



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes:

MND; MNDC, MNSD; FF

Introduction

This is the Landlords' application for a Monetary Order for damages to the rental unit; compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), Regulation, or tenancy agreement; to retain the security deposit in partial satisfaction of their monetary claim; and to recover the cost of the filing fee from the Tenants.

The Tenant IH was not served with the Notice of Hearing documents, as the Landlords did not have a forwarding address for her.

The parties gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

Issues to be Decided

- Are the Landlords entitled to a monetary award for damages to the rental unit and in compensation for damage or loss under the Act, Regulation or tenancy agreement, pursuant to the provisions of Section 67 of the Act?

Background and Evidence

This tenancy began on April 24, 2009, and was a fixed term tenancy ending June 30, 2010. A copy of the tenancy agreement was entered in evidence. The tenancy agreement was signed by the Landlords on April 22, 2009 and signed and sealed by the ConsulateTenant on April 23, 2009.

The rental unit is a fully furnished house.

The Tenant IH was an occupant under the tenancy agreement. A clause in the Addendum to the tenancy agreement states:

"In consideration of the Landlord granting the Lease to the [Consulate] Tenant, the undersigned, being the current Occupier of the rental unit, joins in all covenants and agreements of the Tenant under the Lease with the same effect as if the Occupier had been named as Tenant in the Lease."

The Tenant IH signed the Addendum.

Rent was \$3,950.00 USD per month, payable by tranche, as follows:

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- 1) \$32,521.67 USD for April 24 to December 31, 2009;
- 2) \$23,700.00 USD for January 1, 2010 to June 30, 2010.

The tenancy agreement indicates a security deposit in the amount of \$1,975.00 USD was paid at the beginning of the tenancy. The Landlords' documentary evidence (filed under tab 9 of the Landlords' binder of documents) indicates a security deposit of \$1,095.00 USD was paid by the Tenants.

Utilities were not included in rent.

The Addendum to the tenancy agreement states:

"The Landlord will arrange for provisions of the following services and will bill the Occupier periodically for the cost of same; provided that if the Occupier does not pay these amounts, the [Consulate] Tenant will pay the Landlord:

- (a) Gardening services;
- (b) [name] security alarm."

The Tenant IH moved out of the rental unit on March 5, 2010, and the lease continued to the end of the term. The Consulate Tenant's agent and the Landlords met on June 28, 2010 to inspect the rental unit.

The Landlord GB and the Landlords' counsel gave the following submissions:

The Landlords' counsel submitted that the Landlords seek recovery of their legal fees in the amount of \$7,162.09, together with damages in the amount of \$5,816.98, for a total monetary claim of \$12,797.07.

The Landlords' counsel submitted that, pursuant to the provisions of Section 91 of the Act, common law applies to the Landlords' request for recovery of their legal costs, and that the parties were not on unequal ground with respect to financial means.

At the beginning of the tenancy, the Landlords and the Tenants' agent met to compile an inventory of the furnishings at the rental unit. The Landlords did not use the Condition Inspection Report form provided by the Residential Tenancy Branch because the Tenants insisted on having a detailed list of the inventory. The Landlords submit that the Inventory List was more comprehensive and detailed than a Condition Inspection Report. The Landlords submit that the Tenants indicated their agreement with the condition of the items on the inventory list by initialling beside the items. They submitted that in the absence of an initial, I could infer that the items were in perfect condition. In addition to the inventory list, 2 videos of the rental property were taken and a copy was provided to the Tenants. The inventory list was attached to the tenancy agreement at the beginning of the tenancy.

The Landlords provided a list of items and the estimated or actual cost of replacing or repairing the items, along with photographs of some of the items and a CD. I was unable to read the CD.

The Landlords seek damages, as follows:

ITEM	DESCRIPTION	ESTIMATED COST	COST INCURRED
8 wooden hangers	Missing	\$10.00	
2 matching mid-century upholstered sofas	Dirt stains on one sofa	\$200.00	
1 small stereo cabinet	wine stains	\$350.00	
4 upholstered Johannsen swivel chairs	Wine stains on one chair, reupholster all 4 to match	\$175.00	
2 white wine glasses	Missing	\$20.00	
1 dinner plate	Broken	\$12.00	
1 bowl	Missing	\$8.00	
4 plastic spatulas	1 missing, 3 damaged	\$40.00	
1 broom and dust pan	Missing	\$20.00	
1 tear-shaped glass table top	Broken glass	\$300.00	
Cost of power washing decks (2)			\$477.50
Outdoor furniture (8 chairs, 1 table, 2 leaves)	Destroyed		\$2,276.98
Cost to replace outdoor plants	Dead	\$1,200.00	
Garden maintenance	Not paid for		\$400.00
Cost to clean rental unit	Maximum 2 hours	\$170.00	
Bee-hive on back deck	Cost to remove		\$157.50
SUBTOTALS		\$2,505.00	\$3,311.98
TOTAL		\$5,816.98	

The Tenants' counsel gave the following submissions:

The Tenants' counsel submitted that provision for recovery of legal fees is not found in the Act and therefore should not be allowed. The Tenants' counsel submitted that Section 91 of the Act does not apply to legal fees, but only to common law respecting landlords and tenants. He noted that the Landlords' legal fees amounted to more than the Landlords' claim in damages.

The Tenants' counsel submitted that the Landlords bear the burden of proving their claim. He submitted that there was no evidence as to the state of the property at the start of the tenancy and that the inventory list does not comply with the Act or the Regulation. There was no place provided on the inventory list for the Tenants to agree or disagree with the Landlords' assessment. The Consulate Tenant was to consult with the Tenant IH to confirm her agreement to the Landlords' assessment, and this does not meet the requirements of the Regulation.

The Tenants' counsel stated that the video was not made on the first day of the tenancy, but some time before.

The Tenants do not dispute the following damages:

Repair to stereo cabinet	\$350.00
Replace missing wooden hangers	\$10.00
Replace missing bowl	\$8.00
Replace missing spatula	\$10.00
Replace missing broom and dustpan	\$20.00
Replace two broken wine glasses	<u>\$20.00</u>
TOTAL	\$418.00

The Tenants' counsel submitted that some of the damages claimed by the Landlords are reasonable wear and tear. He submitted that the rental unit was in reasonably clean condition when the Tenant moved out, and that there was no evidence of untidiness in the Landlords' photographs except for some grease on the stove. The Tenants' counsel submitted that there was no proof that the Tenant IH had left the stove in that condition. The Tenants' counsel submitted that the Landlords had access to the rental unit after the Tenant IH moved out, and were there with a dog, two children and another adult when the Consulate Tenant's agent returned to inspect the rental unit. The Tenants' counsel submitted that there was no way of knowing how long they had been there.

There were two baby cribs constructed in the room where the broken glass table top was found. The Tenants' counsel suggested that the glass top might have been broken while setting up the cribs. The dog was sleeping on the dirt stained couch and the Tenants' counsel suggested that the dog may have caused the stains.

The Tenants' counsel suggested that if I accept that the Tenant HI is responsible for leaving the grease on the stove, an amount of \$20.00 would be reasonable for the cost of cleaning the stove.

The Tenants dispute the Landlords' claim for the cost of replacing dead outdoor plants. The Tenants' counsel submit that these fall under the umbrella of gardening services, which the Landlords were responsible for providing. Likewise, the removal of the bee hive falls under the Landlords' responsibility.

The Tenants' counsel submitted that the Tenants paid for all outstanding invoices and referred to documents in support filed in the Tenants' evidence binder under tabs 7, 8 and 9.

The Tenants' counsel submitted that weathering is natural on outdoor furniture. The Tenants' counsel submitted that the Landlords claimed that the damage occurred because the Tenant did not bring the furniture undercover during the rainy months, but there were no instructions left by the Landlords with respect to maintenance requirements for the outdoor furniture.

The Landlords' counsel gave the following reply:

The Landlords' counsel submitted that the tenancy agreement was more like a commercial lease and that it was appropriate to award recovery of legal fees to the Landlords. She submitted that it was necessary for the Landlords to get legal counsel because the Tenants said that they would claim sovereign immunity if the Landlords filed an Application for Dispute Resolution.

The Landlords' counsel questioned why the Tenants would insist on an exhaustive inventory if they were not intending to rely on it.

The Landlords' counsel stated that the Landlords were at the rental unit for only two days and that it was unlikely the damages occurred in only two days.

The Landlord GB stated that the Tenants chose his property over others because it had an art collection and pristine furniture. He testified that he did provide instructions sheets for the property including:

- Security;
- Wireless and intercom;
- Maintenance for plants; and

- Maintenance for furniture.

The Landlord GB testified that he had hired a professional cleaning company to clean the rental unit at the beginning of the tenancy and expected the rental unit to be professionally cleaned at the end of the tenancy, and in the same state of cleanliness.

The Landlords' counsel stated that the Consulate Tenant had offered to settle the claim for more than the Tenants are now agreeing to, if the Landlords withdrew their Application.

Analysis

With respect to the differing amounts provided for the security deposit, I questioned the Landlords' counsel during the Hearing and she stated that the Tenants had paid a security deposit in the amount of \$1,975.00. Therefore, I find that the Tenants paid \$1,975.00 and not \$1,095.00.

The parties entered into a residential tenancy agreement. I find that this was a residential tenancy, not a commercial tenancy, and therefore the provisions of the *Residential Tenancy Act* (the "Act") and the *Residential Tenancy Regulation* (the "Regulation") apply.

During the Hearing, both parties' counsel referred to previous decisions made by dispute resolution officers. Section 64(2) of the Act provides that I must make my decision on the merits of the case as disclosed by the evidence admitted and am not bound to follow other decisions.

Regarding the Landlords' application for recovery of legal fees:

Legal fees are not recoverable as they are not damage or loss resulting from a breach of the Act, Regulation or tenancy agreement. They are fees which are not identified as recoverable in the Act or Regulation. I accept the Tenants' counsel's submission that Section 91 of the Act does not apply to legal fees. The Landlords' application to recover the cost of legal fees is dismissed.

Regarding the Landlords' application for damages and compensation for damage or loss:

It is important to note that the Landlord's counsel submitted that the Tenants had offered to settle this matter for more money than they agreed to pay during the Hearing. Offers to settle are made for various reasons, including the desire to avoid the additional costs and stress of preparing for a Dispute Resolution Hearing. In any event, no offers

to settle were made during the Hearing and I considered the merits of the case and the evidence provided when arriving at this Decision.

Section 5 of the Act provides that landlords and tenants may not contract out of the Act or Regulations and any attempt to do so is of no effect.

Section 37(2)(a) of the Act requires a tenant to leave a rental unit reasonably clean, and undamaged except for reasonable wear and tear. There is no higher standard for luxury or executive-style rental units.

Section 35 of the Act provides that a Landlord **must** complete a condition inspection report at the beginning and at the end of the tenancy, in accordance with the Regulation.

In dispute resolution hearings, a Condition Inspection Report that is completed in compliance with Section 20 of the Regulation is evidence of the state of repair and condition of the rental unit on the date of the inspection in the absence of evidence to the contrary.

Section 20 of the Regulation states:

Standard information that must be included in a condition inspection report

20 (1) A condition inspection report completed under section 23 or 35 of the Act must contain the following information:

- (a) the correct legal names of the landlord, the tenant and, if applicable, the tenant's agent;
- (b) the address of the rental unit being inspected;
- (c) the date on which the tenant is entitled to possession of the rental unit;
- (d) the address for service of the landlord;
- (e) the date of the condition inspection;
- (f) a statement of the state of repair and general condition of each room in the rental unit including, but not limited to, the following as applicable:
 - (i) entry;
 - (ii) living rooms;
 - (iii) kitchen;



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- (iv) dining room or eating area;
- (v) stairs;
- (vi) halls;
- (vii) bathrooms;
- (viii) bedrooms;
- (ix) storage;
- (x) basement or crawl space;
- (xi) other rooms;
- (xii) exterior, including balcony, patio and yard;
- (xiii) garage or parking area;
- (g) a statement of the state of repair and general condition of any floor or window coverings, appliances, furniture, fixtures, electrical outlets and electronic connections provided for the exclusive use of the tenant as part of the tenancy agreement;
- (h) any other items which the landlord and tenant agree should be included;
- (i) a statement identifying any damage or items in need of maintenance or repair;
- (j) appropriate space for the tenant to indicate agreement or disagreement with the landlord's assessment of any item of the condition of the rental unit and contents, and any additional comments;
- (k) the following statement, to be completed by the tenant:

I,

Tenant's name

[] agree that this report fairly represents the condition of the rental unit.

[] do not agree that this report fairly represents the condition of the rental unit, for the following reasons:

.....
.....
.....
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.....
.....
(l) a space for the signature of both the landlord and tenant.

(2) In addition to the information referred to in subsection (1), a condition inspection report completed under section 35 of the Act [*condition inspection: end of tenancy*] must contain the following items in a manner that makes them clearly distinguishable from other information in the report:

- (a) a statement itemizing any damage to the rental unit or residential property for which the tenant is responsible;
- (b) if agreed upon by the landlord and tenant,
 - (i) the amount to be deducted from the tenant's security deposit or pet damage deposit,
 - (ii) the tenant's signature indicating agreement with the deduction, and
 - (iii) the date on which the tenant signed.

I find that the Landlords' exhaustive inventory list does not meet the requirements of the Act and Regulation with respect to Condition Inspection Reports. In particular, it does not comply with Section 20(1)(a), (c), (d), (f), (g), (j), (k) or Section 20(2)(a) or (b) of the Regulation. It is not clear from the inventory list what the state of repair of the items claimed were at the beginning of the tenancy. I do not accept the Landlords' counsel's submissions that I can infer the items were in perfect condition, absent any notation to the contrary.

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard.

To prove a loss and have one party pay for the loss requires the other party to prove four different elements:

1. Proof that the damage or loss exists,
2. Proof that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement,
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage, and
4. Proof that the Applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

In the circumstances before me the Landlords have the burden of proving their claim.

Based on the foregoing and on the testimony of both parties, I make the following findings with respect to the Landlords' claim for damages:

ITEM	DESCRIPTION	FINDING	AWARD
8 wooden hangers	Missing	Allowed as agreed by Tenants	\$10.00
2 matching mid-century upholstered sofas	Dirt stains on one sofa	Dismissed. Insufficient evidence to prove parts 2 and 3 of the test.	
1 small stereo cabinet	wine stains	Allowed as agreed by Tenants	\$350.00
4 upholstered Johannsen swivel chairs	Wine stains on one chair, reupholster all 4 to match	Dismissed. Insufficient evidence to prove parts 2 and 3 of the test.	
2 white wine glasses	Missing	Allowed as agreed by Tenants	\$20.00
1 dinner plate	Broken	Dismissed. Insufficient evidence to prove parts 2 and 3 of the test.	
1 bowl	Missing	Allowed as agreed by Tenants	\$8.00
4 plastic spatulas	1 missing, 3 damaged	Allowed for missing spatula, as agreed by Tenants. Other three spatulas: Insufficient evidence to prove parts 2 and 3 of the test.	\$10.00
1 broom and dust pan	Missing	Allowed as agreed by Tenants	\$20.00
1 tear-shaped glass table top	Broken glass	Dismissed. Insufficient evidence to prove parts 2 and 3 of the test.	
Cost of power washing decks (2)		Dismissed. Insufficient evidence to prove parts 1 and 2 of the test.	
Outdoor furniture (8 chairs, 1 table, 2 leaves)	Destroyed	Dismissed. Insufficient evidence to prove part 2 of the test. The Landlords did not provide sufficient evidence that they had provided the Tenants with instructions for care.	

Cost to replace outdoor plants	Dead	Dismissed. Insufficient evidence to prove part 2 and 4 of the test. The Landlords were responsible for providing gardening service. They were aware that the Tenant IH moved out of the rental unit on March 5, 2010 and that there was no one there to care for the plants.	
Garden maintenance	Not paid for	Dismissed. I accept the Tenants' evidence that all fees were paid for up to the end of the term of the lease.	
Cost to clean rental unit	Maximum 2 hours	The photographic evidence indicates that there was a large build-up of grease on a portion of the stove, which I find most probably accrued over months of use. This portion of the Landlords' claim is allowed at \$25.00 for one hour to clean the stove.	\$25.00
Bee-hive on back deck	Cost to remove	Dismissed. The Residential Tenancy Policy Guideline provides that Landlords are responsible for insect control.	
TOTAL AWARD			\$443.00

The Landlords have been partially successful in their application and are entitled to recover a prorated portion of the cost of the \$100.00 filing fee from the Tenants, calculated as follows:

$$\frac{\$100.00 \times \$443.00}{\$12,797.07} = \$3.46$$

Pursuant to Section 72(2)(b) of the Act, the Landlords may apply the security deposit in satisfaction of the Landlords' monetary award. No interest has accrued on the security deposit.

The security deposit was paid in American dollars. The Bank of Canada fixed the average rate of exchange on American dollars on the date the security deposit was paid, as follows:



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\$1.00 USD = \$1.2345 CDN

Therefore, the Tenants paid a security deposit in the amount of \$2,438.14 CND.
(\$1,975.00 x 1.2345).

The residue of the security deposit must be returned to the Consulate Tenant forthwith:

Security deposit in Canadian funds	\$2,438.14
Less Landlords' monetary award (\$443.00 + \$3.46)	<u>-\$446.46</u>
Residue of security deposit:	\$1,991.68

Conclusion

I hereby provide the Consulate Tenant a Monetary Order in the amount of \$1,991.68 against the Landlords representing the balance of the security deposit after deducting the Landlords' monetary award. This Order must be served on the Landlords and may be filed in the Provincial Court of British Columbia (Small Claims) 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 06, 2011.
