Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution wherein they sought double the security deposit paid to the Landlord, a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act,* the Regulation or the tenancy agreement and for the return of the filing fee for the Application.

Both parties appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form and make submissions to me.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

Issues to be Decided

1. Are the Tenants entitled to return of double the security deposit paid?

2. Are the Tenants entitled to monetary compensation for items sold by the Landlord?

3. Should the Tenants recover the filing fee paid?

Background and Evidence

The Tenant, K.A., testified as follows. She testified that the subject tenancy began in March of 2015 and ended May 2015. She further testified that monthly rent was payable in the amount of $1,200.00 and that they paid a security deposit in the amount of $600.00.

K.A. testified that there was no move in condition inspection report, nor was there a move out condition inspection report.

K.A. confirmed that they agreed the Landlord could retain a portion of the security deposit towards the outstanding hydro bill which at the time they estimated to be $200.00. She advised that later the Landlord confirmed this amount although no bill was ever produced. In the within hearing the Tenants seeks return of the balance of her security deposit ($400.00) in the amount of $800.00.

K.A. confirmed that they also claimed $2,925.00 for compensation for items they say the Landlord sold without their consent. She initially testified that the parties agreed that the Landlord would store some of their items until the late summer or early fall. She confirmed this was a verbal agreement and they agreed they were not to pay the Landlord for the cost of storing these items.

K.A. then testified that the verbal agreement made in late May of 2015 between the Landlord, J.F. and the Tenant, A.S., was that the Landlord could retain and store the items *or sell them*. A.S. was not at the hearing to testify and as such K.A. was relying on information provided by him.

K.A. stated that that they then emailed the Landlord in July 2015 and August 2015 confirming they would be returning to retrieve the items in September 2015.

K.A. continued that she again wrote in September 16, 2015 “asking if the items had been sold”. She stated that she received a response on September 17, 2015 wherein the Landlord confirmed the items had not been sold but that they wanted the items picked up by the end of September 2015 otherwise they would be sold. K.A. confirmed that they did not respond or attend the rental unit by the end of September and were advised on October 5, 2015 that the items had since then been sold.

When I asked the Tenant why they waited until 5 days after the 2 week deadline, the Tenant said “that was our bad”.

K.A. testified that the Landlord sold all of the above items for $350.00 and that on October 5, 2015 the Landlord sent the Tenants an electronic money transfer for the $350.00.

As the mountain bike was not referenced in any of the communication between the parties I asked K.A. if the alleged agreement included the mount bike. K.A. responded that there was no agreement to sell or store the bike and it was "just left behind" and that to her knowledge the Landlord took the bike to the dump. K.A. confirmed that the mountain bike was approximately 10 years old and she believes it should have been donated to thrift store rather than disposed of.

The Tenants introduced in evidence a Monetary Orders worksheet wherein they claimed the sum of $2,925.00 for the following items:

Washing machine	$1,118.88
Winter tires	$943.18
Winter tires	$624.08
Mountain bike	$2,570.40

*Notably, the total of these items is actually $5,256.54.

Also introduced in evidence was a document wherein the Tenants confirm the used value of the items as follows:

	New value	Used value
Washing machine	$1,118.88	$800.00
Winter tires	$943.18	$800.00
Winter tires	$624.08	$500.00
Mountain bike	$2,570.40	$600.00
TOTAL	$5,256.54	$2,700.00

The Landlord J.F. also testified. He confirmed that he completed part of the move in and move out condition inspection report, gave the copy to the Tenants to complete and did not receive a copy. He confirmed he did not make an application to retain the security deposit as required by section 38 and was aware that the remaining deposit of $400.00 would be doubling.

J.F. opposed the Tenants' claim for compensation for items they say he sold without their consent. He confirmed that this was a friendly informal arrangement with the

Tenants as the Tenants planned to sell the items but ran out of time when they were moving and asked him to attend to selling them. He further testified that during the last weekend in May he and the Tenant, A.S., agreed that he would sell the items; he also stated that A.S. promised to take the photos and write up the ads and do all the "leg work".

J.F. further confirmed that they agreed to store them until the end of September, told the Tenants they needed the storage space for their family, gave them a deadline of September 30, 2015 and when they did not hear back from the Tenants he sold the items and sent them the $350.00 received.

The Landlord further confirmed that the mountain bike was not worth the $2,570.40 claimed; rather he said it was just a frame as it had no chain, no wheels, no seat and no handlebars. He confirmed that they paid someone to take it away.

J.F. said that he was surprised when the Tenants called in October after the end of September to say they were coming to pick up the items. He said that had they called and said they needed more time he would have given it to them but after storing the items for four months it seemed the Tenants were not interested in dealing with these items anymore.

Analysis

I will first deal with the Tenants' claim for return of their security deposit.

Section 38 of the *Residential Tenancy Act* provides as follows:

> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
>
> (2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24

(1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) 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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows.

The evidence establishes that the Tenants agreed that the Landlords could retain $200.00 of the $600.00 the security deposit. There was no evidence to show that the Landlords had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenants, to retain the *balance* of the security deposit, as required under section 38.

As well, by failing to perform incoming or outgoing condition inspection reports in accordance with the Act, the Landlords extinguished the right to claim against the security deposit for damages, pursuant to sections 24(2) and 36(2) of the Act.

The security deposit is held in trust for the Tenants by the Landlord. At no time does the Landlord have the ability to simply keep the security deposit because they feel they

are entitled to it or are justified to keep it. If the Landlord and the Tenants are unable to agree to the repayment of the security deposit or to deductions to be made to it, the Landlord *must file* an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

I note that the Landlord submitted evidence about the condition of the rental unit after the Tenants left; however, the Landlord is unable to make a monetary claim through the Tenants' Application. The Landlord has to file his own Application should he seek monetary compensation and must do so within the 15 days provided above should he wish to retain the deposit towards such expenses. The Landlord may still file an application for alleged expenses and alleged damages, however, the issue of the security deposit has now been conclusively dealt with in this hearing.

Having made the above findings, I must Order, pursuant to sections 38(6) and 67 of the *Act*, that the Landlord pay the Tenants the sum of **$800.00**, comprised of double the security deposit (2 x $400.00).

I will now deal with the Tenants claim for compensation for items which were sold by the Landlord.

I find this agreement to be an express agreement as contemplated by section 24(4) of the *Residential Tenancy Regulation.* Accordingly the Landlord as not required to deal with the property in accordance with that Part of the *Regulation*.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;

- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails. In this case, the Tenants have the burden of proof to prove their claim.

In consideration of the evidence before me, the testimony of the parties and on a balance of probabilities, I dismiss the Tenants' claim for the following reasons:

- I prefer the evidence of the Landlord, J.F., as opposed to the evidence of the hearsay Tenant K.A. as to the terms of the agreement. I also note that during her testimony K.A. conceded that the agreement was that the Landlord could store or sell the items. Further, she testified that on September 16, 2015 she contacted the Landlord to see if the items had sold; in doing so, I find she accepted that the items might have been sold by that time. J.F. confirmed he agreed to store *or sell the items*. In selling the items as agreed, the Landlord was not in breach of the agreement.

- After four months, and on September 17, 2015, J.F. informed the Tenants that the items needed to be retrieved by the end of September 2015 otherwise they would be sold. K.A. testified that they were only given a few days to respond, yet a simple review of a calendar confirms they were given two weeks. I accept J.F.'s testimony that had the Tenants contacted him and informed him that they required more time he would have extended the deadline. K.A. admitted this was "[their] bad" and in doing so acknowledged they should have at least replied to the Landlords before September 30, 2015. I find that in failing to attend to the retrieval of the items the Tenants failed to mitigate their loss.

- As agreed J.F. sold the items and provided the funds to the Tenants. He did not charge the Tenants for storage of their items.

- I prefer the evidence of J.F. as to the value of the items and in particular the value of the mountain bike frame which K.A. conceded they simply forgot about. I find that the Tenants have attempted to inflate the value of these items for the purposes of their claim and I simply do not accept their valuations. I find that the value of these items is $350.00 as obtained through their sale and I further find the Landlord provided these sums to the Tenants. In doing so, the Tenants have suffered no loss.

As such, I dismiss in its entirety their claim for compensation for items sold by the Landlord.

I also decline their request for recovery of their filing fee pursuant to section 72(1) of the *Residential Tenancy Act* as I find the majority of the hearing dealt with claims which were entirely dismissed.

The Tenants are granted the sum of $800.00 representing double their security deposit.

Conclusion

The Tenants are given a formal Monetary Order for **$800.00**, representing double their security deposit pursuant to section 38(6) of the *Residential Tenancy Act.* The Landlord must be served with a copy of this Order as soon as possible. Should the Landlord fail to pay the $800.00, the 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: July 29, 2016

Residential Tenancy Branch