously recorded events as they occurred and submitted a lengthy written chronology of events. The tenant also confirmed key events with the landlord, for example, through email or texts, which were submitted as evidence; these often included the landlord's replies which were helpful in determining what took place. Her testimony seemed straightforward, without embellishments or deceptions

On the other hand, I found the landlord was argumentative and unreasonable at times. Some of his statements were contradicted by the tenant's evidence such as texts and other correspondence between the parties submitted as evidence. The written documents cast doubt on his testimony.

I found that the landlord avoided answering questions in a direct and forthright manner. When asked to explain an event, the landlord often shouted denials without addressing the issue at hand.

Several times, I attempted unsuccessfully to stop the landlord's loud talking which rose from time to time to the level of yelling. I warned the landlord several times about his unacceptable conduct at the hearing

Based on these considerations, I concluded the landlord was often not being truthful. For these reasons, I place little weight on his testimony.

Considering the testimony of both parties and the tenant's documentary evidence, I find that the tenant's testimony was credible in all material respects. I give significant weight to her testimony.

I therefore accept the tenant's evidence that the registered mail received by her did not contain the landlord's evidence. I find the tenant has submitted clear evidence to rebut the presumption of delivery of the landlord's documents. I find that the landlord did not serve the evidence package as required under the Act.

I will therefore not consider any of the landlord's submitted evidence.

Preliminary Issue 2: Service of Notice of Hearing and Application for Dispute Resolution by Tenant

The tenant testified she served her package of evidentiary material, consisting of many texts, correspondence, a written summary of events and other documents, by sending to the landlord by registered mail on May 5, 2020 and deemed received by the landlord five days later, on May 10, 2020 under section 90.

The tenant stated she mailed the documents to the landlord at the address he provided on his Notice of Hearing, a copy of which was referenced, and the landlord's address ascertained. The tenant submitted the tracking number which is referenced on the first page.

The landlord denied receipt. The landlord confirmed that the address on the Notice was the address he provided. However, he said the tenant should have sent the materials to another address. It was unclear why the landlord asserted the tenant should have sent the documents to another address other than the one he provided. The landlord could not clarify his response with a reasonable explanation.

For the reasons set out above, I prefer the tenant's testimony as supported by evidence to the landlord's testimony. I give little weight to the landlord's testimony.

I therefore find that the tenant served the landlord on May 10, 2020 with the Notice of Hearing and Application for Dispute Resolution as required by the Act and pursuant to sections 89 and 90.

Issue(s) to be Decided

Is the landlord entitled to:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;

- Authorization to recover the filing fee for this application pursuant to section 72.

Is the tenant entitled to:

- An order for the landlord to return the security deposit pursuant to section 38;

- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the landlord, not all details of the submissions and arguments are reproduced here. The relevant and important aspects of the claims and my findings are set out below. Each party submitted a considerable amount of evidence with conflicting testimony during a hearing which lasted 113 minutes.

The parties agreed the tenancy began on October 1, 2019 and the tenant vacated on November 30, 2019. The tenancy was for a one-year fixed term. The rent was $1,490.00 payable on the first of the month. The tenant provided a security deposit of $745.00 which is held by the landlord without authorization of the tenant.

A copy of the agreement was submitted as evidence which contains a "no pets clause".

The parties completed a condition inspection on September 30, 2019 on moving in. No inspection on move-out took place.

The tenant testified she understood the apartment building was pet-free as stated in the agreement. She explained that she was employed and worked from home; she required a quiet place to work.

The tenant testified that shortly after she moved in, she heard the loud, constant sound of birds from two other apartments. The persistent noise disturbed her work and her sleep. She was shocked and upset. The sound interfered with her ability to concentrate, perform her work, rest, and otherwise enjoy being in the unit. The noise “never stopped, even at night”.

On October 11, 2019, the tenant sent a text complaining about the noise of the birds to the landlord along with an audio file of the sound. The landlord replied with text, a copy of which was submitted, in which he said that other occupants of the building “were used to” the sound of the birds. He also said the tenant could move out if they wanted.

The tenant decided that since the landlord was not going to do anything, and she could not live and work in the unit with the constant noise, she had to move; she informed the landlord she accepted his offer to move out. The parties exchanged texts, copies of which were submitted, about the tenant’s date of departure.

The landlord acknowledged that he did not contact the pet owners about the noise or make any effort to resolve the matter.

The parties agreed the tenant would vacate on November 30, 2019. The landlord sent the tenant a text stating:

> *Please drop a move out notice with your signature in the office, located in the lobby. The tenancy will be ended on Nov 30 at 1:00 PM. Deposit will be returned to you within 15 days after your tenancy ended (Dec 15) by the tenancy act. [as written]*
>
> [emphasis added]

To confirm the agreement, the tenant sent the landlord a letter dated November 18, 2019 both by email and by registered mail to the landlord’s address on the lease, enclosing a Notice to End Tenancy form completed with the vacancy date of November

30, 2019; a copy of the Notice was submitted as evidence which included the tenant's forwarding address. The tracking number in support of service is referenced on the first page.

The landlord replied by email the same day (November 18, 2019) and acknowledged receipt of the letter and Notice by email. A copy of the email was submitted as evidence.

At the hearing, the landlord denied receiving the registered mail although he acknowledged receipt of the email with the Notice to End Tenancy on November 18, 2019.

The tenant subsequently sent the landlord a text, a copy of which was submitted, suggesting a time for a condition inspection on moving out. The landlord did not respond. No moving out inspection was conducted.

The tenant testified that she expected to receive the return of her security deposit soon after moving out, as promised by the landlord in his text.

The tenant submitted a lengthy written argument setting out what took place and attaching confirming documentary evidence.

The following is a summary of key facts as alleged by the tenant:

1. The parties agreed the tenant would move out of the unit at the end of November 2019; the tenant vacated the unit on November 28, 2019 having provided her forwarding address to the landlord;
2. The landlord did not attend the condition inspection at the time suggested by the landlord; the landlord did not schedule any inspection;
3. Before the vacancy date, the landlord promised to return the security deposit to the landlord within two weeks and did not do so;
4. The landlord did not bring an application to keep the security deposit within 15 days of the end of the tenancy or the provision of the forwarding address;
5. On December 2, 2019, without informing the tenant, the landlord issued a 10-Day Notice to End Tenancy for Non-payment of Rent ("Ten-Day Notice"); a copy was submitted which stated that the tenant owes rent for the month of December 2019;
6. The landlord submitted a witnessed Proof of Service form stating that the landlord posted the Ten-Day Notice to the unit's door on December 2, 2019 (now vacated by the tenant);

7. The tenant asserted she did not owe any rent as the parties, as stated, agreed that the tenant would move on November 30, 2019 and the landlord knew she had vacated the unit on November 28, 2019; the tenant had no knowledge of the Ten-Day Notice;

8. On December 14, 2019, unbeknownst to the tenant, the landlord brought an Application for Direct Request, a non-participatory application, claiming that the tenant had been served with the documents as described and claiming outstanding rent for December of $1,490.00;

9. On December 24, 2019, an arbitrator issued an Order of Possession and a Monetary Order for $1,590.00 for December's rent and reimbursement of the filing fee of $100.00;

10. On December 24, 2019, the landlord sent the tenant a copy of the Monetary Order with an email stating that if the tenant does not e-transfer the amount with 24 hours, the tenant would face arrest;

11. The December 24, 2019 email was copied to the Human Resources department of the tenant's employer which the tenant testified caused extreme embarrassment and distress;

12. On January 1, 2020, the landlord sent another email to the tenant, again copied to her employer, warning her not to "threaten me again"; the tenant testified that she did not threaten the landlord and surmised that the statement was a ploy to exert pressure on her to pay;

13. The tenant applied for a Review Consideration of the Decision and Orders;

14. On January 16, 2020, another arbitrator issued a Review Consideration decision and suspended the Decision and Orders of December 24, 2019 ordering that a new hearing take place;

15. A Review Hearing was held March 2, 2020;

16. At the Review Hearing, the landlord denied receipt of the Review Consideration and the tenant's evidence package; the arbitrator found that the landlord had been served;

17. The Arbitrator at the Review Hearing found that the landlord was "aware that the tenant was vacating the rental unit on November 28, 2019" the landlord had posted the documents to the door of the unit knowing that the tenant was no longer occupying the unit; the Arbitrator granted the landlord liberty to reapply for unpaid rent;

18. The landlord brought the second and present application for a monetary award on January 6, 2020, claiming two months' loss of rent; the landlord requested authorization to apply the security deposit to the award;

19. The tenant filed a cross-application on January 30, 2020 applying for the return of the security deposit and a monetary award for both loss of quiet enjoyment and aggravated damages. Both applications are heard today.

The landlord acknowledged sending letters with the Monetary Order to the tenant's employer. The tenant testified her termination was later ended by the employer although she is uncertain of the import of the landlord's actions.

The landlord's claim is as follows:

ITEM	AMOUNT
Rent for month of December 2019	$1,490.00
Rent for the month of January 2020	$1,490.00
Reimbursement of filing fee	$100.00
TOTAL CLAIM - LANDLORD	**$3,080.00**

The landlord claimed the unit was unoccupied after the tenant vacated on November 30, 2019. He claimed two months' rent as the tenant had agreed to a fixed term of one year and vacated before the end of the term.

During the hearing, the landlord acknowledged that the unit was rented to a new occupant on January 1, 2020.

Summary of the Tenant's Claim

The tenant claimed the following:

ITEM	AMOUNT
Loss of quiet enjoyment	$450.00
Aggravated damages	$500.00
Security deposit	$750.00
Security deposit - doubled	$750.00
Reimbursement of filing fee	$100.00
TOTAL CLAIM	**$2,550.00**

Each of the tenant's claims is addressed below. The landlord disagreed with the tenant's testimony regarding key events and the timeline.

Tenant's claim - Loss of Quiet Enjoyment

The tenant claimed compensation for loss of quiet enjoyment of $450.00. The tenant said that she moved in to the unit confident that no pets were permitted as stated in the tenancy agreement. Instead, pets in other units, permitted by the landlord, were so loud throughout the day and the night, that she had trouble sleeping and working.

The tenant expected the landlord to assure peace and quiet. However, the landlord did not protect the tenant's right to quiet enjoyment but told her to leave if she did not like it. The tenant said that she was unable to work effectively and her relationship with her employer suffered.

The landlord's response was that the pets were not disturbing anyone else. He testified he believed he had no obligation to do anything about the complaint.

Aggravated Damages

The tenant requested compensation for aggravated damages of $500.00. The tenant claimed that the landlord knew there were pets in the building and should have told the tenant; if fully informed, the tenant could have decided whether to move in.

The tenant said the landlord had a duty to respond appropriately to her valid complaint. She testified that the landlord did not seem to care whether she was inconvenienced; he appeared indifferent and did nothing to lower the noise level so she could sleep and work. There was nothing she could do for the two months until she vacated.

The landlord denied that he had been anything other than an exemplary landlord. He repeated that the pets in the building did not matter. The landlord acknowledged that he had posted the Ten-Day Notice on the door of the vacant unit after the tenant vacated and that he subsequently obtained a Monetary Order and Order of Possession without the tenant's knowledge. The landlord expressed a lack of concern over the events.

Security Deposit

As previously stated, and repeated here, the tenant claimed the landlord failed to return her security deposit within 15 days of the provision of the forwarding address and the end of the tenancy. She claimed a doubling of the security deposit under the Act.

As stated above, the tenant claimed that she provided her forwarding address to the landlord in her Notice to End Tenancy, receipt of which the landlord acknowledged on November 18, 2019.

The Notice and the landlord's email of acknowledgement were submitted as evidence.

The landlord asserted that any award to the tenant had to be offset by his claims of loss of income, above.

Analysis

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the submissions and arguments are reproduced here. The relevant and important aspects of the claims, key admissible documents, and my findings are set out below.

Landlord's claim

For the reasons expressed earlier, I prefer the tenant's testimony to the landlord's; the tenant's testimony was supported in all material aspects by submitted materials, including texts from the landlord.

I find that the exchange of texts shows that the parties agreed the tenant could vacate the unit at the end of November 2019. I find the landlord told the tenant he would return the security deposit within two weeks of her leaving. I find the landlord was sent the Notice to End Tenancy on November 14, 2019, when the landlord acknowledged receipt in a reply email which set out that the tenant was leaving at the end of the month.

From a review of the testimony, the documents and in consideration of my assessment of each party's credibility, I find the landlord has no claim against the tenant for loss of rent after she vacated at the end of November 2019.

I accordingly dismiss the landlord's claim without leave to reapply.

I will now turn to a discussion of the tenant's claims.

Tenant's claim – loss of quiet enjoyment

Section 7(1) of the Act provides that if a landlord does not comply with the *Act*, the regulations or their tenancy agreement, the non-complying landlord must compensate the tenant for damage or loss that results. The party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Section 22 of the *Act* deals with the tenant's right to quiet enjoyment. The section states as follows:

> 22 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.*
>
> [emphasis added]

Section 60 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide sufficient evidence to establish **all** of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

In this case, the onus is on the tenant to prove entitlement to a claim for a monetary award. 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. *Policy Guideline 16 – Compensation for Damage or Loss* provides guidance on determining damage or loss and compensation.

The Residential Tenancy Policy Guideline # 6 - Entitlement to Quiet Enjoyment states in part as follows:

> *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.*
> *…*
>
> *A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16).*
>
> (Emphasis added)

For the reasons stated above, I found the tenant credible in all aspects. I accept her description of the inconvenience and disturbance caused by the unexpected sound of birds from other units and find this was a f*requent and ongoing interference* and an *unreasonable disturbance*. I believe her description of loss of sleep and the negative effect the constant sound had on her ability to perform her work duties. I find the tenant was able to live in the unit during this period but was significantly deprived of her right to

live peacefully. I find she suffered *substantial interference with the ordinary and lawful enjoyment of the premises.*

I find the landlord did not ensure the tenant's right to quiet enjoyment and failed to act or to respond adequately. I accept the tenant's testimony, as supported by texts, that the landlord was indifferent and dismissive of the tenant's complaints. I find the landlord was *aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.*

I have considered the parties' testimony and evidence, and I find the tenant has met the burden of proof on a balance of probabilities for a claim for loss of quiet enjoyment for a period of 2 months. I find it is reasonable that the tenant should receive compensation in the amount requested of $450.00.

Tenant's claim – aggravated damages

The tenant claimed for aggravated damages in the amount of $500.00.

Policy Guideline 16 – Compensation for Damage or Loss defines aggravated damages and states that an arbitrator may award compensation in appropriate cases. The Guideline states as follows:

> *An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:*
>
> …
>
> *"Aggravated damages" are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence.*

I will not repeat the facts described above or findings of credibility. I accept the tenant's testimony that she was shocked at the volume of the noise and the landlord's indifference to the effect on her. I accept, as she described, she completely lost faith in the landlord when he failed to effectively address the noise, that his indifference was high-handed and completely unexpected, and that moving in and out of a unit in a 2-month period had a profound negative impact of her health and employment.

I find the landlord provided no reasonable explanation for his failure to take appropriate action or live up to his duty as a landlord.

I have considered the parties' testimony and evidence, and I find the tenant has met the burden of proof on a balance of probabilities for a claim for aggravated damages in the amount requested of $500.00. I accordingly award the tenant this amount for this aspect of the claim.

Tenant's claim – security deposit

Section 38 of the Act requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

If that does not occur, the landlord must 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 permission to keep all or a portion of the security deposit pursuant to section 38(4)(a).

The tenancy ended the end of November 2019 and I find the tenant previously provided her forwarding address. The history of the landlord's application for a monetary order by the Direct Request Process is set out earlier. The landlord brought the current application on January 6, 2020, outside the 15-day period. I have dismissed the landlord's claim for damages.

I accept the tenant's uncontradicted evidence they have not waived their right to obtain a payment pursuant to section 38 of the Act. I accept the tenant's evidence that the tenant gave the landlord written notice of their forwarding address before the last day of the tenancy.

Under these circumstances and in accordance with sections 38(6) and 72 of the Act, I find that the tenant is entitled to a monetary award of double the security deposit as well as reimbursement of the filing fee.

Summary of Award

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

The tenant's award is summarized as follows:

ITEM	AMOUNT
Loss of quiet enjoyment	$450.00
Aggravated damages	$500.00
Security deposit	$745.00
Security deposit - doubled	$745.00
Reimbursement of filing fee	$100.00
TOTAL MONETARY ORDER	**$2,540.00**

Conclusion

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

I grant the tenant a monetary order pursuant to section 38 in the amount of **$2,540.00** as described above.

This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) to be enforced as an order of that Court.

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: June 10, 2020

Residential Tenancy Branch