



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MACDONALD COMMERCIAL REAL ESTATE LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNDC, MNSD, FF

Introduction

On June 21, 2017, the Tenant submitted an Application for Dispute resolution requesting the return of the security deposit and pet damage deposit and a monetary order for money owed or compensation for damage or loss under the Act, Regulation or tenancy agreement, and to recover the cost of the filing fee.

On June 22, 2017, the Landlord submitted an Application for Dispute Resolution for a monetary order for damage to the unit; to keep the security deposit; and to recover the cost of the filing fee.

The matter was scheduled as a teleconference hearing. The Landlord and Tenant attended the hearing. At the start of the hearing I introduced myself and the participants. The Landlord and Tenant provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

The Landlord applied for dispute resolution on June 22, 2017, seeking compensation in the amount of \$11,296.50. On November 16, 2017 the Residential Tenancy Branch received documentary evidence from the Landlord including a monetary order worksheet indicating the claim is for \$12,930.94. The Landlord did not amend the original application and did not serve the Tenants with an amended Application and monetary claim amount. The Landlord did not amend the Application in accordance

with the Residential Tenancy Branch Rules of Procedure. I find that the Landlords claims are limited to the issues and compensation of \$ 11,296.50 as set out within the Application that was served on the Tenants.

Issues to be Decided

- Is the Landlord entitled to compensation for damage to the unit?
- Is the Landlord entitled to keep the security deposit and pet damage deposit in full or partial satisfaction of the claim?
- Is the Landlord entitled to recover the cost of the filing fee?
- Are the Tenants entitled to the return of the security deposit and pet damage deposit?

Background and Evidence

The parties testified that the tenancy commenced on October 1, 2015, as a fixed term tenancy to continue until September 30, 2017. The Tenant is to pay the Landlord monthly rent in the amount of \$5,900.00 by the first day of each month. The Tenant paid the Landlord a security deposit of \$2,950.00 and a pet damage deposit of \$2,950.00. The Landlord provided a copy of the tenancy agreement.

The parties testified that the tenancy ended by mutual agreement and the Tenants moved out on May 31, 2017.

Both parties submitted a copy of a signed report ("the Condition Inspection Report") showing the condition and state of repair of the rental unit at the start and end of the tenancy.

Landlord's Application

The Landlord is requesting compensation for the following items:

Materials and Labour for Painting	\$4,897.50
Cleaning Costs	\$1,065.75
Hedge Damage	\$5,000.00
Damage to Grass	\$131.25
Light Bulbs	\$34.12

Painting

The Landlord testified that the rental unit was left damaged at the end of the tenancy. The Landlord submitted that there was damage to the walls of the bedrooms, hallways and garage. The Landlord provided color photographs of the damaged areas and made reference to the Condition Inspection Report that was completed by the parties at the end of the tenancy. The Landlord provided copies of receipts for the repair of the damage.

The Landlord testified that the tenancy agreement requires the Tenants to seek permission to hang pictures and that permission was not requested or granted. The Landlord submitted that the rental unit was painted two years prior to the start of the tenancy.

In response, the Tenants testified that they agree with the damage as reported within the Condition Inspection Report, but they do not agree with the Landlords submission regarding hanging pictures. The Tenant submitted that he patched and sanded most of the nail holes but was not able to patch and paint them all. The Tenant submitted that he should not have to pay to have all the rooms patched and painted. The Tenant submitted that the Landlord's photographs were not taken on the day of the move out inspection.

In reply, the Landlord submitted that the photographs were taken at the end of June 2017, and that nobody else lived in the unit between the end of the tenancy and the date the photographs were taken.

Cleaning Costs

The Landlord testified that the rental unit was not left in a clean condition at the end of the tenancy. The Landlord testified that the kitchen needed cleaning; the carpets were dirty; the curtains were dirty; and the sofa was stained. The Landlord testified that he had a company come to provide an estimate to clean the unit. The Landlord decided to clean the unit himself. The Landlord testified that he spent weeks cleaning the unit and spent 5 hours cleaning the oven. The Landlord provided photographs of a sofa and a curtain.

In response, the Tenants submitted that they are not in agreement to pay the Landlord for cleaning costs. The Tenants submitted that they cleaned the rental unit on a weekly basis and had a regular cleaning service come to the unit.

The Tenants submitted that they had the carpets and unit cleaned on May 30, 2017. The Tenants disagree with the claim to pay the cost to clean the furniture; however, the Tenant submitted that he would agree to pay \$200.00 for cleaning costs.

Hedge Damage

The Landlord testified that the Tenants dog did damage to a hedge. He submitted that the Landlords dog would run in and out of the hedge. The Landlord submitted that he received a quote for the replacement cost of \$9,000.00 to plant a new hedge. The Landlord submitted that he is replacing the hedge in the spring and is only seeking \$5,000.00 from the Tenants.

The Landlord provided color photographs of the original hedge and the hedge area he submits was damaged. The Landlord's photographs contain 1 photograph of the original hedge which is zoomed in on a small area. The photograph of the damaged hedge is taken more at a distance and shows the lower area of the hedge is not fully grown.

The Landlord provided a document that he submits is from a qualified arborist who indicates that lower branches seem to have been broken or have been ripped off the trunk. The document indicates that it is unlikely that new growth will fill back in and if it does it may take several years. The document indicates there are 90 cedar trees and the replacement cost is \$45-\$60 per tree and labour to remove dispose and replace each tree would be approximately \$30 -\$40.00 per tree.

In response, the Tenants testified that there was no mention of damage to the hedge during the move out inspection, except for an area where the swing set was located. The Tenants testified that there dog chewed the hedge in that area; however, the cedar hedge that the Landlord refers to is in the same condition as when they moved into the unit. The Tenants agreed to re-seed the hedge area.

Damage to Grass

The Landlord testified that the Tenants damaged the grass area surrounding the swing set. The Landlord testified that he purchased soil and repaired the grass himself. The Landlord is seeking \$131.00 for the cost to repair the grass.

In response, the Tenants testified that they agree that the damage was caused by their use of the swing set but they disagree with the amount of money the Landlord is seeking. The Tenants submitted that the claim should be for \$50.00.

Light Bulbs

The Landlord testified that the Tenants did not replace the burned out light bulbs at the end of the tenancy. The Landlord is seeking \$34.12 for the cost of replacement bulbs.

In response, the Tenants agreed to pay the Landlord \$34.12 for the cost of replacement bulbs.

Tenants Application

The Tenants are seeking a monetary order in the amount of \$11,800.00 which is double the amount of the security deposit and pet damage deposit.

The Tenants testified that they participated in a move out inspection on May 31, 2017. The Tenants testified that the Landlord was provided with their forwarding address on May 31, 2017.

The Tenants submitted that on May 31, 2017, the Landlord told them that he was going to hold the deposits.

They submitted that they later met with the Landlord to ask why the Landlord's claims were so much different from what was identified at the move out inspection. The Tenants did not agree with the Landlord's claims so they applied for dispute resolution.

In reply, the Landlord submitted that he did not return the deposits. The Landlord testified that the Tenant, Ms. M.D. signed a move out inspection report agreeing that the Landlord could retain all or a portion of the security deposit in the amount of \$5,900.00. The Landlord provided a copy of a Real Estate Services Move Out Inspection Report ("the Report"). The Report bears a signature of the Tenant dated May 31, 2017. Section 9 of the Report states the following:

“The final deduction will be subjected to the actual bill. The balance deposit after the final deduction will be returned to the tenant within 15 days from the date the agreement of deduction is reached.”

TENANT: *I hereby confirm the above is correct and consent to MacDonald Commercial Real Estate Services Ltd. (the Landlord) retaining all or a portion of my security deposit in the amount of \$5900.*

The Tenant, Ms. M.D. submitted that it was unclear what the Landlord was asking agreement for. She submitted that she was not agreeing that the Landlord could retain the full deposit. She understood that the Landlord was looking into costs for patching walls, power washing, and seeding a damaged area of the lawn as provided within the Report.

The Landlord submitted that tried to reach an agreement for costs but an agreement could not be reached.

Analysis

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

Section 21 of the Residential Tenancy Regulation states:

In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The Residential Tenancy Policy Guideline # 16 Claims in Damages states:

An arbitrator may award monetary compensation only as permitted by the Act or the common law. In situations where there has been damage or loss with respect to property, money or services, the value of the damage or loss is established by the evidence provided.

A party seeking compensation should present compelling evidence of the value of the damage or loss in question.

The Residential Tenancy Policy Guideline #1 Landlord & Tenant – Responsibility for Residential Premises states:

A tenant is generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest.

Landlord's Application

Pursuant to section 67 of the Act, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Painting

The Tenant agreed with the damage reported in the Condition Inspection Report and submitted that he was not able to patch and paint all the holes. I find that the Landlords photographic evidence is the stronger evidence regarding the condition of walls and the need to repaint. While I acknowledge that the Condition Inspection Report indicates that the walls in the foyer, office, and dining room had a couple holes in the walls or minor marks at the start of the tenancy, the photographic evidence supports the Landlords claim that the damage to the walls was much more extensive at the end of the tenancy.

I award the Landlord \$4,897.50 for the cost of materials and labour for the painting of the unit.

Cleaning Costs

The Landlord has provided insufficient evidence to support his claim for \$1,065.75 for cleaning costs. The Condition Inspection Report indicates that the kitchen and a bathroom needed cleaning. The Condition Inspection Report indicates there were marks on a carpet and a stain on the floor at the start of the tenancy.

The Tenants refuted the Landlord testimony that the unit was left unclean; however, they acknowledged some responsibility for cleaning costs. In the circumstances, I find it reasonable to award the Landlord \$500.00 for the cost to clean the bathroom, kitchen, upholstery, and carpet.

Hedge Damage

The signed Condition Inspection Report indicates that there was damage to the hedge at the end of the tenancy. The Tenants refute the Landlords submission that their dog damaged the cedar hedge. The Landlord only provided one photograph of the original hedge which is zoomed in on a small area showing the hedge as fully grown in. The photographs of the damaged hedge show a zoomed in area where the hedge is not fully grown in and a photograph taken at a distance showing the lower area of the hedges are not fully grown in.

I find that the Landlord has provided the stronger evidence that the Tenants are responsible for damage to some cedar hedges; however, I find that the Tenants are not responsible to pay the amount of compensation that the Landlord is seeking. I have considered that the Landlord has not paid for the repair or replacement of the hedge and he plans to replace the hedge in the spring. The Arborist indicates that the hedge may grow back over several years.

Based on the Landlords photographic evidence, I find that the area of damaged hedge is approximately 8 meters long. The Arborist report indicates the cedar trees are spaced 1 meter apart. I grant the Landlord the replacement cost of eight cedar hedges. Based on the Arborist report estimating the purchase, removal, and replacement costs of each tree, I have accepted the cost to be \$87.50 per tree. I grant the Landlord \$87.50 per tree.

I award the Landlord the amount of \$700.00 for the damage to the eight cedar hedges.

Damage to Grass

The Tenants acknowledged that the grass was damaged by their use of the swing. I award the Landlord \$131.25.

Light Bulbs

The Tenants agreed to pay the replacement costs of the lightbulbs. I award the Landlord \$34.12.

Tenants Application

The Tenants have applied for a monetary order in the amount of \$11,800.00 for the return of double the amount of the security deposit and pet damage deposit.

Pursuant to section 38 of the Act, a Landlord is required to return, or make claim to a security deposit, within 15 days of receiving the Tenants forwarding address or the amount of the deposits will double as a penalty. I find that the Tenants provided the Landlord with their forwarding address on May 31, 2017. The Landlord applied for dispute resolution on June 22, 2017. The Landlord's application to retain the deposits was made beyond 15 days after receiving the Tenants' forwarding address.

Despite signing the Report, the Tenants are seeking double the amount of the security deposit and pet damage deposit. I have considered whether or not the terms of the Report are in compliance with the requirements under the Act for the return of a security deposit.

Section 5 of the Act states that Landlords and Tenants may not avoid or contract out of the Act or the Regulations. Any attempt to avoid or contract out of the Act or the Regulations is of no effect.

Section 38(4) of the Act states that 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.

Residential Tenancy Policy Guideline # 8 Unconscionable and Material Terms is intended to help the parties to an application understand issues that are likely to be relevant. The Guideline provides:

A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage.

I find that the Report as provided is not an agreement that the Landlord can retain **an amount** to pay a liability or obligation of the Tenant. The Report does not identify **a specific amount** of compensation that the parties agreed the Landlord could retain from the deposits. There is no agreement for the Landlord to keep **a specific amount** of money. It appears that the Report serves the purpose of providing the Landlord more time to negotiate an agreement with the Tenants. I find that the Landlords failure to return, or make a claim to the deposits, within 15 days is not saved by operation of section 38(4) of the Act.

I also find that the Report is prejudicial to the Tenants right to the timely return of the deposits. The signed report effectively gives the Landlord a procedural advantage by reversing the onus placed on the Landlord under section 38 of the Act. The Report states that *the balance deposit after the final deduction will be returned to the tenant within 15 days from the date the agreement of deduction is reached.*" I find that this is contracting outside of the Act.

Similar to the test for determining an unconscionable term, I find that the Report, as signed, limits damages against the Landlord and places no time limit on the Landlord for the return of the deposit. The Report suggests that the Landlord does not have to return a deposit if an agreement is not reached. The Report eliminates the penalty provision of the Act that applies to Landlords who fail to deal with deposits in a timely manner.

After considering the Report and the relevant legislation, I find that the Report is not an enforceable agreement. The Report as completed is inconsistent with section 38 of the Act, and provides the Landlord with a procedural advantage.

I find that the Landlord breached the requirement to return the deposits or apply for dispute resolution within 15 days of receiving the Tenants' forwarding address in writing. I find that the Landlord breached section 38(6) of the Act and the Landlord must pay the Tenants double the amount of the pet damage deposit and security deposit.

I award the Tenants \$11,800.00, which is double the amount of the security deposit and pet damage deposit.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. Since both parties had success with their applications I decline awarding the recovery of the filing fees.

The Landlord has established a monetary claim in the amount of \$6,262.87 for cleaning costs and damage to the rental unit.

The Tenants have established a claim in the amount of \$11,800.00 for the return of double the security deposit and pet damage deposit.

After setting off the amount of the Landlords claim against the amount awarded to the Tenants, I order the Landlord to return the balance of the deposits in the amount of \$5,537.13 to the Tenants.

I grant the Tenants a monetary order in the amount of \$5,537.13. The order must be served on the Landlord and may be enforced in the Provincial Court.

Conclusion

The Landlord established a monetary claim in the amount of \$6,262.87 for cleaning costs and damage to the rental unit.

The Tenants have established a claim in the amount of \$11,800.00 for the return of double the security deposit and pet damage deposit.

After setting off the amount of the Landlord's claim against the amount awarded to the Tenants, I order the Landlord to return the balance of the deposits in the amount of \$5,537.13 to the Tenants.

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 29, 2017

Residential Tenancy Branch