Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WESTERN RENTAL PROPERTY MANAGEMENT GROUP/COLDWELL BANKER PRESTIGE REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, MNSD, FF (Tenant's Application)
FF, MND (Landlord's Application)

Introduction and Preliminary Matter

This hearing convened as a result of Cross Applications where the parties sought monetary compensation from the other.

The hearing originally convened on October 4, 2016 and was adjourned to December 1, 2016 due to late delivery of evidence.

At the December hearing, only the Landlord's representative, J.Y., appeared.

The Tenants applied and were granted a review hearing on the basis that they were unable to attend the hearing for reasons which were unanticipated and beyond their control.

In her Review Consideration Decision, the Arbitrator ordered as follows:

> I have considered that these matters convened on October 4, 2016, during which submissions were made regarding the service of evidence, and the matters were reconvened on December 1, 2016. Therefore, I order the hearing be reconvened with the original Arbitrator to consider oral submissions from both parties and the documentary evidence received on each file prior to December 1, 2016.

The Review Hearing was set to occur before me on January 26, 2017. At that time both parties called into the hearing and were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form, and make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Are the Tenants entitled to monetary compensation from the Landlords?

2. Is the Landlord entitled to monetary compensation from the Tenants?

3. What should happen with the Tenants' security deposit?

4. Should either party recover the filing fee?

Background and Evidence

At the Review Hearing on January 26, 2017 the parties agreed to the following facts:

Agreed Statement of Facts

1. This tenancy began October 16, 2014.

2. Tenancy ended on January 31, 2016.

3. The Tenants paid the Landlord a security deposit of $1,475.00 on or about October 16, 2014.

4. The parties participated in a Move in Condition Inspection Report on October 14, 2014. A copy of the report was introduced in evidence. The parties agreed that the Move in Condition Inspection Report was accurate.

5. The parties participated in a move out condition inspection in February of 2016.

6. At the end of the tenancy the Landlord returned $975.00 to the Tenants and retained $500.00 of the initial security deposit. The Tenants did not agree to this deduction.

7. By application dated February 19, 2016 the Tenants sought return of the balance of their security deposit in the amount of $500.00.

8. By application dated September 12, 2016, the Landlord sought to retain the balance of the security deposit in the amount of $500.00 towards the cost of repairing and repainting the rental unit in addition to further sums for painting the rental unit.

9. Introduced in evidence was a copy of an invoice dated April 24, 2016 in the amount of $3,500.00 for painting of the rental unit.

J.Y. testified on behalf of the Landlord. He confirmed that he participated in the move in and move out condition inspection with the Tenants. He further confirmed that he signed the document on behalf of the Landlord.

J.Y. stated that this was a brand new townhouse and was painted when the Tenants moved in.

J.Y. confirmed his testimony at the December 1, 2016 hearing as follows:

> "that at first the Landlord retained $500.00 as this was the amount it cost to patch and repaint the numerous holes left by the Tenants. J.Y. stated that after this attempt it was clear that the paint did not match and full repainting of the unit was required. As such, the Landlord sought further compensation in the amount of $3,000.00 representing the cost to repaint the unit over and above the $500.00 retained.
>
> J.Y. further confirmed that the normal rate charged for painting in the city in which the rental unit is located is $2.00 per square foot; he stated that the rental unit is 2,000 square feet such that he would have expected to be charged $4,000.00 for painting of the entire rental unit. The invoice indicates that three walls in the main living room were not painted which J.Y. submitted explained why the invoice was $500.00 less than what he would have expected to paint the entire unit. The invoice also indicates 169 holes were made in the walls."

The Tenant confirmed he did not wish to have the Landlord restate the above at the hearing.

J.Y. also confirmed that he made additions to the move out condition inspection report after the Tenants signed the document including:

Those additions include:

- Adding “Holes on the wall” to the “Walls and Trim” section of the Kitchen;
- Adding “Holes on the wall” on the “Walls and Trim” section of the Living Room;
- Adding “Holes on the wall” on the “Walls and Trim” section of the Main Bathroom;
- Adding “Total 110 holes on wall” in the “END OF TENANCY” section Z “Damage to rental unit or residential property for which the tenant is responsible”.

J.Y. stated that the move out condition inspection may have occurred on February 1, 2016 rather than February 2, 2016 as indicated on the report.

J.Y. further testified that he added to the move out inspection report after it was signed because it was dark when they did the inspection. He stated that he told the Tenants that provided there weren’t too many holes it would be fine, but then the next day when he saw all the holes (more than 100 he counted) he contacted the Tenants to come and re-do the inspection. He stated that the Tenants refused. Introduced in evidence was a copy of emails between the Tenant B.M. and V.H., a representative of the Landlord wherein she asked the Tenants to participate in a second move out condition inspection.

B.M. also testified as follows.

In response to the Landlord’s submissions, B.M. stated that when they did the move out condition inspection the Landlord’s representative, J.Y. indicated that the holes in the walls for pictures were fine. He confirmed that the rental unit had three bedrooms upstairs, a living room and kitchen on the main floor, another living room in the basement and three bathrooms. B.M. further stated that they hung pictures in the rooms, likely two per wall, or maybe four or five and that in the circumstances the holes were not excessive.

B.M. confirmed that at the time they did the move out, J.Y. was upset about the holes in the walls for the curtain rods in the master bedroom and the other bedroom where curtain rods were hung on each window: two windows per room therefore four curtain rods. He further stated the he obtained the Landlord’s permission to install the curtain rods in the bedrooms. He introduced emails in evidence including one from November 10, 2014 wherein the Tenant asks for permission and the Landlord replies “it is ok, please go ahead.

The Tenants allege that J.Y. also added the following:

- Added: “strata fine $10” in the END OF TENANCY” section Z “Damage to rental unit or residential property for which the tenant is responsible”.
- Dated the report February 1, 2016.

Initially the Tenants also alleged that J.Y. added the following:

- Added: “TBA for fix the holes” on the in the “END OF TENANCY” section Z portion where the Tenants confirm their agreement to deductions from their security deposit.

However, at the hearing B.M. confirmed that on the Move out Condition Inspection Report the Landlord wrote “TBA for fix the holes” on the report *at the time the report was completed.*

B.M. stated that his concern was that the Landlord went back “after” and counted the holes. B.M. also claimed that when they did the inspection all of the lights were on and it is a very bright home.

B.M. confirmed that J.Y. wished to do a second inspection and the Tenants felt this was inappropriate. He stated that he called the Residential Tenancy Branch and was informed that a second inspection as not required and was not the “norm”.

B.M. further noted that the number of holes J.Y. wrote on the report, added after the fact was 110, yet the number went up to 169 holes on the quote provided in evidence. He questioned whether this was accurate and wondered how the number kept “creeping up”.

B.M. also stated that it took the Landlord’s installer four times to re-install a towel bar in one of the bathrooms and that is why in one of the pictures the towel bar is hanging off the wall. B.M. stated that in hindsight he wished he had taken photos at the time.

B.M. further submitted that the he was told he would receive a quote before any money was to be withheld from the security deposit, he further stated that a week went by and he was not provided with a quote, but then on February 12, 2016 he received a message indicting that $500.00 would be retained; again no quote was provided.

B.M. further stated that the first time he saw the invoice for $3,500.00 was when he received the Landlord’s evidence shortly before the October 4, 2016 hearing.

B.M. also submitted that the Landlord did not comply with the *Residential Tenancy Act* as he did not make his application within 15 days of receipt of the Tenants' forwarding address in writing. B.M. confirmed that he provided the Landlord with his forwarding address in writing on February 1, 2015 and as such, the Landlord should have made an application 15 days from that time. He noted that the Landlord made their Application September 12, 2016.

In reply J.Y. stated that on the move out date he told the Tenants that if there were a couple holes that would be fine.

In further reply J.Y. stated that he agreed the Tenants could install a curtain rod, but then they removed the curtain rod and didn't fix the holes.

J.Y. also confirmed that they only withheld $500.00 of the original security deposit which was an amount agreed to by the Tenants.

The Landlord also stated that he spoke to the developer and the developer confirmed he did not make the holes in the bathroom where the towel bar was installed.

Analysis

The Tenants apply for return of their security deposit. Section 38 of the *Residential Tenancy Act* deals with security deposits and provides as follows:

> **Return of security deposit and pet damage deposit**
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> **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;
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> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
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> (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 before me was that the Landlord returned the sum of $975.00 to the Tenants and retained $500.00 of their security deposit. There was no evidence to show that the Tenants had agreed, in writing, that the Landlord could retain any portion of the security deposit.

There was also no evidence to show that the Landlord had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenants, to retain a portion of the security deposit, as required under section 38 of the *Act*.

While incoming and outgoing condition inspection reports were completed, the outgoing report was altered after the Tenants signed. Notably, at the hearing on October 4, 2016 the Landlord’s agent submitted the move out condition inspection report as evidence of the condition of the rental unit; he did not acknowledge that the report had been altered. Further, and while the notation “add.” and his initials were included on some of the

alterations, the Tenants allege further alterations were made. In any case, I find the report was altered and is therefore of no weight.

Consequently I also find the Landlord's agent failed to perform the move out condition inspection report in accordance with the *Residential Tenancy Act,* and the *Residential Tenancy Regulation.*

By failing to perform the outgoing condition inspection report in accordance with the *Act*, the Landlord extinguished the right to claim against the security deposit for damages, pursuant to section 36(2) of the Act.

The security deposit is held in trust for the Tenants by the Landlord. The Landlord may only keep all, or a portion, of the security deposit through the authority of the *Act*, such as the written agreement of the Tenant an Order from an Arbitrator. If the Landlord believes they are entitled to monetary compensation from the Tenant, they must either obtain the Tenant's consent to such deductions, or obtain an Order from an Arbitrator authorizing them to retain a portion of the Tenant's security deposit. Here the Landlord did not have any authority under the *Act* to keep any portion of the security deposit.

Section 38(6) of the *Act* provides for an automatic doubling of the security deposit if the Landlord breaches section 38(1).

The Tenants did not agree to the $500.00 deduction to their security deposit. Documentary evidence confirms they agreed to $10.00 being deducted for the strata fee.

Pursuant to *Residential Tenancy Policy Guideline 17—Security Deposit and Set Off* paragraph 5 Examples A and B, the initial deposit is to be doubled after the agreed upon $10.00 is deducted. For greater clarity I reproduce these examples as follows:

> • Example A: A tenant paid $400 as a security deposit. At the end of the tenancy, the landlord held back $125 without the tenant's written permission and without an order from the Residential Tenancy Branch. The tenant applied for a monetary order and a hearing was held.
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> The arbitrator doubles the amount paid as a security deposit ($400 x 2 = $800), then deducts the amount already returned to the tenant, to determine the amount of the monetary order. In this example, the amount of the monetary order is $525.00 ($800 - $275 = $525).
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> • Example B: A tenant paid $400 as a security deposit. During the tenancy, the parties agreed that the landlord use $100 from the security deposit towards the

> payment of rent one month. The landlord did not return any amount. The tenant applied for a monetary order and a hearing was held.
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> The arbitrator doubles the amount that remained after the reduction of the security deposit during the tenancy. In this example, the amount of the monetary order is $600.00 ($400 - $100= $300; $300 x 2 = $600).

Applying the above I find that the Tenants are entitled to the sum of **$1,955.00** calculated as follows:

> $1,475.00 (security deposit) - $10.00 (strata fee) = $1,465.00 x 2 = $2,930.00
> - $975.00 (amount returned to Tenants) = $1,955.00

I will now turn to the Landlord's claim for compensation in the amount of $3,500.00 representing the cost to repaint the rental unit.

The Landlord alleged that the Tenants caused damage to the rental unit through excessive nail holes.

The condition in which a Tenant should leave the rental unit at the end of the tenancy is defined in section 379 of the *Act* which reads as follows:

> 37 (2) When a tenant vacates a rental unit, the tenant must
> leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Normal wear and tear does not constitute damage. Normal wear and tear refers to the natural deterioration of an item due to reasonable use and the aging process. A tenant is responsible for damage they may cause by their actions or neglect including actions of their guests or pets.

Residential Tenancy Branch Policy Guideline 1—provides that a 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 parties agreed that the rental unit was approximately 2,000 square feet. The Tenants testified that the rental unit had three bedrooms upstairs, a living room and kitchen on the main floor, another living room in the basement and three bathrooms. B.M. further stated that they hung pictures in the rooms, likely two per wall, or maybe four or five and that in the circumstances the holes were not excessive.

As noted, I find the move out condition inspection report to be of no evidentiary weight. The invoice provided by the Landlord was dated April 24, 2016, nearly three months after the tenancy ended. Consequently, I am unable to find that the 169 nail holes noted on the invoice were a result of the tenancy. In any case, I find, based on the size of the rental unit, and number of rooms, that the Tenants did not make an excessive number of nail holes, rather, I find this to be normal wear and tear.

The Landlord's claim for compensation for repair and painting of the walls is dismissed.

The Tenants are entitled to recovery of their filing fee in the amount of **$100.00** for a total award of **$2,055.00**. The Tenants are granted a Monetary Order in this amount and must serve the Order on the Landlord. This Order may be filed and enforced in the B.C. Provincial Court.

Conclusion

My Decision and Monetary Order of December 2, 2016 are set aside and are of no force and effect.

The Tenants are entitled to the sum of $2,055.00 pursuant to section 38 and 72 of the *Residential Tenancy Act.*

The Landlord's monetary claim is dismissed.

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: February 17, 2017

Residential Tenancy Branch