Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNDC, MNSD, O, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* ("the Act"). The landlord applied for: a monetary order for damage to the unit pursuant to section 67; authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and authorization to recover the filing fee for this application from the tenants pursuant to section 72. The landlord also referenced an "other" remedy under the Act however she testified that she was merely seeking the monetary order less the tenants' security deposit and her filing fee.

The tenants applied for authorization to obtain a return of their security deposit pursuant to section 38 and a monetary amount equal to the security deposit as a result of the landlord's lack of compliance with section 38. Their claim was amended (unopposed by the landlord) at the hearing to include recovery of the filing fee for this application from the landlord pursuant to section 72.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit?
Is the landlord entitled to retain all or a portion of the tenants' security deposit?
Is the landlord entitled to recover the filing fee for this application from the tenants?

Are the tenants entitled to a return of their security deposit?
Are the tenants entitled to an amount equivalent to their deposit for the landlord's contravention of the *Act*?
Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This tenancy began on June 1, 2011 and continued until the tenants vacated the rental unit on or about December 31, 2016. A copy of the most recent tenancy agreement was submitted by the tenants indicating that the two tenants paid $2170.00 on the first of each month. The

landlord confirmed that she still holds the tenants' security deposit in the amount of $1000.00 paid at the outset of the tenancy (June 1, 2011).

The tenants sought to recover their $1000.00 security deposit as well as an additional $1000.00. They submitted that the landlord did not return the security deposit in accordance with the Act. The tenants provided undisputed testimony that they provided their forwarding address in writing to the landlord November 27, 2016 along with their notice to end tenancy. The landlord confirmed receiving their forwarding address at that time. She also confirmed receipt of the tenants' forwarding address after the end of tenancy by both email and text message.

The landlord filed for dispute resolution on March 2, 2017. The landlord claimed that she filed her application in response to the tenants' claim to recover their deposit. The landlord testified that she had not intended to fail to provide the tenants' security deposit to them within the allowable time period. The landlord testified that she had not intended to file a claim for damages but did so to offset the tenants' request for $2000.00.

The tenants explained that their original landlord sold the property to the current landlord on April 4, 2016. All parties (the landlord and 2 tenants) agreed that there was no condition inspection report created at the outset of this tenancy, at the outset of the new landlord's purchase of the rental unit or at the end of this tenancy. The tenants both provided testimony that there had been a walk through the unit both before and after the new landlord's purchase of the residence. The landlord was uncertain in her testimony as to the occurrence of a condition inspection but stated any inspections that were done were informal and she didn't look that closely as someone was living in the unit.

The landlord sought $1312.10 against the tenants. She claims that, after the tenants moved out, she discovered damage to the rental unit. The landlord testified that, at the end of the tenancy after a walk through, she did tell the tenants she would return their deposit but that, in reflection, she did not think she had told them whether she would return the whole deposit or part. She believes she said simply, "I'll mail your deposit".

The tenants sent a variety of follow-up messages to the landlord with respect to the return of their security deposit. The landlord's first response to these follow up requests (on January 4, 2017) was to indicate that she had lost the tenants address as a result of a "computer glich". After the tenants re-sent the forwarding address, the landlord's response was to indicate she has discovered damage to the rental unit and that she estimates the cost at $400.00. In this correspondence, the landlord apologized for her "unprecedented delay" in returning the tenants' deposit but that she will not return the tenants' entire deposit as a result of the discovery of the damage.

As a result of further correspondence from the tenants, the landlord indicated that she had mailed a cheque but that it must have got lost in the mail. She submitted an email to the tenants (on February 10, 2016) requesting permission to send the tenants an electronic funds transfer. The landlord testified that the tenants declined this offer however the tenants deny receiving the

offer and claim that perhaps, as the landlord often indicates in her emails, “the internet is down due to winds and snow”.

The landlord testified that this rental unit is 16 years old and that she is not aware of any renovations or repairs done during that period of time prior to her purchase of the rental unit. The landlord indicated the following damage to the unit is a result of the tenants’ 5 year tenancy;

Item	**Amount**
Toilet seat crack	$32.98
Bathtub	433.13
Refrigerator	42.75
Baseboards	68.22
Gas fireplace	168.00
Window frame	50.00
Cleaning	490.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Amount Sought by Landlord	**$1385.08**

The landlord and tenants agreed that there were no condition inspection reports done at the start or the end of this tenancy. The tenants testified that a walk through was done at the start of their tenancy but no report created. The tenants testified that the landlord walked through the unit after purchasing it but did not create a report. The landlord testified that she didn't think she was allowed to inspect after her purchase of the unit. Both parties agreed that a walk through was done by the tenants and the landlord at which time she did not point out any damage or refer to any deduction from her security deposit.

The landlord submitted a copy of a residential tenancy agreement addendum requiring a $300.00 fee by the tenants if they do not clean the unit sufficiently at the end of the tenancy. She testified that, as well as "regular cleaning", she described lint in the laundry room, windows not cleaned to the very top, a dirty bathroom and a fireplace with dust and dog hair. She described these items as "beyond regular cleaning" and therefore sought a total cleaning amount of $490.00 ($190.00 above the cleaning fee). The tenants claimed that they cleaned the unit at the end of the tenancy and also that any damage was already there at the start of their tenancy.

The landlord claimed that the bathtub was chipped over the course of the tenancy. She submitted quotes for repairs claiming that to this date, the work has not been done. The tenants both testified that the chip in the tub was present from the start of their tenancy and that they pointed it out to the landlord during their walk through after her purchase of the unit.

The landlord testified that, after the end of tenancy when she was replacing the light inside the refrigerator, she realized a door was damaged. She testified that it ultimately cost her more than her original estimate of $42.75 but that she did not think to submit the invoice for this purchase.

The landlord testified that two of the baseboards in the bathroom were "swollen". The tenants testified that they pointed this out to the landlord when she first viewed the rental unit. The landlord submitted a receipt for this purchase.

The landlord testified that the gas fireplace was remarkably dirty when she went to have it cleaned and that it cost $168.00 to have the fireplace cleaned. Her testimony also indicated that the strata corporation might pay for this cost; she submitted no receipt and was unclear as to whether this monetary loss was hers or the strata's loss.

The landlord testified that the window frame tracks were dirty and needed to be cleaned. She described the cleaning as "simply a matter of applying cleaning spray to a cloth and wiping them down". As a result of this effort and some glue residue on a window frame, the landlord submitted she should be compensated in the amount for the cleaning.

Analysis

Section 23 of the Act outline the requirements for a condition inspection report including that the inspection must take place on a mutually agreed upon day and that the landlord is required to; offer two opportunities for the tenant to attend the inspection; that the landlord must complete a condition inspection report. A landlord is required to create a report even if the tenants fail to take part in an inspection or the completion of a report.

Section 24 of the Act indicates the consequences for the parties if a condition inspection report is not created. The consequences for a landlord are set out below,

> **24** (2) 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
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> (a) does not comply with section 23 (3) *[2 opportunities for inspection]*,
>
> (b) having complied with section 23 (3), does not participate on either occasion, or
>
> (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

In this case, the landlord did not create an inspection report when she became a landlord. She did not attempt to conduct a condition inspection at the end of this tenancy. The landlord did not create a report on her own. Whether the landlord is acting in this capacity for the first time or after many successful tenancies, it is incumbent on the landlord to create a record of the state of the rental unit both at the outset and at the end of the tenancy.

The landlord claimed that the tenants should be required to pay for cleaning because they signed the addendum to the residential tenancy agreement. I find that the landlord provided insufficient evidence to support this claim. With respect to all of the landlord's claims for damages, I find that the landlord has extinguished her right to retain the tenants' security deposit. Furthermore, I find that the landlord has not met the burden of proof to establish that the tenants are responsible for; the chip in tub; the refrigerator drawer; the dirty baseboards; the dirty gas fireplace; or the dirty window frames or the general cleaning of the rental unit.

I found the testimony of the tenants clear and consistent. Despite the difficulties with this tenancy at its end, I found that the tenants generally testified in a calm, reasonable manner providing details regarding the state of the rental unit when they were able. I found that the tenants were candid when they were unsure of how to respond to the landlord's claims. The

landlord appeared to be attempting to correct an earlier failure to meet her obligations as a landlord at the end of the tenancy and her testimony was less credible as a result.

With respect to the tenants' security deposit, 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 tenants' forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. 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 tenants' security deposit plus applicable interest and must pay the tenants a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*).

The requirement to return or apply to retain the security deposit is triggered by the latter of the end of the tenancy or the tenants' provision of the forwarding address. In this case, the landlord was informed of the forwarding address in writing by November 27, 2016 and again on January 4, 2017 via email and again on February 10, 2017 by mail and email. The landlord had 15 days after November 27, 2016 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." The tenants both testified that they did not agree to allow the landlord to retain any portion of their security deposit. 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 their deposit, section 38(4)(a) of the *Act* does not apply to the tenants' security deposit.

The tenants seek the return of their security deposit. While the landlord applied to the Residential Tenancy Branch to retain the tenants' deposits on March 2, 2017, she did not make her application within 15 days of the end of tenancy or even within 15 days of the provision of the forwarding address by the tenants again on February 10, 2017. I find that the landlord is not entitled to a monetary award or to retain any of the tenants' security deposit. Therefore, I find that the tenants are entitled to a monetary order including $1000.00 for the return of the full amount of their security deposit.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch'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 evidence of the tenants before me, I find that the landlord has neither successfully applied for dispute resolution nor returned the tenants' security deposit in full within the required 15 days. The tenants have not waived their right to obtain a payment pursuant to section 38 of the *Act*. In accordance with section 38(6) of the *Act*, I find that the tenants are therefore entitled to a total monetary order amounting to double the value of their security deposit with any interest calculated on the original amount only. No interest is payable for this period.

Having been successful in this application, I find that the tenants are entitled to recover the $100.00 filing fee paid for this application.

Conclusion

I issue a monetary order to the tenants in the amount of $2100.00.

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: April 12, 2017

Residential Tenancy Branch