Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF, MND, MNDC

Introduction

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

- a monetary order 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; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72.

The tenants identified only the female landlord (Landlord LM) as the Respondent in their application for:

- authorization to obtain a return of their security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the female landlord 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. The female landlord confirmed that she received a copy of the tenants' dispute resolution hearing package sent by the tenants by registered mail on April 5, 2013. I am satisfied that the tenants served the female landlord with their hearing and evidence packages in accordance with the *Act*.

The landlords testified that they sent the tenants a copy of their dispute resolution hearing package by registered mail on May 18, 2013. Although the tenants testified that they received evidence from the landlords by registered mail on that date, including a copy of the landlords' application for dispute resolution, they gave undisputed testimony that the Notice of Hearing prepared by the Residential Tenancy Branch (the RTB) and the accompanying RTB Fact Sheets were not included in the landlords' dispute resolution hearing package. They said that they only became aware of the hearing date and time by contacting the RTB.

Both parties confirmed that they understood that the hearing of the tenants' application and the landlords' application would be considered together. These two hearings with me were scheduled back-to-back and although different times and contact information was included in the RTB's Notice of Hearing documents, both parties were prepared to have their cross-applications heard together. Even though the landlords had not included important information in their hearing package, both parties indicated that they were willing to proceed to hear the two applications assigned to me. As such, I have considered both applications for dispute resolution during this hearing.

Issues(s) to be Decided

Are the landlords entitled to a monetary award for damage or losses arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested? 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 landlord's failure to comply with the provisions of section 38 of the *Act*? Are either of the parties entitled to recover their filing fees for their applications from one another?

Background and Evidence

This tenancy commenced as a one-year fixed term tenancy on October 15, 2011. When the initial fixed term expired, the tenancy continued as a periodic tenancy. Both parties agreed that the monthly rent established for this tenancy was $1,500.00, payable in advance on the first of each month.

The tenants paid a $750.00 security deposit on or about October 15, 2011. Both parties agreed that the landlord(s) have returned $550.00 of the tenants' security deposit on or about March 19, 2013. The female tenant testified that the tenants have cashed the landlords' cheque for $550.00 for a portion of the return of the tenants' security deposit. Both parties also agreed that the landlords returned another $100.00 in cash from the tenants' security deposit by mail within two weeks to one month of March 19, 2013. The landlords currently retain the remaining $100.00 from the tenants' security deposit.

Although the parties agreed that they participated in a joint move-in condition inspection on October 15, 2011, the landlords did not prepare a report regarding that inspection. The landlords did not conduct a joint move-out condition inspection of the rental unit. The male landlord said that he did perform his own inspection of the premises after the tenants vacated the rental unit. However, he did not prepare a move-out condition inspection report nor did he send a copy of a report to the tenants.

The tenants gave undisputed sworn testimony that they provided the landlords with approximately two months notice of their intention to end their tenancy by January 31, 2013. The parties agreed that the tenants vacated the rental unit on January 31, 2013, returning the keys the following day. The landlords agreed that they received the tenants' forwarding address on or about January 15, 2013.

The tenants' application for a monetary award of $750.00 was for the landlord's failure to return their security deposit in full within 15 days of the end of their tenancy.

The landlords' application for a monetary award of $636.00 included the following items:

Item	**Amount**
Repair of 3 Large Holes in Solarium	$336.00
Damage to Cracked Floor Tile (estimated $280.00 + $14.00 GST = $294.00)	294.00
Total of Above Items	**$630.00**

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, to either return the security deposit or file an Application for Dispute Resolution for an Order to make a claim to retain the deposit. 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. The landlords testified that they did not apply for dispute resolution to authorize their retention of a portion of the tenants' security deposit until May 14, 2013, three months after the expiration of the 15-day time period noted above. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security 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." If the landlord fails to comply with section 38(1) of the *Act*, then the landlord may not make a claim against the security deposit, and the landlord **must** pay the tenant double the amount of the deposit (section 38(6)).

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:

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 claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *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.*

Although the landlords did not comply with the above requirements of the *Act*, I am satisfied that they did return a total of $650.00 from the tenants' original security deposit to the tenants, albeit over a month later than they were required to take this action. I find that the landlords had no legal basis for withholding the tenants' $750.00 security deposit beyond February 16, 2013. The landlords did not file an application for dispute resolution within 15 days of the end of this tenancy, nor did they obtain the tenants' written permission to withhold these funds. As noted in Policy Guideline 17, the validity of any monetary claim that the landlords may have against the tenants has no bearing on the landlords' obligation to return the entire security deposit to the tenants in accordance with section 38 of the *Act*.

Under these circumstances, I find that the tenants are entitled to a monetary award for the remaining $100.00 from their original security deposit plus applicable interest. No interest is payable over this period. I also find that the tenants are entitled to a monetary award equivalent to the value of their original security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act.*

Analysis – Landlords' Application for a Monetary Award for Damage and Losses Arising out of this Tenancy

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlords to prove on the balance of probabilities that the tenants caused the damage and that it

was beyond reasonable wear and tear that could be expected for a rental unit of this age.

I heard conflicting evidence regarding both of the items cited in the landlords' application for a monetary award for damage arising out of this tenancy. As noted at the hearing, I find the quality of the photocopied photographic evidence provided by the landlords to demonstrate the extent of the damage was poor and provided very little assistance in determining the landlords' eligibility for a monetary award for damage.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in and joint move-out condition inspections and inspection reports are very helpful. Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy. For example, section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***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...*

Similar provisions are included in section 24 of the *Act* with respect to joint move-in condition inspections.

In this case, the landlords did not prepare a joint move-in condition inspection report, did not conduct a joint move-out condition inspection and prepared no move-out condition inspection report of the landlords' own inspection of the premises at the end of this tenancy. The landlords' failure to follow the requirements of the *Act* regarding the move-in and move-out inspection processes limited the landlords' eligibility to claim

against the security deposit for damage arising out of the tenancy. However, section 37(2) of the *Act* still required the tenants to "leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear."

Although the parties agreed that the tenants caused the holes in the solarium wall, they provided different estimates of the size of these holes. The tenants provided written evidence and sworn testimony that when they commenced this tenancy they enquired about the landlords' willingness to let them drill holes in the wall to accommodate their furnishings and artwork. While the female landlord confirmed that she had advised the tenants at the beginning of this tenancy that it was alright for the tenants to make holes in the walls to hang their artwork/photographs, she said that she did not intend to give them her permission to drill three one inch holes in the wall. The male tenant testified that he drilled one-half inch holes in the walls to support an IKEA shelf for their wall-mounted television. Later in his testimony he described these holes as being sufficient to insert 3/16 inch toggle bolts. In his final remarks, the male landlord testified that the three holes in question could have been between ½ inch to the size of a Canadian "Loonie" ($1 dollar coin).

The landlords provided a $336.00 receipt for drywalling and repainting that they undertook to repair the three holes in the solarium wall. They said that they were initially surprised at the cost of contracting someone to perform this work, but noted that the contractor had to return to the premises a number of times to enable the gyproc to dry and paint the wall. The tenants testified that they asked the landlords if any of the holes in question presented a problem for them as they were prepared to reputty these holes and paint over them if necessary. The tenants maintained that the cost of repair was excessive and could have been avoided had the landlords advised them that they were going to bill them for the professional repair and repainting of the wall.

Based on the 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 undamaged after the tenants vacated the rental unit. The landlords have clearly incurred losses as a result of the repairs that were necessary to restore the solarium wall to its original state prior to this tenancy. Whether the holes in question were ½ inch or 1 inch, the tenants have confirmed that they did drill holes in the wall, holes that they did not repair before the end of their tenancy. Although I share the tenants' concern about the size of the bill presented by the landlords to repair this damage, I accept the male landlord's explanation as to why the repair cost resulted in a $336.00 bill. For these reasons, I issue a monetary award in the landlords' favour in the amount of $336.00.

I have also given careful consideration to the landlords' claim for a cracked tile. In this case, the tenants did not agree that this damage occurred during their tenancy. When questioned by the male landlord, the male tenant testified that he was 99% certain that the damaged tile was in the same condition at the end of this tenancy as when the tenants first rented this property. The landlords provided a copy of an email from their current tenant who noted this damage. However, as the tenants noted, the current tenant's email was dated two months after the end of this tenancy. I find that an email from someone who did not participate in this hearing attesting to the condition of the rental unit when she moved into the rental unit is no adequate substitute for a properly completed move-out condition inspection report. The landlords' failure to complete a joint move-in or move-out condition inspection report leaves them in a position whereby it is difficult for them to demonstrate to the extent required that damage to the cracked tile arose during this tenancy. In addition, the landlords have not actually incurred any losses as yet, as they have not yet repaired the cracked tile. The female landlord testified that they are encountering difficulty in obtaining a colour match for this tile, although they are hopeful of obtaining this tile and conducting this repair soon.

Without any actual losses demonstrated and without convincing evidence that damage to the tile in question arose during this tenancy, I dismiss the landlords' application for a monetary award for damage to one of their tiles without leave to reapply.

Since both parties have met with some success in their respective applications, I make no order with respect to recovery of their filing fees.

Conclusion

I issue a monetary Order in the tenants' favour against the Respondent in their application, the female landlord (Landlord LM), under the following terms which allows the tenants to recover a portion of their security deposit and a monetary award equivalent to the value of their security deposit due to the landlord's failure to comply with section 38 of the Act, less damage arising out of this tenancy.

Item	**Amount**
Return of Security Deposit ($750.00 - $550-$100.00 = $100.00)	$100.00
Monetary Award for Landlord's Failure to Comply with s. 38 of the *Act*	750.00
Less Damage Arising out of Tenancy	-336.00
Total Monetary Order	**$514.00**

The tenants are provided with these Orders in the above terms and the female landlord must be served with this Order as soon as possible. Should the female 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*.

Dated: July 2, 2013

Residential Tenancy Branch