



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNSD, FF

Introduction

This hearing was scheduled in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord has made application to retain all of the security deposit and to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

The Tenants filed an Application for Dispute Resolution, in which the Tenants made application for the return of double their security deposit and to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

Both parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, and to make relevant submissions to me.

Issue(s) to be Decided

The issues to be decided are whether the Landlord is entitled to retain any portion of the Tenants' security deposit and whether either party is entitled to recover the filing fee for the cost of this Application for Dispute Resolution.

Background and Evidence

The Landlord and the Tenant agree that this tenancy began on November 29, 2001 and ended on August 31, 2009. The parties agree that the Tenants were paying monthly rent of \$1,294.00 at the end of the tenancy; that a security deposit of \$600.00 was paid to the Landlord on November 29, 2001; and that the Tenants provided the Landlord with their forwarding address, in writing, on, or about July 27, 2009.

The Landlord and the Tenant agree that the Landlord gave the Tenants a cheque for \$394.87, dated September 15, 2009, which represented a partial return of the security deposit. The parties agree that the Landlord did not have the Tenants' permission to retain any portion of the security deposit. The parties agree that the cheque was incomplete and does not, therefore, represent legal tender.

The Tenants filed their Application for Dispute Resolution on September 25, 2009. The Landlord filed her Application for Dispute Resolution on October 21, 2009.

The Landlord stated that she recalls walking though the rental unit with the male Tenant and his former spouse at the beginning of the tenancy in 2001, at which time she noted two or three deficiencies in the rental unit that she advised the Tenant she would repair. She acknowledged that she did not complete a formal Condition Inspection Report at the beginning of the tenancy.

The male Tenant stated that he believes his former spouse inspected the rental unit to ascertain the condition of the rental unit at the beginning of the tenancy but they were not given a formal Condition Inspection Report and they were not given a copy of the notes that the Landlord stated she made at the beginning of the tenancy. He does not dispute that the rental unit was in reasonably good condition at the beginning of the tenancy.

The Landlord and the Tenants agree that they had agreed to jointly inspect the rental unit at 1300 hours on August 31, 2009; that a short time prior to the scheduled inspection the Tenants advised the Landlord that they would be unable to attend the inspection; and that the Tenants did not attend the inspection at the scheduled time.

The Landlord stated that she phoned the Tenant in the afternoon of August 31, 2009 and advised him that the rental unit was not cleaned. She stated that during their telephone conversation she advised the male Tenant that he should come to the rental unit at 1600 hours, and he replied that he would not be attending. She acknowledged that she did not attempt to schedule a second time for a condition inspection in writing.

The male Tenant stated that he believes he did participate in the condition inspection on August 31, 2009, albeit over the telephone.

The Landlord is claiming compensation, in the amount of \$115.55, to repair and paint several walls in the rental unit. The Landlord stated that there were numerous small holes in the walls of this rental unit, one of which was in the hallway and was approximately 3"X5". She stated that the Tenants had attempted to repair the holes but the repairs were rough and had not been properly sanded. She contends the damage to the walls exceeds "normal wear and tear". She submitted an estimate from a painting company which indicates that it will cost \$116.55 to repair walls in the rental unit that are, in the opinion of the painter, "over normal wear and tear". The Landlord submitted three photographs of some of the repairs made to the walls in the rental unit, one of which appears to be larger than one would typically associate with hanging something

on the wall. The Landlord submitted several photographs of the walls after they have been repaired by a professional.

The Tenant agrees that he did repair several small holes in the wall and that the repairs were not of a professional standard. He stated that all of the holes were caused by the Tenants hanging things on the wall and he denies making the 3" X 5" patch that is in the hall.

The Landlord and the Tenant agree that some of the walls in the rental unit were painted in August of 2006, at the expense of the Landlord, and that some of the walls have not been painted since the beginning of this tenancy.

The Landlord is seeking compensation, in the amount of \$19.99, because the manuals for the dishwasher and the stove are missing from the rental unit. The Landlord did not experience a financial loss as a result of the missing manual for the dishwasher. The Landlord stated that the stove in the rental unit was purchased in 1998; that the manual for the stove was in the rental unit at the beginning of the tenancy; that the manual for the stove was not in the rental unit at the end of the tenancy; that she was advised by the Tenants that the female Tenant had discarded the manuals; that she needed the manual so that she could operate the self-cleaning oven; and that she obtained the information she needed to operate the self-cleaning oven from the internet, at a cost of \$19.99. The Landlord submitted no evidence to corroborate her statement that the manuals were in the rental unit at the beginning of the tenancy.

The male Tenant stated that he does not know if there was a manual for the stove in the rental unit at the beginning of the tenancy but he does not recall seeing one; that the rental unit was occupied by at least one other person after the stove was purchased and that person could have discarded the manual; that he did not discard the manual; and that he told the Landlord at the end of the tenancy that he does not recall seeing the manual.

The female Tenant stated that she did advise the Landlord that she had discarded some manuals for items that belonged to the Tenants but she did not advise the Landlord that she discarded the manual for the stove. She denies discarding the manual for the stove.

The Landlord is seeking compensation, in the amount of \$111.51, for the cost of cleaning the rental unit. The Landlord submitted photographs to show that one corner of the living room near the baseboards had not been properly vacuumed; that a baseboard in a bedroom had not been cleaned; that the areas behind the fridge and stove had not been properly cleaned; that the stove and oven had not been properly cleaned; that the washing machine had not been properly cleaned; and that one drawer had not been properly cleaned. She submitted a cheque to show that she paid her cleaner \$100.00 to clean the rental unit and a receipt to show that she paid \$11.51 for cleaning supplies.

The male Tenant acknowledged that they did not clean the stove; that they did not clean behind the fridge because it was difficult to move the fridge; that they did not clean behind the stove because it was difficult to move the stove; that the Landlord's claim for cleaning was exaggerated; and that they would be willing to compensate the Landlord for cleaning, in the amount of \$60.00.

The female Tenant stated that she cleaned the rental unit extensively and that they used a cleaning lady on a regular basis, at a cost of \$60.00 every three weeks.

Analysis

The evidence clearly establishes that the parties had a tenancy that ended on August 31, 2009; that a security deposit of \$600.00 was paid to the Landlord on November 29, 2001; and that the Tenants provided the Landlord with their forwarding address, in writing, on or about July 27, 2009.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit plus interest or make an application for dispute resolution claiming against the deposits. In the circumstances before me, I find that the Landlord failed to comply with section 38(1), as the Landlord did not return the security deposit or file an Application for Dispute Resolution within fifteen days of the tenancy ending.

I find that the Landlord would have failed to comply with section 38(1) of the *Act* even if the cheque, dated September 15, 2009, that she returned to the Tenants had been properly completed, as she did not return the entire security deposit plus interest and she did not have the authority to retain any portion of the deposit. The *Act* does not give a landlord the right to unilaterally retain a portion of the security deposit simply because the landlord feels a debt is owed to them.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1), the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(1) of the *Act*, I find that the Landlord must pay the Tenant double the security deposit that was paid, plus any interest due on the original amount.

Section 36(1) of the *Residential Tenancy Act (Act)* stipulates that a tenant's right to the return of the security deposit is extinguished if the landlord complied with section 35(2) of the *Act*, and the tenant has not participated in an inspection of the rental unit on either occasion. In these circumstances the Landlord did not comply with section 35(2) of the *Act* because she did not provide the Tenants with at least two opportunities for the inspection, as prescribed by the *Residential Tenancy Act Regulation*. Section 17(2)(b) of the *Residential Tenancy Act Regulation* stipulates that the landlord must propose a second opportunity to participate in the condition inspection with a notice in the approved form, which is a written form that is generated by the Residential Tenancy

Branch. As the Landlord did not comply with section 35(2) of the Act, I find that the Tenants have not extinguished their right to the return of their security deposit.

Although the Landlord's right to claim against the security deposit is extinguished because the Landlord did not comply with section 35(2) of the Act, pursuant to section 36(2) of the *Act*, sections 38(4), 62(3), and 72(2) permit me to offset the cost of damages against the security deposit held by a Landlord.

After hearing the contradictory evidence regarding the condition of the walls at the end of this tenancy and viewing the photographs that were submitted in evidence, I find that the damage to the walls of this rental unit constitutes reasonable wear and tear. In reaching this conclusion I was strongly influenced by the photographs of the repairs to the walls which, in my view, are typical of repairs made in preparation for painting, particularly when some of the walls have not been painted for approximately three years and some of the walls have not been painted for approximately eight years. In my view, the photographs do not support a conclusion that the walls in this rental unit were damaged by misuse or neglect.

Section 37(2) of the Act requires tenants to leave a rental unit undamaged, except for reasonable wear and tear. As tenants are not required to repair damage that is the result of reasonable wear and tear, I hereby dismiss the Landlord's application for compensation for repairing the walls in the rental unit.

There is a general legal principle that places the burden of proving a fact on the person who is claiming compensation for damages, not on the person who is denying the damage. In these circumstances, the burden of proof rests with the Landlord and I find that the Landlord has submitted insufficient evidence to show that the manual for the stove was in the rental unit at the beginning of the tenancy. In reaching this conclusion, I was strongly influenced by the fact that the Landlord submitted no evidence to corroborate her statement that the manual was in the rental unit at the beginning of the tenancy; that the Landlord did not document on a written report the contents of the rental unit at the beginning of this tenancy; that this tenancy began over eight years ago and it would be difficult for the average person to specifically remember what manuals were in a rental unit; and that this rental unit was occupied prior to these Tenants moving into the rental unit and that occupant could have discarded the manual. As the Landlord has not established that the manual for the stove was in the rental unit at the beginning of the tenancy, I hereby dismiss the Landlord's application for compensation for the missing manual.

I find that the Tenants failed to comply with section 37(2) of the *Act* when they did not properly clean the rental unit at the end of the tenancy. In determining that the Tenants did not properly clean the rental unit at the end of the tenancy I was strongly influenced by the Tenants' admission that some areas of the rental unit were not properly cleaned and by the photographs of those areas that were submitted in evidence.

I find that the Landlord is entitled to compensation for any damages that flow from the Tenant's failure to leave the rental unit in reasonably clean condition. I find that the Landlord's claim for cleaning costs in the amount of \$111.51 to be reasonable, as they are supported by documentation that establishes she incurred these costs and appears reasonable compensation for the cleaning that the Tenants acknowledge was required.

Conclusion

I find that the Tenants have established a monetary claim, in the amount of \$1,272.92, which is comprised of double the security deposit of \$600.00; \$22.92 in interest on the original security deposit; and \$50.00 in compensation for the filing fee paid by the Tenants for this Application for Dispute Resolution.

I find that Landlord has established a monetary claim, in the amount of \$161.51, which is comprised on \$111.51 for cleaning the rental unit and \$50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution.

After offsetting these monetary awards pursuant to section 72(2) of the *Act*, I grant the Tenants a monetary Order for the amount \$1,111.41. In the event that the Landlord does not comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court and 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: January 14, 2010.

Dispute Resolution Officer