Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MND, FF

Introduction

This hearing was convened in response to applications by the tenants and the landlord.

The tenants' application is seeking orders as follows:

1. Return of all or part of a pet deposit and security deposit.

The landlord's application is seeking orders as follows:

1. For a monetary order for damages to the unit;
2. To keep all or part of pet deposit or security deposit; and
3. For compensation for loss under the Act.

Issue(s) to be Decided

Are the tenants entitled to the return of all or part of a pet deposit and security deposit?
Is the landlord entitled to a monetary order for damages to the unit?
Is the landlord entitled to keep all or part of pet deposit or security deposit?
Is the landlord entitled to a monetary order for compensation under the Act.?

Background and Evidence

The tenancy began on August 1, 2006. Rent in the amount of $1,000.00 was payable on the first of each month. A security deposit of $450.00 and a pet deposit of $450.00 were paid by the tenants.

Tenants' application

The tenant testified that they paid $450.00 security deposit and $450.00 pet deposit at the start of tenancy by cheque. Filed in evidence is a copy of the cheque issued to the landlord for both the security deposit and pet deposit.

The tenant testified they vacated the premises on December 31, 2011 and on January 23, 2012, the tenants provided the landlord with a written notice of the forwarding address to return the pet deposit to.

The tenant testified she agreed in writing on December 24, 2011, that the landlord could keep the security deposit for shampooing the carpet and a portion for painting. However, the carpets were not shampooed.

The tenant testified that the parties perform the move-in inspection at the start of tenancy and the landlord has failed to provide her with a copy of this report. The tenant alleges the landlord has a copy, but will not provide a copy as it will show the condition of the rental unit at the start of tenancy.

The tenant testified that a move-out inspection was not done at the end of tenancy.

The tenants' agent argues that the landlord was acting outside the Act by obtaining the tenants written consent as section 38(5) prohibits such consent for damages when the landlord has extinguished their rights to claim against it for damages.

The landlord testified that a move-in inspection was never done with the tenants. The landlord testified she left several phone messages for the tenants, however, the tenants did not responded and it was their fault a move-in inspection was not done. The landlord stated she never sent the tenants a formal request in writing to complete the move-in inspection.

The landlord testified a move-out inspection was not completed at the end of tenancy. However, the tenant agreed in writing that she could keep the security deposit. Filed in evidence is a copy of the written agreement dated December 24, 2011, which is signed by both parties.

The landlord testified that she did receive the tenants forwarding address on January 23, 2012, for the return of the deposit. The landlord stated she did not return the tenants' pet deposit as she believe they did not pay one and she told the tenants "prove you paid one".

Landlord's application

The landlord claims as follows:

a.	Loss of Revenue	$1,000.00
c.	Cost of flooring and paint	$2,250.00
d.	Filing fee	$50.00
	Total	$5,050.00

The landlord testified that during the five years of this tenancy she never received any request for repairs from the tenants and she never attended at the rental unit for periodic viewing during the entire tenancy.

The landlord testified when the tenants provided her with their thirty days notice to end tenancy, she was given permission to show the unit. When she went to the rental unit it was stinky and smelly and she was very embarrassed. The landlord stated that it smelled of cat urine and the smell of cigarette smoke was overwhelming. The landlord stated the tenants were not to be smoking in the rental unit.

The landlord testified on December 24, 2011, the tenant agreed in writing that they had smoked in the unit that the unit had a strong smell of cat, the unit needed painting and that carpets were filthy. Filed in evidence is a document dated December 24, 2011, which is not signed by either party.

The landlord testified the carpets in this rental unit were replaced in 2004 or 2005 and the carpets were not cleanable due to cat urine and were replaced with laminate flooring. The landlord stated she is seeking compensation to replace the flooring.

The landlord testified that the unit was freshly painted prior to the tenants moving in and it was required to be painted as the tenants smoked in the rental unit. The landlord is seeking compensation for the cost of paint and the cost for having the unit painted.

The landlord testified that it took over three weeks to complete the painting and flooring and is seeking compensation for loss of revenue for the month of January 2012.

The tenants' agent testified that he was the original person who viewed the unit prior to tenancy commencing and he was very clear with the landlord that the tenants were smokers and had pets and he was assured by the landlord that there were no issues with the tenants being smokers or that they had pets.

The tenants' agent testified when he viewed the rental unit the carpets were not in good shape at the start of tenancy and he believes they were the original carpets installed and not the age the landlord alleges during her testimony.

The tenants' agent testified that this rental unit was not in good shape as it clearly had previous smokers and pets. However, the tenants decided to rent the unit, because it was hard to find a rental unit that allowed both smokers and pets.

The tenant testified that on December 24, 2011, she did agree in writing that the landlord could keep the security deposit for shampooing the carpets and for a portion of the painting cost, however, the carpets were replaced and not cleaned.

The tenant testified that the carpets were not in good shape when tenancy started and if a copy of the move-in inspection was filed it would have shown the condition of the carpet. The tenant stated that the previous tenants smoked and had cats and that her cat has never urinated on the carpets.

The tenant testified she has never seen the document dated December 24, 2011, which alleges she agreed to the condition of the rental unit. The tenant stated she believes it was created after the fact. The tenant argued that unlike the written consent to keep the security deposit, this document is unsigned.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

Tenant's application

There was no evidence to show that the landlord had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the tenants. The tenants did provide written consent to keep the security deposit for shampooing the carpet and painting.

The evidence of the tenant was a pet deposit was paid at the start of the tenancy. The evidence of the landlord was she did not believe the tenants paid a pet deposit and demanded the tenants to prove it.

The evidence of the tenant was a move-in inspection was completed and the landlord failed to provide her with a copy of the inspection. The evidence of the landlord was a move-in inspection was not completed. The evidence of the landlord was she left several telephone messages for the tenants to complete the move-in inspection. However, it was the tenants fault that a move-in inspection was not completed as they did not returning her calls to schedule a time for the inspection.

In this case, I prefer the tenant's evidence over the landlords for the following reasons. The tenant's evidence was clear regarding the details of the start of tenancy, including paying a pet deposit and completing a move-in inspection. The cancelled cheque filed in evidence proves the tenants paid a security deposit and pet deposit at the start of tenancy.

The landlord's evidence was unreliable, the landlords lack of accurate record keeping, in particular the lack of recording the pet deposit, which is money held in trust and the

landlord response to the tenants was “prove you paid one”. I find that it is possible that and move-in inspection was done as suggested by the tenant and the landlords lack of accurate recording keeping and attitude of “prove it” may bring the landlords creditability into question.

Even if I accepted the landlord evidence (which I do not) the landlord clearly had extinguished her right as the landlord failed to provide the tenant with a final notice for inspection in the prescribed form under the Act.

When a landlord fails to complete a condition inspection report or provide the tenant with a copy of that report, the landlord’s claim against the security deposit or pet damage deposit for damage to the property is extinguished.

In this case, the evidence shows the landlord failed to comply with the requirement of section 23 of the Act (conditional inspection at the start of tenancy) and section 35 of the Act (condition inspection at the end of tenancy).

By failing to comply with section 23 and 35 of the Act the landlord has extinguished their right to claim against the security deposit, pursuant to sections 24(2) and 36(2) of the Act.

The tenant did provide the landlord with written consent to retain the security deposit for damages. However, under section 38 (5) the right of a landlord to retain all or part of a security deposit or pet damage deposit, with written consent 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) or 36 (2).

Section 2 of the Act states landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect. Therefore, I find by the landlord obtaining the tenants written consent was an attempt to avoid the Act and as a result the written consent is of no effect.

The landlord has breached section 38 of the Act. The landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to residential tenancies.

The security deposit is held in trust for the tenants by the landlord. At no time does the landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it.

The landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from a Dispute Resolution Officer. Here the landlord did not have any authority under the Act to keep any portion of the security deposit or pet

deposit for damages. Therefore, I find that the landlord is not entitled to retain any portion of the security deposit, pet deposit or interest.

Section 38(6) provides that if a landlord does not comply with section 38(1), the landlord must pay the tenant double the amount of the security deposit or pet deposit. The legislation does not provide any flexibility on this issue.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the landlord pay the tenant the sum of $1,879.18, comprised of double the pet damage deposit ($450.00), security deposit ($450.00), interest of $29.18 and the $50.00 fee for filing this application. This order may be off-set with the landlord's application should one be granted.

Landlord's application

To prove a loss and have the tenants pay for the loss requires the landlord to satisfy four different elements:

- Proof that the damage or loss exists;
- Proof that the damage or loss occurred due to the actions or neglect of the Tenant in violation of the Act;
- Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- Proof that the Landlord followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

The evidence of the landlord was new carpets were installed in either 2004 or 2005, in this unit and these carpets had to be replaced due to the tenants' cat urinating on the carpets. The evidence of the tenants' agent was the carpets appeared to be the original carpets and they were not in good shape when he viewed the rental unit prior to the tenancy commencing. The evidence of the tenant was the carpets were not in good shape at the start of the tenancy and the previous tenants had cats.

In the absence of a condition inspection report, I find there is insufficient evidence to meet the burden of proof establishing that the tenants damaged the carpet as set out in the application.

> Section 23(1) of the Act states: The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.
>
> Section 23(4) of the Act states: The landlord must complete a condition inspection report in accordance with the regulations and (5) 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.

Therefore, I dismiss the landlord's claim for compensation for replacing the carpets.

The evidence of the landlord was that this tenancy commenced on August 1, 2006 and ended December 31, 2011.

The Residential policy guideline 1 - **PAINTING states:**

The landlord is responsible for painting the interior of the rental unit at reasonable intervals.

The policy guideline section 37 sets the useful life span of interior paint at four years.

Therefore, I dismiss the landlord's request for compensation for the paint and the labour for painting the rental unit as the interior of the rental unit was due for painting in any event.

As I have found the tenants are not responsible for damages to the rental unit and the landlord is not entitled to compensation. I find I must dismiss the landlord clam for loss revenue as the tenants did provided proper notice to end tenancy under the Act.

As the landlord has not been successful with her application the landlord is not entitled to recover the cost of filing the application from the tenants.

The landlord's application for compensation for damages and loss of revenue is dismissed.

Conclusion

The landlord's application for compensation for damage or loss under the Act is dismissed.

The tenant is granted a monetary order in the amount of **$1,879.18** and the landlord must be served with a copy of this order as soon as possible. Should the landlord fail to comply with this order, the order may be filed in the Small Claims division of the Provincial 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: May 3, 2012.

Residential Tenancy Branch