Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF, MNDCT, MNSD, FFT

Introduction

This hearing, conducted by a conference call, dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*).

The landlord applied for:

- 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 applied for:

- a monetary award for damages and loss pursuant to section 67;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to speak, present evidence, provide affirmed testimony and call witnesses. The tenant CH (the "tenant") primarily spoke on behalf of both co-tenants.

As both parties were in attendance I confirmed that there were no issues with service of the parties' respective applications for dispute resolution or either party's evidentiary materials. The parties confirmed receipt of one another's materials. In accordance with sections 88 and 89 of the *Act*, I find that the parties were duly served with copies of the respective application packages.

Issue(s) to be Decided

Is the landlord entitled to retain all or a portion of the security deposit for this tenancy?
Is the tenant entitled to a monetary award equivalent to double the value of his security deposit and pet damage deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*?
Is either party entitled to recover the filing fee for this application from the other?

Background and Evidence

The parties agreed on the following facts. This tenancy began in November, 2016 and ended in June, 2017. A security deposit of $700.00 was paid at the start of the tenancy. The parties visually inspected the rental unit at the start of the tenancy but no condition inspection report was prepared. No condition inspection report was prepared at the end of the tenancy. The tenants paid the full amount of rent up to June 30, 2017. The tenants provided a forwarding address to the landlord in a letter dated May 31, 2017. The landlord returned the amount of $143.66 from the security deposit to the tenants and filed an application to retain $556.34.

The landlord seeks a monetary award in the amount of $556.34 for the following items.

Item	**Amount**
Carpet Cleaning	$129.36
Labour and Repairs	$80.25
Excessive Hydro Usage	$301.96
Wood Transition	$44.75
TOTAL	**$556.34**

The landlord said that some repairs and maintenance was required after the tenants vacated the rental unit. The landlord submitted into written evidence photographs of the rental unit and copies of invoices for the work performed.

The landlord testified that while electricity is included in the rent in the tenancy agreement, there is a clause in the addendum that provides that excessive usage will be billed to the tenants. A copy of the tenancy agreement and addendum were submitted into written evidence.
The tenant testified that they have not given written authorization that the landlord may retain any portion of the security deposit. The tenant said that he had not cashed the

cheque in the amount of $143.66 as he believed doing so may be interpreted as consenting to the landlord's deduction.

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).

I accept the undisputed evidence of the parties that the tenancy ended on June 30, 2017. I find that the date in June, the tenants vacated the rental unit to be irrelevant. The landlord filed his application to retain the security deposit on July 15, 2017 within the 15 days provided under the *Act*.

However, the parties have testified that the landlord did not prepare a condition inspection report as required under section 23(4) of the *Act*. That section provides that the landlord must complete a condition inspection report in accordance with the regulations. It is not sufficient to simply inspect the condition of the rental unit if written record of the inspection is not produced.

Section 24 of the Act outlines the consequences if reporting requirements are not met. The section reads in part:

> 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
>
> …
>
> (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

I accept the undisputed evidence of the parties that the landlord did not prepare a written condition inspection report at the start of the tenancy. Consequently, I must find that the landlord has extinguished any right to claim against the security deposit for damages to the rental unit by failing to prepare a written report in accordance with the *Act*.

Based on the undisputed evidence before me, I find that the landlord had extinguished their right to apply to retain the security deposit for this tenancy and has failed to return the tenant's security deposit in full. 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*. I accept the undisputed evidence of the parties that the landlord attempted to return $143.66 of the security deposit to the tenants but the tenants did not cash this cheque. Under these circumstances and in accordance with section 38(6) of the *Act* and Residential Tenancy Policy Guideline 17, I find that the tenant is entitled to a $1,400.00 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 landlord claims that the addendum to the tenancy agreement provides that the landlord may bill the tenants for excessive usage of electricity. However, I find that the clause in the addendum is too vague to be enforceable. The relevant clause states:

> 2. As noted in Section 3(b) of the agreement, electricity is included in the rent that shall be paid to the Landlord. Nevertheless, it is expected that the Tenant(s) will not overuse electricity which may result in unusually high bills to the Landlord. If electricity bills become excessive, that portion deemed to be excessive will be billed back to the Tenant(s).

The agreement does not define, in the clause or elsewhere in the document, what would be considered "unusual", "excessive" or "overuse". I find that these terms are too vague to create an enforceable contract. It is left open for a party to argue that certain usage should be considered excessive or what constitutes unusual energy usage. The clause, as drafted, appears to give full authority to the landlord to determine what is deemed excessive and to bill the tenants at their pleasure. I find that this clause in the addendum to the tenancy agreement is so vague as to be meaningless and unenforceable.

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 landlord's monetary claim.

As the tenants' application was successful the tenants are entitled to recover the filing fee for their application from the landlord.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $1,500.00 under the following terms:

Item	Amount
Double Security Deposit ($700.00 x 2)	$1,400.00
Filing Fees	$100.00
Total	**$1,500.00**

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 18, 2018

Residential Tenancy Branch