DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the tenants' application pursuant to section 38 of the *Residential Tenancy Act* (the *Act*) to obtain a return of the remainder of their pet damage and security deposits and to recover their filing fee for this application from the landlord pursuant to section 72 of the *Act*. In their application for dispute resolution, the tenants also requested a monetary award for a $319.00 portion of their May 2010 rent pursuant to section 67, which they maintained was agreed upon by the parties in April 2010.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The male tenant testified that he sent the landlord a copy of the tenants' application for dispute resolution hearing package by registered mail on June 23, 2010. The landlord confirmed having received this package. I am satisfied that the tenants have served the application for dispute resolution to the landlord in accordance with the *Act*.

Issues(s) to be Decided

Are the tenants entitled to obtain a monetary award from the landlord for the return of pet damage and security deposits pursuant to section 38 of the *Act*? Are the tenants entitled to a monetary award for a portion of their May 2010 rent? Are the tenants entitled to recover their filing fees for this application pursuant to section 72 of the *Act*?

Background and Evidence

The tenants moved into the rental premises from another of the landlord's properties on November 15, 2009. Monthly rent in this periodic tenancy was set at $825.00, payable on the first of each month. The tenants paid for their own electricity, gas and cable in this rental unit. The landlord said that she applied the tenants' security deposit payment of $475.00 paid for their previous rental unit in June 2009 to this tenancy. She said that

the tenants paid $350.00 for a pet damage deposit on October 28, 2009. In total, the landlord received $825.00 from the tenants for their pet damage and security deposits.

On April 18, 2010, the male tenant sent the landlord an electronic mail (email) message advising the landlord that they were planning to vacate the rental premises and move to Vancouver. The tenants vacated the rental premises on May 19, 2010.

The landlord testified that she sent the tenants a $425.00 cheque for their pet damage and security deposits on June 9, 2010. She said that she retained $400.00 from these deposits for damage and cleaning required as a result of this tenancy. She confirmed that she did not apply for dispute resolution to retain these funds. The tenants testified that they have not cashed this cheque as they disagree with the landlord's deductions.

The tenants applied for a monetary award to recover all of their $825.00 pet damage and security deposits, and to obtain a pro-rated rebate of rent they paid for May 2010, after they vacated the rental premises. They maintained that there was a mutual agreement to rebate them a portion of their May 2010 rent which they calculated at $319.00. During the hearing, the tenants confirmed that they had agreed orally and by emails to the landlord's request for damage to a light fixture. The landlord estimated the cost of this repair at $100.00 to $150.00; the tenants maintained that the landlord had told them that this repair would cost approximately $85.00.

Analysis

Notices in Writing

In considering the tenants' application, I must first consider whether the tenants complied with the *Act* in providing their notice to end tenancy and their forwarding address by email. In her written and oral evidence, the landlord maintained that the tenants did not provide their forwarding address in writing as is required under the *Act*. However, she testified that throughout this tenancy communication with the tenants was usually done by electronic mail (email). She said that she did receive a May 29, 2010

email from the tenants requesting that she return their pet damage and security deposits to their forwarding address.

I find that the parties routinely communicated about this tenancy by email. The landlord confirmed that she received the tenants' April 18, 2010 email advising her that they intended to end their tenancy and sent her own emails advising that she had accepted their notice to end this tenancy. I find that for the purposes of this tenancy, including the following email communications, the parties' satisfied the requirements that documents pertaining to this tenancy be conveyed in writing:

- the tenants' April 18, 2010 notice to end tenancy;
- the tenants' May 29, 2010 provision of a forwarding address to the landlord where the pet damage and security deposits could be sent;
- the tenants' May 29, 2010 acceptance that the light fixture was damaged.

Landlord's Deduction of Amounts for Damage and Cleaning from Security Deposit

Sections 23 and 24 of the *Act* outline the responsibilities of the parties for a condition inspection and a condition inspection report at the start of a tenancy. Sections 35 and 36 of the *Act* outline the same responsibilities at the end of a tenancy.

The parties conducted a joint move-in inspection of the rental premises on November 15, 2009. However, the landlord did not prepare a move-in condition inspection report, nor did she send a copy of a completed report to the tenants. The tenants testified that they remained overnight in the rental premises so that they could participate in the joint move-out inspection with the landlord at the appointed time on May 19, 2010. The landlord testified that the tenants were supposed to call her to arrange for the move-out inspection, but did not do so. Consequently, the landlord's partner had to conduct the move-out inspection without the tenants. The parties disputed the timing of photographs submitted into evidence by the landlord.

I find that the landlord did not comply with the requirement of subsection 23(4) of the *Act* requiring that "the landlord must complete a condition inspection report in accordance with the regulations" following the joint move-in condition inspection. Subsection 24(2)(c) of the *Act* establishes that "the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord... does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations."

I am not satisfied that the landlord offered at least 2 opportunities to conduct a joint condition inspection of the premises after the tenants ceased occupancy of the rental unit as required by subsection 35(2) of the *Act*. In addition, the landlord did not comply with the requirement under subsection 35(3) of the *Act* to complete a condition inspection report at the end of this tenancy and forward a copy to the tenants. Pursuant to section 36(2) of the *Act*, the landlord's right to claim against the security or pet damage deposits is extinguished by the failure to comply with the requirements for conducting these inspections and reports at the end of this tenancy.

After reviewing the oral and written evidence, including photographs submitted, I find that the only entitlement that the landlord has to deduct from the damage deposit is that which was agreed to by the tenants in writing and at the hearing for damage to the light fixture. I allow the landlord to deduct $105.00 from the security deposit, as the tenants admitted that they were responsible for this damage that occurred during their tenancy. Given this sworn testimony, the landlord's failure to comply with the move-in and move-out condition inspection requirements has no bearing on the admitted damage caused by the tenants to the light fixture in this rental unit. This $105.00 amount is arrived at by examining the landlord's written evidence of a receipt for $40.00 for the light fixture, $60.00 for labour to install it, and applicable tax of $5.00.

In making this determination, I recognize that the tenants also admitted that they have been responsible for additional damage to the banister. However, they maintained that this item was already damaged when they occupied the rental unit. Without a move-in

condition inspection report to use as a reference point, I do not allow the landlord to retain anything from the tenant's security deposit for this damage.

Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution for an Order to make a claim to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the deposit (section 38(6) of the *Act*).

The following provisions of Policy Guideline 17 of the Residential Tenancy Policy Guidelines would seem to be of relevance to the consideration of this application:

RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH ARBITRATION
3. Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;…*
- *if the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim...*

The landlord mailed the $425.00 cheque to the tenants within the 15-day period permitted under section 38(1) of the *Act*. For this reason, I am satisfied that the landlord did return the $425.00 portion of the deposits to the landlord within 15 days of receiving the tenants' forwarding address for doing so. As the tenants testified that they continue

to hold this cheque, I direct them to cash this cheque in partial satisfaction of the return of the security and pet damage deposits owed to them by the landlord. I make no order pursuant to section 38(6) of the *Act* requiring the landlord to pay double the $425.00 cheque sent to the tenants in June 2010.

The landlord did not apply for a monetary award for damage nor did she apply for dispute resolution to obtain authorization to retain the remaining $400.00 of the tenants' security and pet damage deposits. In her written and oral evidence, the landlord asked to be allowed to retain this portion of these deposits.

The following provision of subsection 38(4) of the *Act* would allow the landlord to retain that portion of the tenants' security and pet damage deposits where there was written agreement from the tenants to do so. Although I accept that the landlord had written agreement to retain a portion of the $400.00 that she retained, subsection 38(5) of the *Act* reads as follows:

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4)(a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24(2) [landlord failure to meet start of tenancy condition report requirements] or 36(2) [landlord failure to meet end of tenancy condition report requirements].

Since I find that the landlord's right to claim for damage against these deposits is extinguished by both section 24(2) and section 36(2) of the *Act*, I find that she was not allowed to keep even that portion of the security deposit where she had written agreement from the tenants. However, until now, she would not have known that section 38(5) prevented her from retaining the amount agreed to in writing by the tenants for repair of the light fixture. For that reason, I do not issue an order requiring her to pay double the amount of the $105.00 repair for the light fixture.

Other than the $105.00 portion for repair of the light fixture, I find that the landlord had no legal basis for withholding $400.00 from the tenants' pet damage and security deposits. The landlord did not file an application for dispute resolution within 15 days of receiving the tenants' forwarding address in writing, nor did she obtain the tenants' written permission to withhold $295.00 of these funds. As is noted above in Policy Guideline 17, the validity of any monetary claim that the landlord may have against the tenants has no bearing on the landlord's obligation to return the entire pet damage and security deposits to the tenants in accordance with section 38 of the *Act*.

Pursuant to section 38(6) of the *Act*, I find that the tenants are entitled to a monetary award amounting to double $295.00 of the tenants' pet damage and security deposits as calculated below. No interest is payable over this period.

Item	**Amount**
Amount Retained by Landlord from Tenants' Pet Damage and Security Deposits	$400.00
Less Repair to Light Fixture	-105.00
Total Unpaid Pet Damage and Security Deposit Owing x Two ($295.00 x 2 = $590.00)	**$590.00**

Tenant's Application for a Rebate in May 2010 Rent

The landlord testified that she sent the following emails which confirm that the landlord accepted the tenants' proposal to allow the tenants to vacate the premises within a month of the tenants' April 18, 2010 email. In her April 18, 2010 email response, the landlord wrote as follows:

...1 month is normal but if we can rent it again by the first I am fine with earlier. Do you know anyone? Are you willing to have showings? I can put an ad in tomorrow and see how it goes for May 1.

Otherwise, I think 1 month from today is fine. Give or take. Ie. Half rent for May and vacant on the 15th??

On April 26, 2010, the landlord sent an additional email, confirming that she had accepted the tenants' notice to end tenancy and was planning to reimburse the tenants for half of their May 2010 rent cheque.

...Is it OK if I cash your May cheque and then reimburse you on the 15th or would you prefer to write another cheque. If so, please try to have it to me by tomorrow night...

I am satisfied by the evidence presented that the landlord provided her written agreement to rebate to the tenants a pro-rated portion of their May 2010 rent for the period following their end to this tenancy on May 19, 2010. She only changed her mind about this arrangement after the tenants left the rental unit and unrelated issues regarding the condition of the rental unit arose. I allow the tenants a pro-rated rebate in their May 2010 rent of $319.35, calculated at 12/31 of their regular monthly rent of $825.00.

Filing Fee

As the tenants have been successful in their application, I allow them to recover their $50.00 filing fee for this application from the landlord.

Conclusion

I grant a monetary Order in favour of the tenants in the following terms.

Item	**Amount**
Total Unpaid Pet Damage and Security Deposit Owing x Two ($295.00 x 2 = $590.00)	$590.00
Rebate of Rent May 20-31, 2010	319.35
Filing Fee	50.00
Total Monetary Order	**$959.35**

This monetary Order provides the tenants with recovery of monies owed from their pet damage and security deposits, a rebate of rent from May 2010, and recovery of their filing fee for this application. I also direct the tenants to cash the $425.00 cheque sent to them by the landlord in June 2010.

The tenants are provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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*.