Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF; MNSD, FF

Introduction

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

- 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 their filing fee for this application from the tenant pursuant to section 72.

The landlord seeks to retain $404.25 from the tenant's security deposit.

This hearing also dealt with the tenant's application pursuant to the Act for:

- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and
- authorization to recover his filing fee for this application from the 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, to call witnesses and to cross-examine one another. The landlord's agent attended the hearing. Neither party raised any issue with service.

Preliminary Issue – Scope of Proceedings

The landlords did not check the box indicating that they sought a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67. In the details of dispute the landlords provide sufficient details so that it was understood that the landlords sought a monetary order pursuant to section 67 of the Act. On this basis, I find that the landlords have

sufficiently pleaded that the landlords seek a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement.

The parties took advantage of the opportunity to engage in a facilitated settlement conversation (pursuant to section 63 of the Act) at the beginning of the scheduled hearing time. I outlined for the parties that these settlement conversations occur on a "without prejudice" basis. I explained to the parties that this meant that I understood that parties may make concessions from their positions in the interest of settlement that were based on personal, pragmatic, or business reasons and distinct from any admission or waiver by the party. In the course of this settlement conversation the tenant indicated her intent to waive her right to doubling of the security deposit. The settlement discussion did not bear fruit and the proceedings converted from mediation to arbitration.

Residential Tenancy Policy Guideline, "17. Security Deposit and Set off" (Guideline 17) sets out that:

> 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; …
>
> [emphasis added]

In the course of the adjudication, I read this excerpted portion of Guideline 17 to the parties. I asked the tenant if she was waiving her right to doubling of her security deposit. The tenant indicated she was not. The agent objected to this on the basis that the tenant had waived her right to doubling. I informed the parties at the hearing that as the waiver occurred in the course of without prejudice settlement discussions, the waiver did not bind the tenant. Further, the tenant provided notice of her potential intent to rely on the doubling provisions in her submission letter of 5 August 2015.

Preliminary Issue – Video Evidence

The agent raised her concern with video evidence submitted by the tenant. The recording is of the agent and was taken without her consent, but acknowledged in her letter of 17 November 2014 that she was aware she was being recorded.

Section 75 of the Act deals with the admissibility of evidence in these proceedings:

> The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be
>
> (a) necessary and appropriate, and
>
> (b) relevant to the dispute resolution proceeding.

Rule 3.10 of the Rules of Procedure (the Rules), establishes rules for admitting digital evidence: The tenant has complied with the procedural requirements of Rule 3.10.

Residential Tenancy Policy Guideline, "42. Digital Evidence" (Guideline 42) sets out the policy that applies to video recordings:

> **VIDEO RECORDINGS**
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> To be considered, the party submitting the evidence must demonstrate that:
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> the video recording fairly and accurately represents the facts; and
>
> there is no intention to mislead.
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> Factors that can be used when considering video recordings as evidence are:
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> 1. the authenticity of the video recording;
> 2. the quality of the video and audio reproduction, and its reliability in relation to a matter on the application for dispute resolution;
> 3. the presence or absence of relevant material in the video; and
> 4. whether the information in the recording is available in other forms, and whether it adds significant value to the body of evidence.
>
> <u>Video recordings that violate privacy laws or that are obtained illegally may not be considered.</u>
>
> [Emphasis added]

In accordance with Guideline 42, I may not admit video recordings that violate privacy laws or that are obtained illegally. If I find that the tenant's recordings violate privacy laws then those recordings are inadmissible. This is not the same as an inquiry as to whether making such a recording was polite or in good taste.

There are four main statutes that deal with privacy laws:

- *Criminal Code;*
- *Freedom of Information and Protection of Privacy Act;*
- *Personal Information Protection Act; and*
- *Privacy Act.*

Section 183.1 of the *Criminal Code* sets out that where one party in a private communication consents to the interception of that communication, there is consent for the purposes of the *Criminal Code* part governing invasion of privacy. As the tenant was always part of the conversations, there is consent for the purposes of the *Criminal Code* and no violation of the privacy provisions occurred.

The *Freedom of Information and Protection of Privacy Act* applies to public bodies. Neither party is a public body. Accordingly, there is no violation of the *Freedom of Information and Protection of Privacy Act*.

Subsection 3(4) of the *Personal Information Protection Act* sets out that the act does not limit the information available by law to a party to a proceeding. As the tenant's application is part of a proceeding, the *Personal Information Protection Act* does not function to limit the admissibility of the video recordings.

Section 1 of the *Privacy Act* makes it a civil wrong to violate the privacy of another:

(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

At all times, the tenant's agent was permitted to be in the areas in which the recorded conversation was occurring. At all times, the tenant's agent could have provided testimony of the events that occurred. The tenant's agent was a visible participant in the interactions and made no attempts to conceal his presence. It is not necessary that I determine whether or not the tenant or her agent disclosed the fact that they were recording, as I do not consider that the act of recording with a machine is so different from recording into one's memory so as to create an invasion of privacy. Further, the agent acknowledged that she knew she was being recorded. I find that the privacy rights of the agent were not violated by the mere fact that the exchanges were recorded.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement? Are the landlords entitled to retain a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Are the landlords entitled to recover the filing fee for this application from the tenant?

Is the tenant entitled to a monetary award for the return of a portion of her security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the Act? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlords' cross claim and my findings around each are set out below.

This tenancy began 1 July 2010 and ended 8 October 2014. The tenant, her spouse and a property management corporation entered into a written tenancy agreement dated 31 May 2010. Monthly rent was $1,600.00. At the beginning of the tenancy the landlords collected a security deposit on 31 May 2010 in the amount of $800.00 and a bike locker deposit in the amount of $25.00.

At the beginning of the tenancy a commercial property management company conducted the condition move in inspection with the tenant. The report was dated 17 June 2010. There is nothing remarkable about this report.

The tenant provided her notice to vacate the rental unit in September 2014 effective 31 October 2014. The tenant paid full rent for October.

On 1 October 2014, the tenant emailed the agent:

> I just spoke with [the tenant's agent]. He thinks he still can hand off the keys on Oct 8th 7 pm. I will do most the cleaning beforehand except the floor where the movers may dirty it. [The tenant's agent] will mop the floor after the movers leave. If you and [the landlord] are not satisfied with the condition of the suite on Oct 8th, then we will need to come back during a weekend before the end of Oct

> to do another cleaning. How does it sound? We don't know your level of expectation of how clean the suite has to be. So at least, this gives us some options to not stress us out of the moving :). [Property management company] was not meticulous. When we moved in, we had to clean also.
>
> [emphasis added]

On 2 October 2014, the landlord wrote to the tenant:

> …I will have [the agent] meet [tenant's spouse] on October the 8th at 7pm as originally agreed. This should not be a complicated issue – this is merely to provide us with the keys and us to do the assessment and then we will get back to you in a timely manner regarding the damage deposit.
>
> [emphasis added]

On 8 October 2014, the agent conducted a condition move out inspection with the tenant's spouse. I was provided with a copy of the condition move out inspection report dated 8 October 2014. There are checkmarks throughout the report with the exception of the stove (a question mark) and the oven (an "x"). The report includes the tenant's forwarding address and is signed by the tenant's spouse. A copy of this report was not provided to the tenant.

The tenant testified that she was never told that this inspection was not a final inspection. The tenant characterised the agent's inspection on 8 October 2014 as "thorough" and "lengthy". The tenant testified that she was told that everything was good; however, the tenant did admit that the agent stated she would have to check with the landlord SB about the oven.

The landlord testified that this condition move out inspection was a "preliminary" check as the landlord was unable to attend the condition move out inspection as a result of a family emergency. The landlord testified that she instructed the agent to do the "exit". The landlord testified that the agent did not complete the condition move out inspection report onsite. The landlord testified that she and the agent went through the rental unit approximately one week later and identified the alleged deficiencies.

The landlord SB conducted an inspection of the rental unit on 16 October 2014.

On 16 October 2014, a cleaning service provided a quote for cleaning in the amount of $420.00. The landlords provided an invoice dated 27 October 2014 for cleaning services in the amount of $404.25.

On 10 November 2014, the agent wrote to the tenant. In that letter the agent sets out the alleged deficiencies in the rental unit.

On 12 November 2014, the tenant wrote to the agent and set out that she believed that the oven could not be cleaned and that it needed to be replaced as it was the original oven from the rental unit's construction circa 1990. The tenant notes that the counter was similarly original.

On 17 November 2014, the tenant received return of $296.48 from her security deposit. The landlords deducted $150.00 for removal of a lock and $400.00 for cleaning. The landlords included $21.48 in interest.

On 1 December 2014, the tenants sent their forwarding address by registered mail to the landlords. The forwarding address demanded repayment of the balance of the tenant's security deposit.

The landlords provided photographs of the rental unit. The landlord testified that these photographs were taken 16 October 2014. The landlord testified that no one occupied the rental unit after the tenant vacated. The photographs show dust on baseboards, dust on blinds, dust in cupboards, grease on the kitchen backsplash, a coating in the oven, dust around the back of the toilet, dust in the front closet, dust in the fireplace, a film on a counter.

The tenant submitted that the landlords' photographs misrepresent the condition of the rental unit by being of particularly close focus. In response, the tenant provided photographs. These photographs are taken from a distance.

The tenant testified that she did not use the oven as it was dirty and old on move in and instead used a counter-top toaster oven. The tenant admitted on cross examination that there is no such note to corroborate the oven's condition on the condition move in inspection report. The tenant admitted on cross examination that the agent raised her concerns about the condition of the oven with the tenant's spouse and said that she would have to check with the landlord. The tenant submitted that the stove could not be cleaned because of its age.

The landlord provided an invoice for cleaning the rental unit dated 27 October 2014 in the amount of $404.25.

The landlords filed their claim for dispute resolution 30 July 2015.

Analysis

Landlords' Claim

Subsection 37(2) of the Act specifies that when a tenant vacates a rental unit, the tenant must leave the unit reasonably clean and undamaged except for reasonable wear and tear.

The tenant says she left the rental unit in reasonably clean condition. The landlords allege the tenant breached subsection 37(2) of the Act by leaving the rental unit in a noncompliant state.

Section 21 of the *Residential Tenancy Regulation* (the Regulation) establishes that the condition inspection report is strong evidence to the state of the rental unit at the time of the report.

The condition inspection report is signed by the tenant's agent. The tenant and tenant's agent were not provided with any reason to doubt that the agent was acting as the landlords' agent. In particular, it is reasonable for the tenant to assume the agent had full authority to complete the inspection as, pursuant to subsection 35(1) of the Act, a condition inspection must be completed by the tenant and landlord together. The condition move out inspection report does not note any deficiencies with the exception of the "x" beside the oven. The landlords have provided photographs of cleaning that was required around the rental unit. On the basis of the presumption in section 21 of the Regulation and the photographic evidence provided, I find that the tenant left the rental unit reasonably clean and undamaged except for regular wear and tear. In respect of the oven, I find that the tenant did breach section 37 of the Act.

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.

I accept that by leaving the oven in a condition that did not comply with the Act, the tenant caused the landlords a loss; however, in this case, the tenant had paid for her

use and occupancy of the rental unit until 31 October 2014. In her email dated 1 October 2014 the tenant specifically stated that if there were any deficiencies in the rental unit, her agent would return in October to remedy the deficiencies. The agent identified the oven as an issue at the 8 October 2014 inspection. The landlord SB inspected the rental unit on 16 October 2014. The landlords did not provide the tenant notice of the deficiencies until early November, thereby denying the tenant the option of remedying the deficiency herself. As the tenant had paid for her use of the rental unit until the end of October, she was entitled to enter the unit. I find that by failing to extend this offer to the tenant, the landlords failed to mitigate their losses. As the landlords failed to mitigate their losses they are not entitled to recover the cost of cleaning claimed.

As the landlords have been unsuccessful in their application, they are not entitled to recover their filing fee for this application.

Tenant's Claim

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security 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 security deposit.

The tenant provided her forwarding address in writing to the landlord on 1 December 2014. The landlords did not file for dispute resolution until 30 July 2015. As such, the landlord did not return the tenant's security deposit or file for dispute resolution within the fifteen day time limit established in subsection 38(1) of the Act. The landlords did not have the tenant's written authorization to deduct any amount from the security deposit. According, the tenant is entitled to return of the remainder of her security deposit as well as an award equivalent to the total amount of her security deposit. No interest is payable on the deposit amount.

As the tenant has been successful, she is entitled to recover her filing fee for this application from the landlords.

Conclusion

The landlords' application is dismissed without leave to reapply.

I issue a monetary order in the tenant's favour in the amount of $1,378.52 under the following terms:

Item	**Amount**
Return of Security Deposit	$800.00
Return of Bike Deposit	25.00
Subsection 38(6) Compensation	800.00
Filing Fee	50.00
Less Amount Returned	-296.48
Total Monetary Order	**$1,378.52**

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: October 29, 2015

Residential Tenancy Branch