Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, OLC, FF, MND

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). On June 25, 2013, Tenants OS and DL applied for the following orders against both landlords named as respondents in their application:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of double the security deposit for this tenancy pursuant to section 38;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

On September 9, 2012, Landlord KK submitted her application for dispute resolution in which she named only Tenant DL as the respondent:

- a monetary order for damage to the rental unit pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenant 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.

In identifying only Tenant DL as the respondent in her application, Landlord KK (the landlord) correctly noted that she was the only landlord and Tenant DL (the tenant) was the only tenant named on the written Residential Tenancy Agreement (the Agreement). Only KK and DL signed the Agreement. At the commencement of the hearing, I clarified the spelling of the applicants' names, which are as outlined above, and advised the parties of my preliminary finding that only those named in the Agreement and who signed the Agreement could seek monetary awards arising out of this tenancy. As

such, I find that the sole landlord for this tenancy was Landlord KK and the sole tenant for this tenancy was Tenant DL.

The landlord, giving evidence through her translator for the most part, testified that she received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on June 28, 2013. The tenant testified that he received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on September 12, 2013. I am satisfied that the parties served one another with the above documents and their written evidence packages in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for damage arising out of this tenancy? Which of the parties is entitled to the security deposit for this tenancy? Is the tenant entitled to an additional monetary award equivalent to the amount of his 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 fixed term tenancy commenced on June 27, 2012. Although the landlord entered into written evidence a copy of the Agreement, she did not include the second page of that Agreement, which provided details as to the monthly rent and terms of the Agreement. The landlord's translator (turned witness for this portion of the hearing) read the key elements of the missing second page of the Agreement in which monthly rent was set at $1,350.00, payable in advance on the first of each month. The landlord continues to hold the tenant's $700.00 security deposit paid on June 20, 2012. The Agreement called for an end to this tenancy by April 28, 2013, although the tenancy could be renewed on a month-to-month basis after that date.

Both parties confirmed that there was a joint move-in condition inspection of the rental premises when the tenancy began. The landlord did not prepare a move-in condition inspection report. The parties agreed that the tenant's parents met with the landlord on April 28, 2013 to conduct a joint move-out condition inspection. Again, the landlord failed to prepare any move-out condition inspection report.

The tenant gave consistent testimony throughout this hearing that he vacated the rental unit on April 28, 2013, as per the terms of the Agreement. He gave sworn testimony and written evidence that he sent his request to return the security deposit and his forwarding address to the landlord by registered mail on May 6, 2013 and May 28, 2013. He entered into written evidence copies of the Canada Post Tracking Number,

Customer Receipt and the returned envelope from Canada Post. Neither of these mailings sent to the landlord's correct and current mailing address were successfully delivered to the landlord. Canada Post noted that the May 6, 2013 registered letter was refused by the recipient (the landlord) while the second registered letter of May 28, 2013 indicated that the recipient had advised Canada Post that she had moved. The landlord testified that she was unaware of the two May 2013 registered letters. However, the landlord did testify that she received the tenant's dispute resolution hearing package sent by the tenant on June 28, 2013. She acknowledged that she had received the tenant's forwarding address by late June 2013, but did not apply for authorization to retain any portion of the tenant's security deposit until September 9, 2013.

The tenant's application for a monetary award of $1,400.00 sought a return of double his security deposit as he maintained that the landlord had not complied with the provisions of section 38 of the *Act*.

The landlord applied for a monetary award of $748.20. She supplied a number of receipts and photographs to support her claim that the tenant was responsible for damage that arose during this tenancy. An April 28, 2013 invoice she submitted identified payments of a $160.00 repair of the garberator in the kitchen sink, $150.00 to change a door knob (as the tenants had allegedly vacated without leaving their keys for the landlord) and $150.00 for fireplace drywall repair. In addition, the landlord cited damage to the paint on the ceiling that needed to be repaired. At the hearing, the landlord testified that the ceilings have not been repainted as yet.

The landlord's evidence changed a number of times during this hearing. For the first half of this hearing, the landlord gave sworn testimony that the tenant did not vacate the rental unit until May 28, 2013. She testified that the tenant had asked for an extra month beyond the stated end date on the Agreement to vacate the rental premises. She said that she agreed to this request. She also testified that the tenant did not give her any written notice to end this tenancy and that the tenant and his parents did not return the key to the rental unit.

As the hearing proceeded, it became apparent that the landlord's own written evidence and subsequent sworn testimony did not coincide with her claim that the tenant did not vacate the rental unit until May 28, 2013. For example, the landlord's own repair invoices were dated April 28, 2013. The landlord also testified that she conducted the joint move-out condition inspection with the tenant's parents on April 28, 2013. As these glaring inconsistencies in her own evidence required explanation, I asked the landlord whether she was certain that this tenancy did not end until May 28, 2013. It was only at this point that the landlord, through her translator, modified her earlier

repeated sworn testimony regarding the date when this tenancy ended. She said that she must have been mistaken as she now realized that the tenant was correct in his claim that this tenancy ended on April 28, 2013. The translator reported that the landlord said that she must have been confused in the translation of the dates. While I would normally accept such an explanation, this account does not explain why the landlord provided specific details in her earlier testimony as to why the tenancy extended beyond the stated end date on the Agreement.

Analysis – Tenant's Application

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 tenant sent his forwarding address to the landlord's correct and still current mailing address on May 6, 2013 and again on May 28, 2013. In accordance with section 90 of the *Act*, I find that the landlord is deemed to have received the tenant's forwarding address in writing on May 11, 2013, the fifth day after the initial registered mailing to the landlord. An additional deemed service to the landlord at this address, although unnecessary, was also provided on June 2, 2013. The landlord also acknowledged that she had the tenant's forwarding address late in June 2013, when she received his dispute resolution hearing package at the same mailing address. I find that the landlord did not return the tenant's security deposit in full within 15 days of receiving the tenant's forwarding address in writing. She did not apply to the Residential Tenancy Branch (the RTB) for authorization to retain any portion of the tenant's security deposit until September 9, 2013, well after her 15-day time limit for doing so expired. She did not have the tenant's written authorization to retain any portion of the security deposit.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch's (RTB's) 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.*

I find that the landlord has not returned the tenant's security deposit within 15 days of receipt of the tenant's forwarding address. The tenant is therefore entitled to a monetary order amounting to double the deposit with interest calculated on the original amount only. No interest is payable over this period. As the tenant has been successful in his application, I allow him to recover his filing fee from the landlord.

Analysis – Landlord's Application

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 landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

With respect to the landlord's claim for the costs of repairing damage to the ceiling that still requires repainting, I note that the landlord testified that she has not actually conducted these repairs. As there is no evidence that the landlord has incurred losses arising out of the alleged damage to the ceiling paint, I dismiss the landlord's claim for this portion of her application without leave to reapply.

Subsection 36(2)(c) of the *Act* reads in part as follows:

36 *(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit...for damage to residential property is extinguished if the landlord...*

(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.

Although the landlord is not precluded from applying for a monetary award for damage arising out of a tenancy even if she did not complete condition inspection reports, these reports are very useful in establishing a base line for considering the extent to which damage arose during the course of a tenancy.

In this situation, the landlord has relied almost solely on photographic evidence and her own sworn testimony, which I found inconsistent and unreliable for the most part, to establish the condition of those portions she considered damaged during the tenancy at the end of the tenancy. There are no photos of the condition before the tenancy began. After reviewing the landlord's photographs, the landlord's written evidence and the sworn testimony of the parties, I find that there is insufficient evidence to enable me to issue a monetary award to the landlord for damage to the wall near the fireplace in this rental unit. The damage appears relatively minor in nature and I am not satisfied that this damage exceeded what could be expected over time as a result of reasonable wear and tear. I dismiss the landlord's claim for the recovery of her costs in repairing and repainting areas surrounding the fireplace without leave to reapply.

Rather than rekeying the lock to the rental unit, the landlord apparently replaced the entire door knob and locking mechanism on April 28, 2013 at a cost of $150.00. I first note that the replacement of the entire door knob would seem to be unnecessary even if I were to accept the landlord's initial testimony that the tenant vacated the rental unit without leaving her the keys. After the tenant testified that the keys were returned to the landlord later on the same day that the tenancy ended, the landlord once again modified her earlier sworn testimony in which she clearly stated that the tenancy ended without the keys being returned to her. Confronted with the tenant's straightforward and consistent testimony that his parents returned their keys later on the same day that the tenancy ended, the landlord testified that the keys were in fact returned to her later on the final day of the tenancy. She said that by then her repair person had already purchased and installed a new locking mechanism and door knob, for which she was seeking compensation.

Under these circumstances, I find that the keys for this tenancy were returned to the landlord on the same day that this tenancy ended and there was no need for the landlord to have replaced the door knob and attempted to recover this cost from the tenants. I also note that the *Act* requires a landlord to absorb the cost of rekeying locks if a new tenant requests a change in locks. I dismiss the landlord's claim for the replacement of the door knob and locking mechanism without leave to reapply. I am not satisfied that there was any need to replace the door knob and locking mechanism at the tenant's expense given that the landlord eventually admitted that the tenant's keys were returned to her on the same day that this tenancy ended.

I heard sworn testimony from both parties that the garberator in this rental unit was damaged during this tenancy. The tenant's only issue with respect to this portion of the landlord's claim was that the tenant did not believe that the landlord should have relied on the initial $160.00 estimate provided by the first repair company she consulted. The tenant said that his parents obtained a second quote for a $140.00 repair of the garberator. He did not enter into written evidence a copy of any such estimate.

Based on the evidence before me and on a balance of probabilities, I find that there is sufficient evidence to demonstrate that the landlord has incurred a $160.00 loss as a result of damage to the garberator that arose during this tenancy. I issue a monetary award in the landlord's favour in this amount.

As the landlord has been only partially successful in her application, I allow her to recover $25.00 of her $50.00 filing fee from the tenant. I dismiss all other portions of the landlord's application for dispute resolution without leave to reapply.

Conclusion

I issue a monetary Order in Tenant DL's favour against Landlord KK under the following terms, which include the return of his damage deposit, a monetary award for the landlord's failure to comply with section 38 of the *Act*, and for recovery of his filing fee, less a monetary award for damage to the landlord and her recovery of a portion of her filing fee:

Item	**Amount**
Return of Security Deposit	$700.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the *Act*	700.00
Tenant's Recovery of Filing Fee	50.00
Less Landlord's Monetary Award for Damage to Garberator	-160.00

Landlord's Recovery of ½ Filing Fee	-25.00
Total Monetary Order	**$1,265.00**

Tenant DL is provided with these Orders in the above terms and Landlord KK must be served with this Order as soon as possible. Should Landlord KK 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: October 03, 2013

Residential Tenancy Branch