Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BROWN BROTHERS AGENCIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

This hearing convened as a result of cross applications.

In the Landlord's Application for Dispute Resolution the Landlord sought compensation for damage to the rental unit, authority to retain the Tenants' security deposit and recovery of the filing fee. In the Tenants' Application for Dispute Resolution the Tenants sought return of the security deposit paid and to recover the filing fee.

The hearing was conducted by teleconference on May 17, 2017. The Landlord's representative, K.N., called into the hearing, as did the Tenant, P.D. who appeared on his own behalf and as agent for his spouse, the other Tenant. K.N. and P.D. 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. Is the Landlord entitled to monetary compensation from the Tenants?

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

3. Should either party recover the filing fee?

Background and Evidence

The original tenancy agreement was provided in evidence and confirmed that the tenancy was initially for a one year fixed term beginning August 1, 2013. Monthly rent was payable in the amount of $1,200.00 in addition to parking of $50.00. The Tenants paid a $600.00 security deposit.

Also introduced in evidence was a copy of the "Residential Rental Agreement—Extension by Endorsement" which provided that the tenancy was to continue for another fixed term from August 1, 2014 to July 31, 2015. The Landlord's agent confirmed that the tenancy continued on a month to month basis following the expiration of the second fixed term.

Introduced in evidence was a copy of the move in condition inspection report which is stamped August 2, 2013.

The Tenant gave written notice to end the tenancy effective October 31, 2016. This notice was not provided in evidence.

The Landlord's agent testified that the tenancy ended October 21, 2016.

The Landlord's agent testified that the Tenants gave their address to the Landlord by way of their application for Dispute Resolution.

Residential Tenancy Branch Records indicate that the Landlord originally applied for dispute resolution on November 15, 2016. The Landlord's agent stated that they did not complete the application at that time as they did not have the Tenants' forwarding address. She further stated that upon receipt of the Tenants' application materials, they completed their filing and paid the application fee.

Notably, the application filed on November 15, 2016 contains the Tenants' forwarding address. Branch records confirm the Landlord filed and paid their application fee on November 15, 2016.

Central to the parties' dispute was whether the other complied with the *Act* in terms of the move out condition inspection report.

The Landlord's agent stated that when the Tenants provided keys to the Tenant on October 21, 2016 they took this as the Tenant giving up vacant possession.

The Landlord's agent stated that the first opportunity for inspection was scheduled for October 17, 2016 as that was the date the Tenants stated they intended to vacate the rental unit. The Landlord's agent testified that the Tenants called the same day and stated that they could not make it for that date and they wished to schedule it for a different date. She claims the Tenants then proposed October 20, 2016 as the alternate date.

The Landlord's agent confirmed that the Landlord agreed to the Tenant's proposed date of October 20, 2016. She says the Tenant then called on October 20, 2016 and stated that he would not participate in the inspection as that date did not work for him and rather he would return the keys on October 21, 2016.

The Landlord's agent further stated that they offered the Tenants two opportunities to do the inspection, but did not serve an RTB-22 form "Notice of Final Opportunity to Schedule a Condition Inspection"

The Landlord's agent confirmed that they offered the Tenants $300.00 if they moved out of the rental unit by October 21, 2017. When I asked the Landlord's agent if they paid the Tenants the $300.00 as offered she responded that it was "applied to the Tenants' account".

The Landlord's agent stated that the rental unit was brand new when the tenancy began.

The Landlord's agent stated that their cleaners (who give the Landlord a preferred rate) spent six hours with four people cleaning. She stated that it appeared as though no cleaning had been done. The oven was not cleaned, the stove, the bathrooms, the floors, the refrigerator, the microwave, the dishwasher, sinks etc.

The Landlord's agent stated that the repairs that were done including:

- repairs to the cabinet doors as they were swollen as a result of water damage.
- repairing "giant gouges" in the wall;
- replacing the bathroom door handle which was broken off;
- replacing pieces of the flooring transition trim which were missing;

The Landlord's agent testified that the Tenants did not attend to cleaning of the carpet.

The Tenant testified as follows.

He stated that he did not propose an inspection on October 17, 2017 as that was four days before they were scheduled to move out. He also stated that there was no agreement for an inspection on October 17, 2017 as the Landlord's agent claimed. He confirmed that although they spoke on October 17, 2017 at 12:34 p.m., there was no discussion about the inspection, as following the call, the Landlord's agent sent an email to the Tenant at 1:54 p.m. wherein the Landlord wrote:

> "…No Move-out inspection has happened you will be given at least 2 opportunities to participate in one..."

The Tenant noted that if they had in fact had an agreement about October 17, 2017, the above message would not make any sense.

The Tenant further stated that the Landlord's agent failed to provide a second opportunity for an inspection as she claimed.

The Tenant stated that the agreement with respect to the $300.00 was as follows. The Landlord informed the Tenants that they had a tenant who wished to move in early and as such, if they moved out by the 21st they would receive $300.00. The Tenant stated that the deal was that the Landlord would give the Tenants a cheque for $300.00. The Tenant confirmed they moved by October 21, 2016 fulfilling the agreed upon move out date yet the Landlord failed to provide the $300.00 payment to them.

The Tenant also stated that he provided his forwarding address in writing to the building manager on the date the building manager showed the rental to the prospective tenants. He noted that the Landlord had his address at the time of filing for dispute resolution on November 15, 2016.

In terms of the Landlord's claims for damage and cleaning of the rental unit, the Tenant testified as follows.

He stated that he and his wife cleaned the carpets the weekend before they vacated the rental unit. He claimed that he borrowed some equipment from a friend (a steamer and a vacuum).

In terms of the Landlord's claims for cleaning, the Tenant stated that the rental unit was clean at the time they moved out and claimed they vacuumed, cleaned the fridge, and cleaned the blinds.

In terms of the Landlord's claims for damage to the kitchen cabinet doors, the Tenant stated that there were some issues with respect to the unit, despite it being new, but that in any case they did not damage the cabinet doors as alleged. He stated that there wasn't even an extendable faucet hose in the kitchen, such that he could not explain the swelling of the cabinet doors.

In reply, the Landlord's agent alleged that the sink overflowed during the tenancy which caused the water damage to the cabinets. She stated that the Tenant admitted this to the property manager, G.M.

Analysis

After careful consideration of the testimony and evidence of the parties and on a balance of probabilities, I find as follows.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Landlord has the burden of proof to prove their claim for cleaning and repair of the rental unit.

The condition in which a Tenant should leave the rental unit at the end of the tenancy is defined in section 37 of the *Act* 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.

I accept the Landlord's evidence that cleaning and repairs of the rental unit were required. As noted during the hearing, the photos submitted by the Landlord were difficult to view as they were photocopied and consequently very dark. I confirm I was able to see damage to the walls, a broken handle, and a swollen cabinet door. I am persuaded by the Landlord's agent's testimony as well as the invoice dated November 6, 2016 that the repairs also included a repair to the countertop, doors stop, towel bar, closet door and gate as well as replacement of light bulbs. I am also persuaded by the invoice relating to cleaning that the Landlords paid cleaning costs in the amount of $520.00.

I also accept the Landlord's evidence that the Tenants failed to clean the carpets as required.

I therefore award the Landlord compensation for the following:

Cleaning of the rental unit	$520.00
Repairs to the rental unit	$662.55
Carpet cleaning	$99.75
TOTAL	**$1,282.30**

I will now deal with the parties' claims against the security deposit.

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

> **Return of security deposit and pet damage deposit**
>
> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> 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.

I accept the Tenants evidence that they did not agree to the Landlord retaining any portion of their security deposit.

I find the Landlord received the Tenants forwarding address on October 21, 2016, the date the Tenants moved from the rental unit. It is notable that the Landlord's agent claimed she did not have the Tenants' forwarding address until they received the Tenants' Application for Dispute Resolution. However, the Tenant's Application was filed on November 17, 2016, two days after the Landlord filed for Dispute Resolution on November 15, 2016. I therefore find it more likely that the Landlord had the Tenants' forwarding address at the time the Landlord filed for Dispute Resolution.

I therefore find the Landlord failed to apply for arbitration, within 15 days of receipt of the forwarding address of the Tenants, to retain a portion of the security deposit, as required under section 38(1) of the *Act*.

I further find the Landlord failed to follow section 17 of the *Residential Tenancy Regulation* in terms of serving a Form 22- Notice of Final Opportunity to Schedule a Condition Inspection; for greater clarity I reproduce that section as follows:

> **Two opportunities for inspection**
>
> **17** (1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
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> (2) If the tenant is not available at a time offered under subsection (1),
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> (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
>
> (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.
>
> (3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

By failing to perform the outgoing condition inspection report in accordance with the *Act* and the *Regulations*, the Landlord extinguished their 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 Tenants an Order from an Arbitrator.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenants the sum of **$1,200.00**, comprised of double the security deposit (2 x $600.00).

As the parties have enjoyed divided success, I find that they should each bear the cost of their filing fee.

The parties agreed the Tenants were to be paid the sum of $300.00 for vacating the rental unit by October 21, 2016. The Landlord failed to pay this sum. I therefore Order

that the Landlord compensate the Tenants a further **$300.00** for a total award of **$1,500.00.**

Conclusion

The amounts awarded to each party, namely: $1,282.30 to the Landlord and $1,500.00 to the Tenants are to be offset against one another such that the Tenants are granted a Monetary Order in the amount of **$217.70.** The Tenants must serve this Order on the Landlord and may file and enforce the Order in the B.C. Provincial Court (Small Claims Division) as required.

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: June 16, 2017

Residential Tenancy Branch