



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- 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 and pet damage deposit (the deposits) in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover his 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, to call witnesses and to cross-examine one another. The landlord was represented by his agent. The agent confirmed he had authority to act on behalf of the landlord.

Neither party raised any issue with service of evidence or other dispute documents.

Preliminary Issue – Landlord's Evidence

At the hearing, I informed the agent that the photographs contained in the condition move-out inspection report were of very low quality. I confirmed with the agent that he understood I would only rely on the photographs on the external storage device provided. The agent stated that he understood this and that the reason the electronic photographs were provided was in anticipation of the faxed copies being poor quality.

Preliminary Issue – Information Provided at Hearing

At the beginning of the hearing, I informed the parties of the law and policy that I would have to provide in this matter. In particular I provided information on the following provisions and policy:

- extinguishment under section 24 and 35 of the Act and its effects on return of the security deposit pursuant to section 38 of the Act;
- the entire section on nail holes contained in *Residential Tenancy Policy Guideline*, “1. Landlord & Tenant – Responsibility for Residential Premises” (Guideline 1);
- page 2 paragraph 3 of *Residential Tenancy Policy Guideline*, “17. Security Deposit and Set off” (Guideline 17); and
- the useful life of interior paint as set out in *Residential Tenancy Policy Guideline*, “40. Useful Life of Building Elements” (Guideline 40).

After providing this information, I asked the tenant if she was waiving compensation pursuant to subsection 38(6) of the Act in the event I found the landlord’s right to claim against the security deposit was extinguished. The tenant indicated she was not waiving compensation pursuant to subsection 38(6) of the Act.

The parties were given an opportunity to engage in settlement discussions. The parties did not reach a settlement.

At the end of the hearing I reviewed the potential range of outcomes of adjudication, i.e. a total range of award from \$250.00 (and retention of the deposits) in the landlord’s favour to \$3,600.00 in the tenant’s favour.

The parties were given a second opportunity to settle this matter. The parties did not reach a settlement. The tenant confirmed that she did not wish to waive compensation pursuant to subsection 38(6) of the Act.

Preliminary Issue – Prior Dispute Resolution Hearing

This tenancy was subject of an earlier dispute resolution hearing. The tenant sought compensation for loss of laundry services.

A decision of this Branch in the prior dispute was issued 17 December 2014. The landlord was ordered to pay compensation in the amount of \$350.00. The tenant stated that this order has not yet been satisfied.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for damage arising out of this tenancy? Is the landlord entitled to retain all or a portion of the deposits in partial satisfaction of the

monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This tenancy began 6 December 2013. The parties entered into a written tenancy agreement dated 6 December 2013. Monthly rent of \$1,800.00 was due on the first. The landlord collected a security deposit in the amount of \$900.00 and a pet damage deposit in the amount of \$900.00. The tenancy ended 31 December 2014.

I was provided with a copy of the tenancy agreement. Clause 14 reads in part:

Hooks, nails, tapes, or other devices for hanging pictures or plants, or for affixing anything to the rental unit or residential property will be of a type approved by the landlord and used only with the landlord's prior written consent.

The agent testified that the landlord did not provide written consent to the tenant to affix anything to the walls.

The agent testified that a condition move-in inspection report was created 6 December 2013. I was provided with a copy of the report. The report is on the form provided by the Residential Tenancy Branch. The only fields that are completed are the possession and move-in inspection dates (in which the year is incorrectly noted as being 2014), the landlord's address for service, the address of the rental unit, and the tenant's signature. The agent explained that the report was largely blank because the rental unit was new.

The tenant testified that an agent of the landlord "S" told the tenant that there was no need to conduct an actual inspection as the rental unit was new. The tenant testified that she did not perform an inspection with the landlord or agent of the landlord. The tenant testified that she signed the report without an inspection.

The agent testified that a computer generated email was sent to the tenant on or about 12 December 2014. The agent testified that AE (another agent of the landlord) had a telephone conversation with the tenant on 30 December 2014 indicating that the condition move-out inspection would occur before 1300 on 31 December 2014.

The tenant testified that she did not receive the computer generated email. The tenant testified that she has had difficulties with the landlord's computer database system and testified to this problem in the prior hearing. The tenant testified that she communicated with AE by telephone. The tenant testified that prior to the first inspection date she asked to reschedule the condition move out inspection as she could not leave work to

attend. The tenant testified that she asked to reschedule for the early evening of 31 December 2014. The tenant testified that she was told she could not reschedule the condition move-out inspection. The tenant confirmed on cross examination that she was not seeking to overhold the rental unit by moving the time of possession, but to reschedule the condition move-out inspection only

The agent testified that a condition move-out inspection report was created 31 December 2014 in the tenant's absence. The inspection was conducted by AE. The report is not in the form created by the Residential Tenancy Branch.

The agent testified that there were "serious" holes in the walls. The agent testified that the holes were patched but that it created a bad look. The agent testified that the tenant had said she would repair the holes. The tenant was provided with paint for doing the touch ups. The agent testified that the tenant patched most of the holes but did not paint them. The agent testified that there were holes in approximately eight or ten different areas. The agent testified that the entire rental unit had to be repainted.

The tenant estimated that she put approximately 27 holes in the walls with nails or screws in 7 different areas. The tenant testified that there were eight larger screws for the purpose of anchoring a piece of furniture. The tenant testified that she patched most of the hole, but did not paint them. The tenant testified that she did not patch the screw holes. The tenant testified that approximately half of the filled holes were sanded. The tenant agreed that she owed compensation failing to patch and repaint the all of the holes in the walls. The tenant disagreed with the total cost. The tenant testified that she contacted a third-party contractor who informed the tenant that it would cost approximately \$350.00 to patch and repaint the holes. The tenant testified that she had communicated this to the landlord.

The agent testified that the wood flooring was scratched. The agent noted a scratch by the refrigerator and by the cupboards in the kitchen. There was a third scratch on the living room floor. The agent testified that the repairs were completed using wood filler.

The tenant testified that there was a scratch by the refrigerator that was caused when something fell out of the fridge. The tenant testified that there was a dent, but not to the extent of the damage that is depicted in the landlord's photograph of the same area. The tenant testified that it looks like someone pulled pieces away. The tenant estimated that none of the scratches she observed in the rest of the flooring were longer than one centimetre.

The agent testified that excess water on the cupboards caused them damage. The agent testified that the cupboards had to be restrained. The tenant testified that she did not see any damage to the cupboards.

The agent testified that there was damage to the closet. In particular, the closet handle had fallen off, the shelf had split from its support and the closet rod was down. This damage was first noticed in a routine inspection. The agent testified that the tenant told another employee that she would fix the closet. The agent testified that the damage to the closet was not regular wear and tear because this was a new unit and all of the deficiencies were reported to the developer. The agent testified that he believed the damage was caused by misuse. The agent testified that the landlord was not billed separately for repairs to the closet and that it was included in the invoice for work completed on the rental unit.

The tenant testified that she had her jackets hung up on the rod. The tenant testified that she stored shoes on the shelf. The tenant testified that one day she heard a loud crash and went to investigate. The tenant testified that her belongings were on the floor. The tenant testified that the support for the shelf had shifted so that the brackets supporting the clothing rod were too far apart to do so. The tenant testified that she discussed the closet repairs with a representative of the landlord. She told the landlord's representative that when she opened the door, the handle pulled off. The tenant testified that the door was sticking and required a hard pull to open. The tenant testified that the landlord's representative told the tenant that it would be better if she fixed the issues. The tenant testified that she told the representative that she would try to fix it, but did not promise to do so. The tenant admits that she caused staining to the exterior of the closet door when she hung wet laundry to dry.

The landlord provided me with a copy of the tenant's email providing her forwarding address this email was dated 6 January 2015. This is the address the landlord listed for service of the tenant on this application. The agent forwarded the tenant's email containing her forwarding address to his assistant on 8 January 2015.

The agent testified that the work to repair the rental unit was completed on or before 14 January 2015.

I was provided with an invoice dated 14 January 2015 for work completed on the rental unit. The invoice is in the amount of \$1,995.00. This was the only invoice provided by the landlord. The invoice sets out total painting and patching costs in the amount of \$1,500.00, closet handle repair of \$150.00 and floor repairs of \$250.00.

The agent testified that on 16 January 2015, the landlord sent a final notice of inspection to the tenant (the inspection notice). The inspection notice was sent by both email and registered mail. I was provided with a tracking number that shows that the mailing was sent 16 January 2015. The inspection notice set out a proposed inspection date of 22 January 2015.

Analysis

Subsection 23(1) of the Act sets out that a landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day. Subsection 23(3) of the Act sets out that the landlord must offer the tenant at least two opportunities for the inspection. Subsection 24(2) sets out that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not offer the tenant two opportunities for inspection or, if the landlord does make the offer, does not participate on either occasion.

I accept the tenant's testimony that there was no condition move-in inspection completed. I find that the agent's explanation that no inspection was required as the tenant certified that the rental unit was new does not comply with the requirements of the Act. The landlord or his agent did not together with the tenant inspect the condition of the rental unit on the day the tenant was entitled to possession of the rental unit or on another mutually agreed day. Neither the landlord nor its agents made any offer of a date to conduct the inspection. Pursuant to subsection 24(2), I find that, by failing to offer inspection dates or conduct a move-in inspection, the landlord has extinguished his right to claim against the deposits. Further, the landlord provided a second opportunity for a condition move out inspection after the repairs had been completed. I find that an inspection completed at that time would have not satisfied the requirements of section 35 as the rental unit was materially changed. As such, the landlord has also extinguished its right to claim against the security deposit pursuant to subsection 36(2) of the Act by failing to provide the tenant with two opportunities to inspect the rental unit after move out. This extinguishment does not prevent a landlord from seeking compensation for damages under the Act.

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or pet damage deposit or file for dispute resolution for authorization to retain a security deposit or pet damage deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the deposits. As the landlord's right to claim against the deposits was

extinguished, the only available action by the landlord was to return the security deposit within fifteen days of receiving the tenant's forwarding address in writing

Section 88 of the Act sets out how documents may be delivered. Email is not an acceptable method of service pursuant to section 88 of the Act. Accordingly, the tenant did not provide her forwarding address to the landlord in compliance with the Act when she delivered her forwarding address by email to the agent on 6 January 2015.

Paragraph 71(2)(c) allows me to order that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act. In this case the agent forwarded the tenant's email to his assistant on 8 January 2015. Further, the landlord used this address as the tenant's address for service in this application. It is clear that the landlord had this address in its possession. I find, pursuant to paragraph 71(2)(b), that the landlord received the tenant's forwarding address on 8 January 2015, the date the address was forwarded to the assistant. As the agent had actual notice of the tenant's forwarding address, I order that the tenant's forwarding address was sufficiently delivered for the purposes of this Act.

Guideline 17 sets out:

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 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;

...

whether or not the landlord may have a valid monetary claim.

The tenant has not waived her right to compensation pursuant to subsection 38(6) of the Act. The agent was alerted to this twice at the hearing. Accordingly, the tenant is entitled to return of the deposits and an order for compensation pursuant to subsection 38(6) of the Act in the amount of \$3,600.00.

Subsection 32(3) of the Act requires a tenant to repair damage to the rental unit or common areas that was caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant. Caused means that the actions of the tenant or his visitor logically led to the damage of which the landlord complains. Subsection 32(4) of the Act provides that the tenant is not responsible for making repairs for reasonable wear and tear.

Guideline 1 provides helpful instruction in determining this application:

Reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant.

Residential Tenancy Agreements must not include terms that contradict the Legislation. ... The tenant may only be required to paint or repair where the work is necessary because of damages for which the tenant is responsible.

...

Nail Holes:

1. Most tenants will put up pictures in their unit. The landlord may set rules as to how this can be done e.g. no adhesive hangers or only picture hook nails may be used. If the tenant follows the landlord's reasonable instructions for hanging and removing pictures/mirrors/wall hangings/ceiling hooks, it is not considered damage and he or she is not responsible for filling the holes or the cost of filling the holes.

2. The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.

...

The tenant may only be required to paint or repair where the work is necessary because of damages for which the tenant is responsible.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

The landlord alleges the following damage to the rental unit:

- holes in the wall;
- scratches on the floor;

- staining on the closet door;
- water damage to the cupboards;
- damage to the closet door handle, shelf and rod.

The tenant admits that she is liable to the landlord for the repairs to the walls. The tenant disputes the amount the landlord claims in compensation. The tenant testified that she contacted a third-party contractor who told her that the cost to patch and paint the holes would be \$350.00. The agent testified that the entire rental unit had to be repainted because of the holes. I have viewed the photographs of the wall damage. I find the agent's testimony that the holes required the entire rental unit to be repainted to be implausible. I find that the landlord has failed to mitigate his damages by using a less costly method such as spot painting the patched holes. The landlord has not provided evidence of how much this level of intervention would have cost. The only evidence before me is the tenant's testimony that she was quoted \$350.00 for these repairs. I accept the tenant's testimony. The landlord is entitled to \$350.00 as compensation for the tenant's failure to repair the holes. I find that the landlord is entitled to this lower amount as he has failed to mitigate his damages.

The landlord has provided me with three photographs of damage to the flooring. Two of these photographs show minor scratching or damage; one shows more extensive damage. The tenant admits that she dropped an object from the fridge and that this caused a dent. I find that this damage was caused by the tenant's neglect when she dropped an object from the fridge. The remainder of the scratches are consistent with damage caused by regular use. The landlord has not provided me with any evidence that the tenant caused this damage through either her intentional actions or her neglect. Accordingly, with the exception of the damage near the refrigerator, I find that this type of damage is consistent with wear and tear and is not compensable. The itemised invoice sets out that the floor damage was \$250.00 to repair. There is no evidence as to the actual cost for fixing that one scratch by the refrigerator. As there is no evidence as to the cost of this repair, I award the landlord nominal damages in the amount of \$100.00.

The tenant admits that she caused the staining to the closet door. I do not have any evidence as to the cost or repainting the one door. As there is no evidence to the cost of this repair, I award the landlord nominal damages in the amount of \$50.00.

The agent testified that there was damage to the cupboards from water. I was provided with photographs. I could not identify damage in the photograph with the exception of a minor chip at the bottom edge of the cupboard. The tenant testified that she did not

identify any damage to the cupboards when she was leaving the rental unit. I find that the landlord has failed to establish that the tenant through her actions or neglect caused damage to the cupboards. As such, the landlord is not entitled to compensation for repair of the cupboards.

The agent testified that the tenant caused damage to the closet door handle and closet shelving. The agent bases this conclusion on the fact that other closets within the same building were not damaged in this way by settling, but does not have first-hand knowledge of how the damage occurred. The tenant testified that she used the closet for its intended purpose and in an ordinary fashion. I accept the tenant's testimony regarding her use of the closet as she is in the best position to determine the extent of her use. Further, the tenant has readily admitted when she was at fault for damage to the rental unit. I find the tenant highly credible. As the tenant used the closet for its intended purpose and in an ordinary fashion, I find that the damage was the result of regular wear and tear or possibly pre-existing deficiencies with the shelving or handle. Pursuant to subsection 32(4) of the Act, the landlord is not entitled to any compensation for this damage to the closet.

As the landlord has been partially successful in his claim, I find that he is entitled to recover the cost of his filing fee from the tenant.

The landlord has proven entitlement to a monetary award in the amount of \$550.00:

Item	Amount
Filling and Painting Holes	\$350.00
Floor Damage by Refrigerator	100.00
Painting Closet Door	50.00
Recovery of Filing Fee for this Application	50.00
Total Landlord's Monetary Award	\$550.00

Conclusion

Offsetting the tenant's and landlord's awards, I issue a net monetary order in the tenants' favour in the amount of \$3,050.00 under the following terms:

Item	Amount
Return of Deposits	\$1,800.00
s. 38(6) Compensation	1,800.00
Offset Landlord's Award	-550.00
Total Monetary Order	\$3,050.00

The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: July 30, 2015

Residential Tenancy Branch

