Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, FF, MNSD

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* (the *Act*).

The landlord applied for:

- a monetary order for compensation for unpaid rent and damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenants applied for:

- authorization to obtain a return of all or a portion of the security deposit and pet damage deposit pursuant to section 38; and
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

As both parties were in attendance I attempted to confirm service. The landlord confirmed receipt of the tenant's application for dispute resolution, amendment and evidentiary materials. I find that the landlord was served with the tenant's materials in accordance with sections 88 and 89 of the *Act*.

The tenant disputed receiving any of the landlord's materials. The landlord testified that they were sent by registered mail to the tenant on December 8, 2017. The landlord provided a working Canada Post tracking number as evidence of service. While the tenant said they did not receive the landlord's materials I find that the landlord served the tenant in a manner in accordance with the Act. In accordance with Policy Guideline 12, "Where a document is served by registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not

override the deeming provision." Accordingly I find that the landlord's application package was deemed served in accordance with sections 88, 89 and 90 of the *Act* on December 13, 2017, five days after mailing.

Issue(s) to be Decided

Is either party entitled to a monetary award as claimed?
Is the tenant entitled to a return of double the security deposit?
Is the landlord entitled to recover the filing fee for the application from the tenant?

Background and Evidence

The parties agreed on the following facts. This tenancy began in December, 2016 and ended on February 12, 2017 by way of a 10 Day Notice to End Tenancy for Unpaid Rent. At the end of the tenancy the monthly rent was $1,295.00. A security deposit of $647.50 was paid at the start of the tenancy and is still held by the landlord.

The parties participated in a move-in inspection at the start of the tenancy. A copy of the condition inspection report prepared at that time was submitted into written evidence. The parties did not participate in a move-out inspection. The landlord said that they offered the tenant two opportunities to participate as prescribed in the Act but the tenant failed to attend. The tenant said that the landlord did not offer any opportunity to participate in an inspection. The landlord submitted into written evidence letters dated February 6, 2017 and another dated February 11, 2017 which she said were the request to arrange a move-out inspection.

The landlord seeks a monetary award of $1,123.95 for the following items.

Item	**Amount**
Unpaid Rent February	$795.00
Unpaid Utilities	$100.00
Carpet Cleaning	$103.95
Painting	$125.00
TOTAL	**$1,123.95**

The parties agree that the tenant paid only $500.00 for February rent. The tenant said that because she moved out on the 12th she does not feel that she has an obligation to pay the full rent for that month.

The landlord claims utilities as she believes the tenant's usage was excessive. The landlord said that while the tenancy agreement provides that utilities are included, it also states that the parties man renegotiate if the tenant abuses the usage. The tenant disputes that her usage of utilities was excessive or that she agreed to an additional payment.

The landlord claims the cost of painting the rental unit and carpet cleaning, saying that the tenant left the rental unit in disrepair requiring work to be done before renting to another occupant.

The landlord submitted into written evidence a copy of a letter from the tenant dated February 6, 2017 where the tenant writes, "I ask you to use my security deposit of $647.50 towards the balance for February's rent". The landlord said that the letter is written authorization from the tenant that she may retain the security deposit.
The tenant seeks a monetary award of $1,336.37 comprised of double the security deposit and various costs of mailing and serving documents on the landlord.

The tenant testified that she did not participate in a move-out inspection and the landlord did not give her an opportunity to participate. The tenant disputes that the letter of February 6, 2017 allows the landlord to retain the full security deposit. The tenant said the offer in the letter was contingent on coming to an agreement with the landlord to end the tenancy by way of a draft Mutual Agreement to End Tenancy she provided. The tenant directed attention to the other portions of the letter.

Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit and pet damage deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit and pet damage deposit as per section 38(4)(a).

Furthermore, the parties gave evidence that no condition inspection report was prepared at the end of the tenancy. The landlord claims that the tenant was given 2 opportunities to participate. The first offer was included in a letter dated February 6, 2017 where the landlord writes, "we can do the walkthough on the last day". The landlord submitted a letter dated February 11, 2017 into written evidence, saying that it was the second request to arrange a time.

However, I find that the letter does not provide an opportunity for an inspection as set out in the Act and regulations. Neither of the letters proposes a particular time to perform the move-out inspection. Regulation 17(1) states that a landlord must offer to a tenant an opportunity to schedule the inspection by proposing one or more dates and times. I find that simply writing that the inspection will occur on the last day of the tenancy to be inadequate. Similarly, the second letter of February 11, 2017 does not propose a date or time. The landlord invites the tenant to set a date/time but that is not the tenant's obligation under the *Act*. The landlord

cannot simply extend an invitation for the tenant to arrange a time for the move-out inspection, the obligation is on the landlord to propose a date and time for the inspection.

Furthermore, Regulation 17(2)(b) provides that an opportunity must be provided to the tenant in the approved form. I find the letter does not conform the requirements of the Act and regulations and therefore the landlord has failed to provide the tenant with 2 opportunities in accordance with the Act.

Section 36 of the *Act* provides that the right of a landlord to claim against a security deposit is extinguished if they do not comply with the requirements of section 35 in offering the tenant 2 opportunities for an inspection and completing a condition inspection report. Consequently, I find that the landlord extinguished their right to claim against the security deposit.

I find the tenant's explanation of their letter of February 6, 2017 to be reasonable. While the tenant's letter does offer that the landlord may utilize the security deposit for the balance of the rent owing, it is clear from context that the offer is contingent on other factors. I accept the tenant's explanation that the letter was not a blanket authorization that the landlord may retain the security deposit but an offer made contingent on the landlord singing a Mutual Agreement to End Tenancy. I find that the tenant did not provide written authorization allowing the landlord to retain the security deposit.

Based on the undisputed evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. I accept the tenant's evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is entitled to an $1,295.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the Act, regulations or a tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. The claimant also has a duty to take reasonable steps to mitigate their loss.

The tenant claims the costs of mailing their application and evidentiary materials to the landlord in preparation for this hearing. The cost of serving a party is not an expense that is recoverable under the Act. Therefore, I dismiss this portion of the tenant's claim.

The parties provided undisputed evidence that the tenant paid only $500.00 for rent for the month of February. I accept the landlord's evidence that the tenancy is in arrears by $795.00. I

find that the tenant was obligated to pay the full rent for the month of February even though they did not occupy the rental unit for the full duration of the month. Therefore, I find that the landlord is entitled to a monetary award in the amount of $795.00.

I find that the landlord has not provided sufficient evidence in support of the balance of their monetary claim. I find that the landlord has not shown on a balance of probabilities that the tenants have breached the Act, regulations or tenancy agreement so as to give rise to the landlords' monetary claim. While I accept the evidence of the parties that electricity was consumed by the tenant during the tenancy, the tenancy agreement clearly indicates that utilities are included in the rent. While the tenancy agreement provides that the utility charge may be renegotiated, there is no provision in the tenancy agreement allowing the landlord to unilaterally and retroactively charge an additional amount for utilities if they feel the consumption was high.

Landlords are in the business of providing rental accommodations for profit. There is an element of risk in a business venture and this risk is knowingly borne by the landlord. I do not find that there is any basis in the Act, regulations or tenancy agreement that allows the landlord to shift this risk onto the tenants after the fact. A residential tenancy agreement is a binding contract and as such cannot be disregarded because the landlord feels it is inconvenient when their profits are less than anticipated. I find that there was discussion between the parties to renegotiate the utility costs but I am unable to conclude that there was an agreement that entitles the landlord to a $100.00 monetary award for this item.

I find that the landlord has failed to show on a balance of probabilities that the rental unit suffered damage in excess of expected wear and tear, that required the cleaning and repair costs claimed. The landlord has submitted into written evidence the receipts for the work done but I find that there is insufficient evidence to show that the work was necessary or caused by the tenant. Therefore I dismiss this portion of the landlord's claim.

As the landlord's claim was only successful in part I find that the landlord is not entitled to recover the filing fee from the tenant.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $500.00 under the following terms:

Item	Amount
Double Security Deposit ($647.50 x 2 = $1,295.00)	$1,295.00
Less Feb Rent Arrear	-$795.00

TOTAL	**$500.00**

The landlord must be served with this Order as soon as possible. Should the landlord 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: January 8, 2018

Residential Tenancy Branch