Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF, MND, MNR, MNDC

Introduction

This hearing dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* (the *Act*). The landlords applied for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72.

The tenants applied for:

- authorization to obtain a return of double their security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. Both parties confirmed that the tenants sent the landlords an email on September 1, 2012, advising the landlords that the tenants planned to end their tenancy by September 30, 2012. This tenancy ended on September 30, 2012 on the basis of the tenant's emailed notice to end this tenancy.

The male landlord (the landlord) confirmed that both landlords received a copy of the tenants' dispute resolution hearing package sent by the tenants by registered mail on November 23, 2012. The male tenant (the tenant) confirmed that both tenants received a copy of the landlords' dispute resolution hearing package sent by the landlords to both tenants by registered mail on January 21, 2013. Both parties also confirmed that they received one another's written evidence packages in advance of this hearing. I am

satisfied that the parties served one another with the above documents related to this hearing in accordance with the *Act*.

Issues(s) to be Decided

Are the tenants entitled to a monetary award for the return of a portion of their security deposit? Are the tenants entitled to a monetary award equivalent to the amount of their security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*? Are the landlords entitled to retain any portion of the tenants' security deposit in partial satisfaction of the monetary award requested? Are the landlords entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Are the landlords entitled to a monetary award for damage arising out of this tenancy? Are either of the parties entitled to recover their filing fee for this application from the tenants?

Background and Evidence

This tenancy began as a one-year fixed term tenancy on June 1, 2011. At the expiration of the initial term, this converted to a periodic tenancy. Monthly rent was set at $1,500.00, payable in advance on the 2nd of each month, plus heat and hydro. The tenants paid a $750.00 security deposit. After the tenants vacated the rental unit on September 30, 2012 and gave the landlords their forwarding address in writing, the landlords returned $147.08 of the security deposit to the tenants. The landlords continue to hold the remaining $602.92 of the tenants' security deposit.

The parties agreed that they conducted joint move-in and move-out condition inspections on June 1, 2011 and September 30, 2012 respectively. The parties entered into written evidence copies of the inspection reports prepared by the landlord for each of the above condition inspections.

The tenants' application for a monetary award of $1,502.92 included a request for a return of double their security deposit less the amount already returned to the tenants. They also requested the recovery of their filing fee.

In the Details of the Dispute section of their application, the tenants included a request for a rent rebate of $100.00 for the last two days of September 2012. In their written evidence, they maintained that the landlord commenced cleaning, yardwork and repairs on September 29, 2012, prior to the end of their tenancy. Although they did not formally apply for the issuance of a monetary award for the loss in value of their tenancy for the last two days of September 2012, they claimed that they were entitled to such an award as a result of section 10.6.2 of the *Act*. At the hearing, I asked the tenant to clarify this portion of their request because no such section exists in the *Act*. The tenant said that

he must have been mistaken in citing that section of the *Act*. He provided no further reference to the authority requested for a monetary award for this item.

The landlords' application for a monetary award of $4,969.59 included the following items:

Item	**Amount**
Unpaid October 2012 Rent	$1,500.00
Damage Deposit	750.00
Paint	1,500.00
Carpet Cleaning	168.00
Replacement of Floors in 2 Rooms	1,604.51
Less Amount Withheld from Security Deposit	-602.92
Recovery of Filing Fee for this Application	50.00
Total Monetary Award Requested	**$4,969.59**

Analysis - 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 seeking an Order allowing the landlord 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 return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant."

In this case, I find that the landlords have not returned the tenants' security deposit in full within 15 days of September 30, 2012, the date of the end of the tenancy and the date when the landlord testified that he received the tenants' forwarding address in writing. The landlord confirmed that the landlords did not apply for dispute resolution to obtain authorization to retain any portion of the tenants' security deposit until January 17, 2013.

The issue in dispute is whether the tenant gave the landlords written authorization at the end of the tenancy to retain any portion of the tenants' security deposit. In this regard,

the landlord referred to a handwritten statement added to the end of the joint move-out condition inspection report. In this statement added to the bottom of statements about various rooms in the rental unit was a three item "HIGH ESTIMATE" for:

- the estimated $120.00 cost of replacing two doors, one of which was noted as damaged in the joint move-out condition inspection report;
- the $120.00 cost of repairing the garage and miscellaneous expenses; and
- the $500.00 cost of cleaning the rental unit for 20 hours of cleaning at $25.00 per hour.

The landlord testified that he considered the tenant's initials at the bottom of this page immediately under this "HIGH ESTIMATE" as the tenant's agreement that he could retain these amounts from the security deposit held by the landlords.

The tenant testified that he provided his initials at the bottom of this, the final page of the move-out condition inspection report, along with the landlord to signify that he agreed with the room-by-room breakdown of the condition of the rental unit at the end of this tenancy. With few exceptions, the joint move-out condition inspection report did not identify damage that did not exist at the beginning of this tenancy.

In more standard condition inspection reports, landlords often ask tenants to sign a specific Security Deposit Statement in which the landlords outline each of the items damaged during the tenancy and to confirm their written agreement to enable the landlord to deduct these expenses from the tenant's security deposit. I find the meaning of the HIGH ESTIMATE included at the bottom of the joint move-out condition inspection report is unclear. I find that the vague nature of the estimate and this portion of the document suggests that some further discussion between the parties was envisioned should the landlords intend to use this material as grounds for claiming that the tenants had given their written authorization pursuant to section 38(4)(a) of the *Act* to retain portions of the tenants' security deposit. Given that very little of the joint move-out condition inspection report identified damage arising out of this tenancy, there is reason to believe the tenant's claim that he understood that the report he was initialling would not lead to a claim from the landlords against the security deposit for this tenancy. However, to be fair to the landlords, there was a clear reference at the end of this document to estimated expenses that the landlord expected to recover from the tenants. Rather than the HIGH ESTIMATE of $740.00 plus GST, the landlords retained $602.92 from the tenants' security deposit.

In considering this matter, I find that the legal principle of *contra proferentem* applies. "*Contra Proferentem*" is a rule courts use when interpreting contracts. In plain English it means that if there is an ambiguous clause in a contract it will be interpreted against

the party responsible for drafting the clause. The Supreme Court of B.C. used this legal doctrine in a Victoria case as follows:

Contra proferentem is a rule of contractual interpretation which provides that an ambiguous term will be construed against the party responsible for its inclusion in the contract. This interpretation will therefore favour the party who did not draft the term presumably because that party is not responsible for the ambiguity therein and should not be made to suffer for it. This rule endeavours to encourage the drafter to be as clear as possible when crafting an agreement upon which the parties will rely. This rule also encourages a party drafting a contract to turn their mind to foreseeable contingencies as failure to do so will result in terms being construed against them. That there is ambiguity in the contract is a requisite of the application of this rule, however, once ambiguity is established, the rule is fairly straightforward in application.

In this case, I find that the principle of *contra proferentem* establishes ambiguity as to whether or not the tenant's initials after the HIGH ESTIMATE at the end of the joint move-out condition inspection report signified the tenants' written agreement to allow the landlords to retain a portion of their security deposit at the end of this tenancy. As I find the meaning of this document unclear, I find that this document does not constitute the tenants' written authorization pursuant to section 38(4)(a) of the *Act* to allow the landlords to keep any portion of their security deposit.

In accordance with section 38 of the *Act*, I allow this portion of the tenants' application. I find that the tenants are therefore entitled to a monetary order amounting to double their security deposit with interest calculated on the original amount only, less the returned portion of that deposit. No interest is payable over this period. This results in a monetary award in the tenants' favour in the amount of $1,352.92 (i.e., $1,500.00-$147.08 =$1,352.92).

The tenant could not explain the statutory justification for issuing the tenants a monetary award for the loss in value of their tenancy for September 29 and 30, 2012 and I find no entitlement to a monetary award for this item. I dismiss the tenants' request for a monetary award for this portion of the tenants' application without leave to reapply.

Analysis – Landlords' Application for a Monetary Award

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. Section 45(1) of the *Act* requires a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for October 2012, the tenants would have needed to provide their notice to end this

tenancy before September 1, 2012. Section 52 of the *Act* requires that a tenant provide this notice in writing.

There is undisputed evidence that the tenants did not provide their notice to end this tenancy before September 1, 2012. In addition, I find that the tenants' provision of their notice to end this tenancy by email does not meet the requirement under section 52 of the *Act* that a notice to end tenancy must be in writing. The tenants did not pay any rent for October 2012. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises for October 2012. The landlord gave undisputed testimony that he commenced trying to locate new tenants for the rental unit shortly after he received the tenants' notice to end this tenancy by placing an advertisement on a local rental website. He testified that he located a new tenant on October 4, 2012, who was to take possession on November 1, 2012. However, due to damage that the landlord maintained was caused by the tenants, the new tenants were not able to move into the rental unit. The landlord testified that different new tenants occupied the premises as of November 15, 2012, for a monthly rent of $1,550.00. I am satisfied that the landlords have discharged their duty under section 7(2) of the *Act* to minimize the tenants' loss. I issue the landlords a monetary award in the amount of $1,500.00 to compensate them for their loss of rent for October 2012.

Section 37(2) of the *Act* requires a tenant to "leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear." The parties entered conflicting evidence regarding the condition of the rental unit when this tenancy ended and submitted photographs and the condition inspection reports to demonstrate their assertions. The tenant maintained that the premises were left in the same or better condition as when they first occupied the rental unit in June 2011. The tenant also noted that the joint move-in and move-out condition inspection reports recorded very little difference in the condition of the rental unit during the course of this tenancy. When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. I find that the landlords are only entitled to a monetary award for items clearly identified as damaged during the course of this tenancy.

The landlord entered oral and written evidence that problems relating to inadequate painting were not identified until his brother attended the rental premises on October 10, 2012, eleven days after the joint condition inspection occurred. Similarly, problems with

cat odour caused by cat urine were not apparent until November 5, 2012, when the new tenants raised this as a problem.

I first note that the landlord testified that the premises had not been painted since October or November 2010. Consequently, any successful claim that the landlords may have had for repainting would be limited to approximately one-half of their costs, as the Useful Life of an interior paint job in a rental property is estimated at 4 years, as set out in Residential Tenancy Branch Policy Guideline 40. I find that the landlords failed to notice damage that required painting during the joint move-out condition inspection. This failure leads me to dismiss the landlords' application for a monetary award to compensate them for their repainting costs without leave to reapply.

The landlords also applied for the replacement of flooring damaged by cat urine during this tenancy. The landlord testified that he has not incurred any expense for this item as yet, as the floor replacement has not occurred. The landlord also said that he is obtaining more rent from the new tenants who currently occupy the rental premises than was being paid by the tenants in the current application, even without the replacement of the floor. The landlord also failed to notice this problem in the joint move-out condition inspection report until November 2012, over one month after the tenants' vacated the premises. For these reasons, I dismiss the landlords' application for a monetary award for the replacement of flooring without leave to reapply.

On the basis of the landlords' undisputed evidence, I find that professional carpet cleaning was required at the end of this tenancy. I issue a monetary award in the landlords' favour in the amount of $168.00 for professional carpet cleaning, the amount of the invoice they submitted for this item.

Based on the landlords', I find that there is oral and written evidence, particularly noted in the joint move-out condition inspection report, that at least one of the bi-fold doors in the bathroom was damaged during the course of this tenancy. I issue the landlords a monetary award in the amount of $60.00 to compensate them for this damage.

Based on the oral, written and photographic evidence of the parties, I find on a balance of probabilities that the tenants did not comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit "reasonably clean" as some cleaning was likely required by the landlords after the tenants vacated the rental unit. However, I do not find that the extent of this cleaning as noted on the room-by-room inspection of the rental premises on September 30, 2012, entitles the landlords to the level of cleaning claimed in either the landlords' HIGH ESTIMATE or in the landlords' $362.50 receipt entered into written evidence by the landlords. The tenants challenged the authenticity

of this receipt and the landlords did not produce the author of that receipt and a letter describing the extent of cleaning required at the end of this tenancy. I do not find that the 14.5 hours of cleaning claimed by the landlords and the written account of the work undertaken by the landlords' cleaner matches with the landlords' joint move-out condition inspection report or the photographs taken by the tenants and entered into evidence. For that reason, I find that the landlords are entitled to a monetary award of $100.00 for general cleaning that was likely required at the end of this tenancy.

As both parties have been partially successful in their applications, I make no award with respect to their respective claims to recover their filing fees.

Conclusion

I issue a monetary Order in the landlords' favour under the following terms, which allows the landlords to recover unpaid rent, losses and damage arising out of this tenancy, less the amount of the tenants' entitlement to a monetary award:

Item	**Amount**
Unpaid October 2012 Rent	$1,500.00
Carpet Cleaning	168.00
Cleaning	100.00
Bi-Fold Doors	60.00
Less Remaining Portion of Security Deposit	-602.92
Monetary Award for Landlords' Failure to Comply with s. 38 of the *Act*	-750.00
Total Monetary Order	**$475.08**

The landlords are provided with these Orders in the above terms and the tenant(s) must be served with this Order as soon as possible. Should the tenant(s) 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. I dismiss the remainder of both parties' applications without leave to reapply. 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: February 28, 2013

Residential Tenancy Branch