



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF, SS, O

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord 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;
- 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.

The tenant applied for:

- a monetary order for compensation for the cost of emergency repairs and for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of double her security deposit pursuant to section 38;
- authorization to serve documents or evidence in a different way than required by the *Act* pursuant to section 71; and
- other unspecified remedies.

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.

Preliminary Issues – Service of Documents

The landlord testified that she sent the tenant a copy of her dispute resolution hearing package by registered mail on September 13, 2013. Although the tenant testified that she had received the landlord's dispute resolution hearing package, she said that she received this package by regular mail. I am satisfied that the landlord served her hearing package to the tenant in accordance with the *Act*. As both parties confirmed

that they had received one another's written evidence, I am also satisfied that this evidence has been submitted to one another in accordance with the *Act*.

At the commencement of the hearing, the tenant clarified that she had been able to serve her documents to the landlord by a method allowed under the *Act*. She withdrew her application for authorization to serve documents or evidence in a different way than required under the *Act*. The tenant's application for a substitutional service order is hereby withdrawn.

The tenant testified that on October 18, 2013, she sent the landlord a copy of her dispute resolution hearing package, including a copy of her application for dispute resolution and her Notice of a Dispute Resolution Hearing, by registered mail. The landlord testified that she received a hearing package from the tenant by registered mail. However, she testified that the tenant had not included a copy of her application for dispute resolution with that package. As such, the landlord said that she had no sense of what the tenant was seeking in her application. The landlord testified that she was unaware that the tenant had requested a monetary award of \$4,500.00. She had understood that the tenant was seeking a return of her security deposit.

Initially, the tenant testified that she placed a copy of her application for dispute resolution in the hearing package she sent to the landlord. She later said that she was uncertain as to whether she included that application in the envelope she sent the landlord. Later still in the hearing, the tenant stated that she may not have been aware that she had to include a copy of her application in the package she sent the landlord.

Based on the evidence before me, I advised the parties that I could not proceed to consider the tenant's application as I was not satisfied that the tenant had included a copy of her application for dispute resolution with the hearing package she had sent to the landlord. Under these circumstances, I find that the tenant has not complied with the provisions of section 89(1) of the *Act* by failing to provide a vital component of her application for dispute resolution to the landlord in advance of this hearing. A fundamental principle of natural justice requires that a respondent named in proceedings has the right to know the case against them so as to be in a position to address the applicant's claim. To proceed to hear the tenant's application would also be to deny the landlord's right to a fair hearing. As such, I advised the parties of my decision to dismiss the tenant's application for dispute resolution with leave to reapply with respect to the issues not addressed in the landlord's application. I noted that I could consider the tenant's application for a return of double her security deposit in the context of the landlord's own application to retain that deposit. As noted above, the tenant has withdrawn her request for a substitutional service order as no such order was required.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for damages and losses arising out of this tenancy? Which of the parties are entitled to the tenant's security deposit? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

I heard conflicting testimony as to whether there was a Residential Tenancy Agreement (an Agreement) in place for this tenancy. The landlord and her manager (the manager) testified that there was a written Agreement in place. The tenant said that there was no such signed Agreement in place for this tenancy, although she was provided with a blank Agreement. She said that this tenancy was subject to an oral agreement between the parties. The manager testified that the tenant's application for tenancy was a written Agreement and that this application was typically the written Agreement that she entered into with tenants on the landlord's behalf. I noted that the *Act* requires a landlord to create a written Agreement signed by both parties for every tenancy. As no such Agreement was in place for this tenancy, I accepted the tenant's testimony that this tenancy was based on an oral agreement between the parties.

The tenant testified that this was a fixed term tenancy agreement commencing on September 1, 2012, which was to have ended on August 31, 2013. The landlord and the manager testified that this was a periodic tenancy that commenced on September 1, 2012. As nothing turns on whether this was a fixed term or a periodic tenancy, I have made no determination regarding this disputed testimony.

Both parties agreed that the monthly rent during this tenancy was set at \$950.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$475.00 security deposit paid on August 15, 2012.

The parties agreed that there was no joint move-in condition inspection for this tenancy. The landlord testified that she attempted to conduct a joint move-out condition inspection with the tenant, but the tenant refused to participate in one. The landlord entered into written evidence a copy of a Notice of Final Opportunity to Schedule a Condition Inspection, a Residential Tenancy Branch (RTB) developed document. She testified that she posted this notice on the tenant's door on September 1, 2013. This notice requested that the tenant participate in an inspection on September 4, 2013 at 4:30 p.m. However, the manager testified that she and the landlord gained access to the mostly vacant suite at 1:00 p.m. on August 31, 2013. By that time, the landlord and her manager realized that the tenant had given up possession of the rental unit, although there were some belongings left behind. The landlord testified that the

purpose of the Notice of Final Condition Inspection was to provide an opportunity for the tenant to remove the belongings she had left behind and to clean the rental unit.

The tenant denied having received any written notice to conduct a joint move-out condition inspection. She said that she had tried repeatedly to make arrangements with the landlord or her manager to conduct a joint move-out condition inspection. She was unaware of any Notice posted on her door on September 1, 2013.

The tenant agreed that she received a copy of a 1 Month Notice to End Tenancy for Cause dated July 24, 2013, posted on her door. The landlord confirmed that on or about July 31, 2013, she received the tenant's notice to end her tenancy by August 31, 2013. The tenant had left this notice in the mailbox of the manager.

The tenant testified that she had moved her belongings out of the rental unit on August 29, 2013. Although she considered her tenancy over as of that date, she said that she could not make arrangements with the landlord or her manager to return her keys and obtain a joint move-out condition inspection. She testified that she returned to the rental unit on August 30, 2013, at which time she left her keys for the landlord and her manager in the rental unit.

The landlord's application for a monetary award of \$475.00 included the following items:

| Item | Amount |
|--|-----------------|
| Cleaning of Rental Unit (2 people @ 8 hours per day @ \$20.00 per hour = \$320.00) | \$320.00 |
| Damage to Door Handle and Locking Mechanism | 254.34 |
| Total of Above Items | \$574.34 |

In her written evidence, the landlord also noted that she believed that the tenant was responsible for the replacement of broken blinds. The landlord also requested the recovery of her \$50.00 filing fee for her application.

I heard sworn testimony from the parties with respect to the landlord's claims for cleaning and damage to the door handle. The landlord also provided photographic and written evidence, including a copy of a \$254.34 receipt for locksmith services to supply an entrance door handle, backset latch, keys, rekeying and labour to rekey the locks.

The manager testified that the premises were very clean when the tenant moved into the rental unit in September 2012. She described the rental unit as having been left in "mint condition" when the tenancy began. The landlord and her manager testified that the tenant left the rental unit in poor condition and left many items in the rental unit at the end of this tenancy. They maintained that there had been smoking in this non-smoking rental unit and that the bathroom looked like it had never been cleaned in the year that the tenant lived there. They supplied photographs of a number of items, including bags, food in the refrigerator, a mirror, a bag of bedding, etc., that remained in the rental unit after the tenant vacated the rental unit. The landlord and her manager testified that they understood that the tenant had agreed to purchase or at least take responsibility for a number of items left by the previous tenant in this rental unit. They testified that two people took eight hours each at a pay rate of \$20.00 per hour to clean the rental unit after the tenant vacated the premises. The manager testified that the door was difficult to open when she and the landlord entered the rental unit on August 31, 2013. She said that repairs had to be undertaken to handle the locking mechanism by a locksmith.

The tenant did not dispute the photographic evidence regarding the items left behind at the end of this tenancy. She confirmed that she left bags and some food behind for the next tenant. However, she testified that most of the items left behind were in the rental unit when she moved into the premises in September 2012. The tenant's mother, who was present when the tenant moved into the rental unit, confirmed the tenant's testimony on this point. The tenant said that the only item she purchased from the previous tenant was a bookcase, which she removed when she ended her tenancy in August 2013.

The tenant and her mother testified that the rental unit was dusty and dirty when the tenant moved into the premises in September 2012. The tenant said that the oven and fridge had to be cleaned and blinds and a window pane were broken. She said that the landlord and her manager committed to repair these items before she moved in, but it took the landlord nine months to replace the broken blinds and repair the window.

The tenant testified that the door handle was working "perfectly fine" until the landlord and her manager entered the rental unit to replace the blinds. She said that the landlord requested that she leave the rental unit while she was undertaking repairs. The tenant maintained that when she returned later that day the door handle was loose and was not working properly. Her mother also noted that there had been no problems with the door handle until it became loose after the landlord conducted her repairs. The tenant attributed the damage to the door handle to the landlord and/or her manager.

She and her male witness testified that the handle could likely have been easily fixed by tightening one of the screws on the door handle

The tenant provided written evidence in support of her claim that the landlord had not complied with the requirements of section 38 of the *Act* with respect to the return of her security deposit or the filing of an application to retain that deposit within 15 days of the end of her tenancy. She maintained that the landlord had not taken either of these actions within 15 days of the end of her tenancy. As such, she requested a return of double her security deposit. The landlord's application for dispute resolution to retain the tenant's security deposit was filed with the RTB on September 13, 2013.

Analysis – Landlord's Application for a Monetary Award for Damage

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.

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 began and when it ended. The tenant and her mother maintained that the premises were left in better condition than when she moved into the rental in 2012.

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. However, in this case, the landlord did not undertake a joint move-in condition inspection and did not prepare a joint move-out condition inspection report, although she did enter into written evidence some photographic evidence regarding the condition of the rental unit at the end of this tenancy.

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. In this

case, I find the Notice posted on the tenant's door after the landlord knew that the tenant had vacated the rental unit was of little value in ensuring that a joint move-out condition inspection would occur. The landlord and her manager knew well in advance of the end of this tenancy that the tenant was planning to vacate the rental unit and did not take formal measures to undertake a joint move-out condition inspection until the tenancy was over.

I find that the landlord did not follow the requirements of the *Act* regarding the joint move-in and joint move-out condition inspections and the need to produce a condition inspection report of her own move-out inspection. For these reasons, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. However, I also find on a balance of probabilities that the tenant did not comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit "reasonably clean, and undamaged" as some cleaning and repair was likely required by the landlord after the tenant vacated the rental unit. For that reason, I find that the landlord is entitled to a monetary award of \$100.00 for general cleaning that was required at the end of this tenancy.

I have also considered the landlord's claim for the recovery of damage to the door handle and locking mechanism at the end of this tenancy. Although I have given the testimony of the tenant, the tenant's mother and the male witness careful consideration, I find on a balance of probabilities it unlikely that the damage to this handle occurred on the one occasion when the landlord and/or manager had access to the rental unit during the course of other repairs to the rental unit. While I accept that the landlord may be entitled to recover some of the costs she incurred to repair this damage, there is an element of reasonable wear and tear that would have occurred over time that would reduce the landlord's eligibility for compensation from the tenant. I also note that section 25(1) of the *Act* establishes that the costs identified by the landlord to alter the locks so that keys issued to the previous tenant do not allow access the rental unit are to be absorbed by the landlord. Under these circumstances, I allow the landlord a monetary award of \$75.00, as partial compensation for the repair of the door handle claimed by the landlord.

As the landlord has been partially successful in this application, I allow her to recover \$25.00 of her \$50.00 filing fee from the tenant.

Analysis – Return of 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 tenant gave the landlord written notice that she planned to end her tenancy on August 31, 2013. Although she moved her belongings out of the rental unit on August 29, 2013, she re-entered the rental unit on August 30, 2013, to return her keys to a location in the rental unit where the landlord or her manager could find them. There is undisputed testimony that the landlord and her manager did not take possession of the rental unit until August 31, 2013. Whether the tenancy ended on August 30, 2013 or August 31, 2013, I find the landlord's September 13, 2013 application for dispute resolution to retain the tenant's security deposit was within the 15-day time period for taking such action as established in section 38(1) of the *Act*. As such, I find that the provisions of section 38(6) of the *Act* requiring a return of double the tenant's security deposit are not in effect with respect to this tenancy.

For these reasons, I allow the landlord to retain a total of \$200.00 (\$100.00 + \$75.00 + \$25.00 = \$200.00) from the tenant's security deposit for the items outlined above. No interest is applicable over this period. I order the landlord to return the remaining \$275.00 from the security deposit to the tenant plus applicable interest forthwith. No interest is payable over this period.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the landlord to retain a portion of the tenant's security deposit in order to recover damages arising out of this tenancy and a portion of her filing fee:

| Item | Amount |
|-----------------------------|-------------------|
| Cleaning | \$100.00 |
| Damage to Door Handle | 75.00 |
| Less Security Deposit | -475.00 |
| Plus One-Half of Filing Fee | 25.00 |
| Total Monetary Order | (\$275.00) |

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the 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.

The tenant's application for a substitutional service order is withdrawn. The tenant's application for a return of double her security deposit has been considered in the context of the landlord's properly served application to retain that deposit. As this matter has been addressed in this decision, I dismiss the security deposit portion of the tenant's application without leave to reapply. The remainder of the tenant's application for dispute resolution is dismissed with 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: October 29, 2013

Residential Tenancy Branch

