Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

This hearing dealt with applications from both the landlord and the female tenant (the tenant) under the *Residential Tenancy Act* (the *Act*). The landlord identified both tenants in his application for:

- a monetary order for unpaid rent and utilities, 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 security and pet damage deposits (the deposits) for this tenancy in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenants pursuant to section 72.

The female tenant applied for:

- 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 their deposits pursuant to section 38;
- authorization to recover her filing fee for this application from the landlord pursuant to section 72; and
- other remedies, identified in her application as the losses she incurred in cancelling a cheque provided to the landlord.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Preliminary Issues – Service of Documents

The tenant testified that on July 24, 2014, she gave the landlord's father, who she maintained acted as the landlord's agent throughout the course of this tenancy, oral notice of the tenants' intention to end this tenancy by August 31, 2014. She testified that she followed up on this oral notice by providing email notice to the landlord on

August 9, 2014. The landlord denied having received the oral notice, but entered into written evidence a copy of the tenants' August 9, 2014 emailed notice to end tenancy.

The landlord confirmed that on October 2, 2014, he received a copy of the tenant's dispute resolution hearing package sent by registered mail on September 27, 2014. The tenant confirmed that the tenants received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on February 24, 2015. I am satisfied that the parties were duly served with one another's hearing packages in accordance with section 89(1) of the *Act*.

The tenant testified that on March 6, 2015, she sent a copy of the tenants' written evidence to the landlord by Canada Post's ExpressPost system in which the tenants required a signature for delivery of the package. She provided the Canada Post Tracking Number to confirm this mailing. The landlord testified that he had not received the tenants' written evidence package nor had he received any notice that an ExpressPost package was available for his pickup.

An evidence package sent by Canada Post's ExpressPost system requiring a signature for delivery qualifies as registered mail, under the definition provided by section 1 of the *Act*. Under these circumstances and based on the sworn testimony confirmed by Canada Post's Online Tracking System, I find that the landlord was deemed served with the tenants' written evidence package on March 11, 2015, five days after its mailing. I make this finding in accordance with sections 88 and 90 of the *Act*. I have considered the tenants' written evidence in reaching my decision.

Although the tenants confirmed having received the landlord's written evidence and digital evidence package, the tenants testified that the only material included in that package were the digital photos of the rental unit, a copy of the landlord's application for dispute resolution, and a written expense report. The tenants denied having received any other portions of the landlord's written evidence. They also denied ever having been provided with a copy of a Residential Tenancy Agreement, a signed copy of which was entered into written evidence by the landlord. Although I have considered the landlord's written evidence, I have noted the tenants' claim that they neither signed nor were provided copies of some of the documents submitted by the landlord.

At the hearing, the landlord did not dispute the tenants' claim that they paid their utility bills at the end of this tenancy. The landlord withdrew his application for a monetary award for unpaid utility bills.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for loss of rent for the first half of September 2014? Is the landlord entitled to a monetary award for losses and damage arising out of this tenancy? Is the tenant entitled to a monetary award equivalent to double the value of the deposits as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*? Is the tenant entitled a monetary award for losses arising out of this tenancy? Are either of the parties entitled to recover their filing fees for this application from one another?

Background and Evidence

The landlord entered into written evidence a copy of a Residential Tenancy Agreement (the Agreement) allegedly signed by both tenants for this periodic tenancy on February 3, 2014. The monthly rent was set at $1,600.00, payable on the first of each month, plus hydro and gas. Both parties agreed that the landlord continues to hold the tenants' $800.00 security deposit and $800.00 pet damage deposit both paid on January 15, 2014. The tenants were to take occupancy of the rental unit on January 15, 2014. The landlord's signature was not on the Agreement entered into written evidence. Although the tenants denied having been provided with the Agreement and also denied having signed the Agreement, they did not dispute the basic terms as outlined above.

The landlord did not dispute the tenants' claim that they physically vacated the rental unit on August 17, 2014. The tenant testified that the tenants gave the landlord's agent their forwarding address on August 27, 2014; the landlord acknowledged receiving their forwarding address by September 1, 2014. The landlord testified that he assumed possession of the rental unit on August 28, 2014.

The landlord entered into written evidence a copy of a January 30, 2014 joint move-in condition inspection report allegedly signed by the parties. In that report, a copy of which was provided by the landlord, the tenants signed that they agreed to allow the landlord to retain their pet damage and security deposits before this tenancy began. Although the tenants confirmed that a joint move-out condition inspection was performed with the landlord's agent at the end of this tenancy, no report of this inspection was created or entered into written evidence by the landlord. The landlord said that the tenants were in a hurry to be finished with the move-out inspection and rushed off without signing the report that he maintained was prepared at that time. He said that he stayed in the car outside the premises while his agent interacted with the tenants. At one point, the landlord said that this inspection occurred on September 9, 2014; later in the hearing, he said this occurred on September 2, 2014. The tenants testified that no such report was written or signed by them at the end of their tenancy. The landlord did not enter into written evidence any copy of a move-out condition inspection report.

The landlord testified that he was uncertain that the tenants were going to vacate the rental unit until they vacated the rental unit in late August 2014. After undertaking some initial cleaning and repairs, he said that he commenced trying to re-rent the premises on September 7, 2104. He testified that he was able to locate new tenants who took possession of the rental unit on October 1, 2014.

The tenant's application for a monetary award of $3,270.00 received by the Residential Tenancy Branch (the RTB) on September 25, 2014, included the following items:

Item	**Amount**
Return of Double Pet Damage Deposit ($800.00 x 2 = $1,600.00)	$1,600.00
Return of Double Security Deposit ($800.00 x 2 = $1,600.00)	1,600.00
Cancelled Cheque Fee	20.00
Recovery of Filing Fee	50.00
Total Monetary Order Requested	**$3,270.00**

The landlord's claim for a monetary award of $3,111.40 received by the Residential Tenancy Branch (the RTB) on February 10, 2015, included the following items:

Item	**Amount**
Cleaning	$1,650.00
Fixing/Repairs	180.00
Loss of Rent for One Half Month (September 2014)	800.00
Unpaid Hydro Bill	249.21
Unpaid Gas Bill	232.19
Total Monetary Order Requested	**$3,111.40**

The landlord requested the reimbursement of his cleaning and repair costs, providing receipts from his own cleaning company for these costs. He also applied for the recovery of one-half month's rent for September 2014, due to the tenants' late provision of their notice to end this tenancy and his inability to rent the unit for the month of September 2014. As noted above, he withdrew his application to recover unpaid utility bills.

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 deposits in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposits. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposits, and the landlord must return the deposits plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the deposits (section 38(6) of the *Act*). With respect to the return of the deposits, the 15-day limit begins on the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, the landlord had 15 days after September 1, 2014, the date he said he received the tenants' forwarding address to take one of the actions outlined 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." As there is no evidence that the tenants have given the landlord written authorization **at the end of this tenancy** to retain any portion of the deposits, section 38(4)(a) of the *Act* does not apply to these deposits.

The following provisions of Policy Guideline 17 of the 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.*

Based on the undisputed evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the deposits for this tenancy in full within the required 15 days. In fact, the landlord waited over five months before applying for authorization to retain the tenants' deposits. The tenants gave sworn oral testimony that they have not waived their rights to obtain a payment pursuant to section 38 of the *Act* owing as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I

find that the tenant is therefore entitled to a monetary order amounting to double the value of the deposits for this tenancy with interest calculated on the original amount only. No interest is payable over this period.

I have also considered the tenant's application for the recovery of a $20.00 fee charged to cancel a cheque issued to the landlord. As outlined below, I find that rent was still owing for September 2014 when they cancelled their cheque, as the tenants had not provided proper notice to end their tenancy to the landlord. I dismiss this portion of the tenant's application without leave to reapply.

Analysis – Landlord's Application

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 month-to-month (periodic) tenancy by giving the landlord written 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 September 2014, the tenants would have needed to provide their written notice to end this tenancy before August 1, 2014. Section 52 of the *Act* requires that a tenant provide this notice in writing.

In this case, there is undisputed sworn testimony from both parties that no written notice was provided to the landlord or the landlord's agent. Oral notice provided by the tenants in July 2014, and emailed notice on August 9, 2014, does not satisfy the requirements of sections 45(1) or 52 of the *Act*.

There is undisputed evidence that the tenants did not pay any rent for September 2014. 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.

In this case, the landlord testified that he did not commence efforts to attempt to re-rent these premises until September 7, 2014, more than a week after the tenants vacated the rental unit. Although there was a delay in the landlord's commencement of action to re-rent the premises to a new tenant, I find that the landlord had no written notification of the tenants' intention to end this tenancy by August 31, 2014. Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises and has discharged his duty under section 7(2) of the *Act* to minimize the tenants' exposure to his full rental loss for September 2014. Under these circumstances, I am satisfied that the landlord has made a reasonable request for the recovery of one-half of his loss of monthly rent for September 2014. I issue a monetary

award in the landlord's favour in the amount of $800.00, to enable the landlord to recover the one-half month's rental loss he has claimed for September 2014.

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. Section 37(2) of the *Act* also requires a tenant to "leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear." 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.

The parties entered conflicting evidence regarding the condition of the rental unit when this tenancy ended. The landlord testified that the premises were left in a condition requiring extensive cleaning by his cleaning company to remove pet odours. He said that repainting was also required at that time and to cover minor damage at a total cost of $800.00, including labour. The landlord testified that the rental unit was painted in 2014, shortly before this tenancy began. The landlord submitted photographs and digital evidence to support his claim, including photographs of a broken door, which he said cost $75.00 to repair.

The tenants disputed the landlord's claims, with the exception of the broken door, which they agreed occurred during their tenancy, and for which they were responsible. They also questioned the extent of the costs incurred by the landlord, noting that these costs were included on an invoice from the landlord's own cleaning company, at what they considered inflated rates. The male tenant testified that the garage was painted before the tenants took occupancy of the premises, but the living area had not been paintly recently.

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. Although the tenants said that they were never provided with a copy of the landlord's joint move-in condition inspection report, they did not dispute the landlord's claim that the premises were in acceptable condition when this tenancy began. While the landlord testified that a joint move-out condition inspection report was issued by the landlord, he provided unconvincing sworn testimony regarding this report, changing his testimony as

to the date of this report, and failing to have this before him during the hearing. I also note that the landlord did not enter this move-out inspection report into written evidence and clearly could have had it truly existed. I also note that the tenants denied ever having received a move-out condition inspection report.

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.

Section 35 of the *Act* reads in part as follows:

> ***35*** *(1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit*
>
> > *(a) on or after the day the tenant ceases to occupy the rental unit, or*
> >
> > *(b) on another mutually agreed day…*
>
> *(3) The landlord must complete a condition inspection report in accordance with the regulations.*
>
> *(4) 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.*
>
> *(5) The landlord may make the inspection and complete and sign the report without the tenant if*
>
> > *(a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or*
> >
> > *(b) the tenant has abandoned the rental unit...*

Section 36(1) 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 or a pet damage deposit, or both, 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...*

For the reasons noted above, I find on a balance of probabilities that the landlord has not provided sufficient evidence to demonstrate that he issued a joint move-out condition inspection report to the tenants. Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-out condition inspection report, I find that the landlord's eligibility to claim against the deposits for damage arising out of the tenancy is limited. However, this does not prevent the landlord from submitting an application for a monetary award for damage or losses arising out of this tenancy.

Based on the oral, written and photographic evidence of the parties, I find on a balance of probabilities that the tenants did not fully comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit "reasonably clean" as some cleaning and repair of damage was likely required by the landlord after the tenants vacated the rental unit. As the tenants admitted that they were responsible for damage to the door, I allow the landlord's application for a monetary award of $75.00 to repair the damaged door. On a balance of probabilities, I find that the landlord is also entitled to a monetary award of $160.00 for general cleaning and repairs that were likely required at the end of this tenancy. This award is based on 8 hours of cleaning at a rate of $20.00 per hour. As I am not satisfied that the landlord has demonstrated to the extent required that the entire premises were painted shortly before this tenancy began, I dismiss the landlord's application for the recovery of the painting costs from the tenants. I dismiss the remainder of the landlord's application for a monetary award without leave to reapply.

As both parties have been partially successful in their respective applications, I find that the parties are responsible for their own filing fees and make no order with respect to their applications to recover these fees from one another.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to recover double the value of their deposits, less the monetary awards granted to the landlord:

Item	**Amount**
Return of Double Pet Damage Deposit ($800.00 x 2 = $1,600.00)	$1,600.00
Return of Double Security Deposit ($800.00 x 2 = $1,600.00)	1,600.00
Less Landlord's Loss of Rent for One-Half of September 2014	-800.00

Less Damage to Door	-75.00
Less Cleaning (8 hours @ $20.00 = $160.00)	-160.00
Total Monetary Order	**$2,165.00**

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.

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: March 24, 2015

Residential Tenancy Branch