



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNSD MNDC OLC RPP FF

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlords requested:

- a monetary order for damage to the unit, site, or property, or for money owed or compensation for damage or loss 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 tenants requested:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- an order requiring the landlords to return the tenants’ personal property pursuant to section 65;
- an order requiring the landlords to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

This hearing was originally set to deal with the tenants’ application only, but it came to my attention during the hearing that the same parties had a second matter set for a hearing on February 20, 2018 to deal with the landlords’ cross application pertaining to this same tenancy. Both parties appeared, and with their consent, both applications were dealt with today. Both parties 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.

Both parties confirmed receipt of each other's applications for dispute resolution hearing package ("Applications") and evidence. In accordance with sections 88 and 89 of the *Act*, I find that both the landlords and tenants were duly served with the Applications and evidence.

Issue(s) to be Decided

Are the landlords entitled to a monetary award for losses arising out of this tenancy?

Are the landlords entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested?

Are the tenants entitled to the return of their security and key deposit?

Are the tenants entitled to an order requiring the landlords to comply with the *Act*, regulation or tenancy agreement?

Are the tenants entitled to an order requiring the landlords to return the tenant's personal property?

Are either of the parties entitled to recover the costs of their filing fees for their applications?

Background and Evidence

This fixed term tenancy began on April 1, 2017 with monthly rent set at \$1,400.00, payable on the first of the month. The landlords collected a security deposit in the amount of \$700.00 as well as a \$50.00 key deposit, which they still hold. The tenants do not dispute the fact that this was a fixed term tenancy which was to end on March 31, 2018. A copy of the tenancy agreement was provided in evidence by both parties. The tenants moved out on July 31, 2017 prior to the end of this tenancy. The tenants provided a forwarding address on July 31, 2017, requesting the return of their deposits.

The landlords mitigated their losses, and were able to find a new tenant to fill the vacancy. The suite was re-rented for August 1, 2017 for \$1,450.00 per month.

The landlords submitted a monetary claim for \$850.00 in order to recover their losses associated with the tenancy as listed below:

Item	Amount
Liquidated Damages as set out in the Tenancy Agreement	\$700.00
Move Out Fee	100.00
Painting Fee	50.00
Total Monetary Order Requested	\$850.00

The landlords testified that the tenants were aware that the tenancy agreement indicates liquidated damage term on the written tenancy agreement which states that *“If the tenant is in default under the terms of the Tenancy Agreement, such default to include early termination of the Tenancy Agreement, the Tenant will forfeit its security deposit and pet damage deposit (if applicable)”*.

The landlords testified in the hearing that the forfeiture of the security deposit in satisfaction of the liquidated damages term covers associated costs of the tenants breaking the lease, such as the re-leasing fee charged by the leasing agent. The landlords included confirmation dated October 25, 2017 that \$350.00 was paid for re-leasing the rental suite.

The tenants dispute the fee as they feel the landlords did not suffer any losses due to the early end of this fixed-term tenancy.

The landlords also made a monetary claim for a \$100.00 move-out fee, which is also listed in the tenancy agreement to “cover associated costs”. The tenants dispute this charge, stating that there were no strata fees charged to the landlord as the entire building is owned and managed by the landlord, which the landlord confirmed in the hearing. The tenants testified that furthermore no services were provided as part of this fee, and were not clear as to what the associated costs were.

The landlords are also seeking the costs of painting for the small marks left on the wall by the tenants. The tenants do not dispute that there was some damage to the wall, but testified that this was wear and tear. Both parties confirmed in the hearing that this was a brand new building when the tenants had moved in, and both parties confirmed in the hearing that both move-in and move-out inspections were completed.

The tenants requested the return of their deposits in full, as they did not give permission for the landlords to retain any of their deposits. The landlords agreed in the hearing to return the tenants' \$50.00 key deposit. .

Analysis

Section 44 of the *Residential Tenancy Act* reads in part as follows:

44 (1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:...

(b) *the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;*

(c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

45 (2) *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*

(a) *is not earlier than one month after the date the landlord receives the notice,*

(b) *is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*

(c) *is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

It was undisputed by both parties that the tenants had moved out prior to the end of this fixed term tenancy, in a manner that does not comply with the *Act*, as stated above. The landlords did not mutually agree to end this tenancy in writing, nor did the tenants obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy. No applications for dispute resolution have been filed by the tenants in regards to this tenancy. The tenants moved out eight months earlier than the date specified in the tenancy agreement.

The evidence is clear that the tenants did not comply with the *Act* in ending this fixed term tenancy, and I therefore, find that the tenants vacated the rental unit contrary to Sections 44 and 45 of the *Act*. The evidence of the landlords is that they were able to

re-rent the suite, and the landlords are requesting the forfeiture of the security deposit as specified in the tenancy agreement. The landlords drafted the agreement requiring the forfeiture of the security deposit in the event that the tenants ended the tenancy before the end of the fixed term. This clause is in contravention of sections 20(e) and 5(1) of the *Act* as stated below:

Landlord prohibitions respecting deposits

20 A landlord must not do any of the following...

(e) require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this *Act* or the regulations.

(2) Any attempt to avoid or contract out of this *Act* or the regulations is of no effect.

I find that this term of the tenancy agreement does not comply with section 20(e) of the *Act*, and as stated in section 5(2), “any attempt to avoid or contract out of this *Act* or the regulations is of no effect”. Accordingly, the landlords’ application to retain the deposit in satisfaction of this condition on the tenancy agreement is dismissed without leave to reapply.

The landlords testified that they suffered a loss of \$350.00 in fees to their leasing agent. In regards to the landlords’ claim to recover the costs of hiring a leasing agent, I find the landlords made a business decision to retain the services of a leasing agent. As a result, I am not satisfied the landlords have demonstrated that this decision was necessary as a result of any violation of the *Act*, regulation, or tenancy agreement on the part of the tenants. On this basis, I dismiss this portion of the landlords’ monetary claim without leave to reapply.

The landlords applied for a monetary claim of \$100.00 for the move out fee, which is a condition on the tenancy agreement. Section 7(1) of *Residential Tenancy Regulation* reads: “ 7 (1) A landlord may charge any of the following non-refundable fees...(f) a

move-in or move-out fee charged by a strata corporation to the landlord". As the landlords did not provide sufficient supporting evidence to demonstrate that any fees were charged by a strata corporation to the landlords, I find that this condition of the tenancy agreement fails to meet the requirements of section 7(1)(f) of *Residential Tenancy Regulation*. Accordingly, I dismiss this portion of the landlords' monetary claim without leave to reapply.

Section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. I find that the landlords provided sufficient evidence to show that the tenants did not take reasonable care and attention when vacating the suite. I find that the landlord complied with sections 23 and 35 of the *Act* by performing condition inspection reports for both the move-in and move-out, which shows that the walls were in good condition at the beginning of the tenancy. The tenants did not dispute that they had caused damage to the walls during this tenancy. I find \$50.00 to be reasonable compensation for the touchups required for the tenants' failure to comply with section 37(2)(a) of the *Act*. Accordingly I allow the landlords a monetary order in the amount of \$50.00 for the damage to the wall.

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 tenant's forwarding address in writing, to either return the deposit 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 deposit, and the landlord must return the tenant's 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*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenants agree in writing the landlord may retain the amount to pay a liability or obligation of the tenants."

I find the landlords had applied for dispute resolution within 15 days of being provided with the tenants' forwarding address on July 31, 2017, and therefore complied with section 38(1) of the *Act*. Accordingly I dismiss the tenants' application for a monetary award in accordance with section 38(6) of the *Act*. The landlords agreed to return the \$50.00 key deposit to the tenants. The landlords continue to hold the tenants' security deposit of \$700.00. In accordance with the offsetting provisions of section 72 of the *Act*,

I order the landlords to retain a portion of the tenants' security deposit in satisfaction of the monetary claim.

The tenants had applied for the landlord to return personal property to them, as well as an order for the landlords to comply with the *Act* and tenancy agreement. As the tenants did not make any submissions in the hearing as to these two issues, this portion of the tenants' application is dismissed with leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As both parties were both partially successful in their applications, no order will be made in regards to the recovery of their filing fees.

Conclusion

I issue a Monetary Order in the amount of \$700.00 in the tenants' favour under the following terms which allows the landlords to retain a portion of the security deposit in satisfaction of the monetary claim for damages. The remainder of the tenants' and landlords' applications are dismissed without leave to reapply.

Item	Amount
Return of Security Deposit	\$700.00
Return of Key Deposit	50.00
Less Painting Fee	-50.00
Total Monetary Order	\$700.00

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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: December 5, 2017

Residential Tenancy Branch