



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 convened by way of conference call to deal with the landlord's application for an order permitting the landlord to retain a portion of the security deposit and to recover the filing fee from the tenant for the cost of this application.

Both parties attended the hearing, gave affirmed evidence and were given the opportunity to cross examine each other on their evidence.

The landlord provided photographic and other paper evidence in advance of the hearing, and provided same to the tenant. All evidence has been reviewed and considered.

Issues(s) to be Decided

Is the landlord entitled to retain a portion of the security deposit?

Background and Evidence

This month-to-month tenancy began on October 1, 2009 and ended on May 1, 2010. Rent in the amount of \$775.00 was payable in advance on the 1st day of each month, and there are no rental arrears. On September 20, 2009 the landlord collected a security deposit from the tenant in the amount of \$387.50.

The landlord's agent testified that a move-in condition inspection report was completed on October 1, 2009 in the presence of the tenant, a copy of which was provided in

advance of the hearing. She further testified that the tenant had given notice to vacate the unit and she had a telephone conversation with the tenant on April 23, 2010 wherein the parties scheduled a move-out condition inspection for April 30, 2010 at 1:00 p.m. When she arrived the tenant was not there. The tenant's sister was packing and advised the landlord's agent that the move was to take place the following day, as per the notice given. The landlord's agent then returned the following day at 1:00 p.m. with a carpet cleaner and a maintenance person and the tenant was still there as well as some furniture. She stated that she discussed doing the move-out condition inspection and requested a forwarding address from the tenant, but the tenant replied that she did not have a forwarding address and she refused to do the move-out condition inspection. She further testified that she always has carpets cleaned before a new tenant moves in.

The landlord's agent further testified that when she was in the unit on May 1, 2010, the apartment was not cleaned. She testified to dog feces on the carpet and scratches in the paint on the walls.

On May 6, 2010 the landlord's agent received a text message from the tenant which contained the tenant's forwarding address. The landlord applied for dispute resolution the same day claiming against the security deposit. The agent repaid the tenant \$68.55 of that security deposit, withholding \$50.00 for the cost of this application and her claim for carpet cleaning in the amount of \$78.75 and \$180.00 for cleaning, patching the walls, sand, paint and blind repair. A copy of the carpet cleaning invoice and the landlord's Maintenance/Suite Cleaning form were also provided by the landlord in advance of the hearing. She stated that blinds were broken and had to be repaired, and that picture nail holes had to be filled, sanded and painted. The photographs provided show paint peeling from the registers, however that flaw is contained in the move-in condition inspection report as well as peeling paint in the bedroom. The photographs also show scratches in some walls and nail holes from pictures. The photographs also show unclean linoleum under the fridge and the stove, however the evidence is that the parties did not remove the fridge and stove to inspect the condition prior to the tenant taking possession of the rental unit.

A move-out condition inspection report was completed by the landlord's agent, without the tenant present, a copy of which was provided in advance of the hearing, and is dated May 1, 2010.

The tenant testified that her notice indicated that she would be moving from the rental unit on May 1, 2010, and that she did not receive a call from the landlord's agent to schedule a move-out condition inspection. On April 30, 2010 the tenant's sister called the tenant at work advising that she had been yelled at by the landlord. The tenant called the landlord and reminded her what date of vacancy was contained in her notice, being May 1, 2010, not April 30, 2010.

She further testified that on May 1, 2010 she and her sister had cleaned the apartment, but did not remove the nails from pictures on the walls. She had to make 2 trips, which was not her plan, and when she returned to the unit to get her remaining belongings and the nails, the landlord was "in her face" and she was not able to finish moving. The landlord had other people with her, in the way, and that she was mean, rude, demanding and unprofessional. She demanded to do the inspection immediately, but the tenant felt she couldn't due to the move not being completed, and the tenant could not provide her forwarding address at that time because she did not know it off-hand.

The tenant also testified that the blinds were plastic and were old and when she opened the blinds, they broke. She further testified that the broken blinds were reasonable wear and tear due to their condition and age when she moved in. Further, the landlord's agent was aware she had a pet, but did not request a pet damage deposit because she told the tenant the carpet was in rough shape. That evidence is consistent with the move-in condition inspection report.

Analysis

This is an application by the landlord to retain a portion of the security deposit. The onus is on the landlord to prove that the requirements of the *Residential Tenancy Act* have been satisfied, particularly Section 35, which states as follows:

35 (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit

- (a) on or after the day the tenant ceases to occupy the rental unit, or
- (b) on another mutually agreed day.

(2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

(3) The landlord must complete a condition inspection report in accordance with the regulations.

(4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(5) The landlord may make the inspection and complete and sign the report without the tenant if

- (a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
- (b) the tenant has abandoned the rental unit.

The tenant has disputed that any arrangements were made by the parties to conduct the move-out condition inspection, and in the absence of any written evidence of such arrangements, I find that the landlord has failed to establish that the landlord complied with subsection (2) and that the tenant failed to participate. I further find that the tenant did not abandon the rental unit, and therefore, subsection (5) (b) does not apply in the circumstances.

The *Residential Tenancy Act* further states:

36 (2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord

- (a) does not comply with section 35 (2) [*2 opportunities for inspection*],
- (b) having complied with section 35 (2), does not participate on either occasion, or
- (c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

Having found that the landlord has failed to establish that the landlord complied with Section 35 (2), I must also find that the right of the landlord to claim against the security deposit is extinguished.

With respect to the damages and cleaning, the landlord has not made that claim, however refers to damages in the details section of the Application for Dispute Resolution and provided evidence to substantiate that claim. The failure of the landlord to “tick a box” on the form should not prevent the landlord from advancing that claim however I also find that the landlord cannot claim against the tenant for reasonable wear and tear. The landlord did not dispute the evidence of the tenant that the blinds were old and made of plastic, and I find that the damage to the blinds is reasonable wear and tear. I also find that the landlord would have, in her own evidence, cleaned the carpet before a new tenant moved in and therefore, the tenant should not bear that cost.

Further, the condition inspection report that was completed when the tenant moved into the unit shows that the unit was in need of painting due to peeling. The tenant agreed that nail holes were left in the walls, and the photographic evidence supports that.

With respect to the cleaning, the tenant testified that the fridge and stove were not pulled out to inspect the condition behind and under those appliances when she moved in, which was not disputed by the landlord’s agent, however, the landlord has provided photographic evidence showing that they were not clean when the tenant moved out.

The Maintenance/Suite Cleaning form provided is rather vague, which shows a cleaning charge of \$60.00, patching walls \$40.00, sand and paint \$40.00, 6 broken blind pieces for \$27.00 (\$4.50 each) and \$13.00 for installation. The form used by the maintenance person has a place to show the number of hours spent, and what the charge is per hour, but those portions of the document are blank. I have viewed the photographs, and the tenant is required to leave the unit in a state of reasonable health and cleanliness as required by the *Act*, although the landlord being there without scheduling

a condition inspection prior with the tenant, and having additional people with her there preventing the tenant from finishing did not assist in mitigating any damage or claim made by the landlord. Further, the landlord provided photographs showing that the tenant had not cleaned behind the kitchen appliances knowing full well that those areas were not inspected during the move-in condition inspection. Further, photographs of the balcony were provided but are not mentioned in the condition inspection reports at all. I find that the landlord has failed to establish its claim with respect to cleaning.

Conclusion

For the reasons set out above, the landlord's application for an order permitting the landlord to retain the security deposit is hereby dismissed without leave to reapply. Since the landlord has not been successful with the application before me, I decline to order that the landlord recover the filing fee from the tenant for the cost of this application.

I hereby order that the tenant reimburse the landlord for the cost of repairing picture holes in the walls in the amount of \$40.00. I further order that the amount be set-off from the security deposit currently held by the landlord, and I order that the landlord return the balance of the security deposit, in the amount of \$278.95 to the tenant, and I grant the tenant a monetary order in the amount of \$278.95. This order may be filed in the Provincial Court of British Columbia, Small Claims Division 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: September 21 2010.

Dispute Resolution Officer