Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **Landlord** – MNDL-S, FFL
Tenant – MNSD, MNDCT, FFT

Introduction

This hearing dealt with an application by both parties pursuant to the *Residential Tenancy Act* ("*Act*").

The landlord sought:

- a monetary order for damage to the rental unit pursuant to section 67;
- authorization to retain all or a portion of the tenant's 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 tenant pursuant to section 72.

The tenant sought:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Landlord M.K. (the landlord) and the tenant attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant's assistant also attended the hearing, although the tenant was the primary speaker.

While I have turned my mind to all the documentary evidence, including the testimony of the parties, only the relevant details of the respective submissions and/or arguments are reproduced here.

The tenant acknowledged receipt of the Landlords' Application for Dispute Resolution (Landlords' Application) and an evidentiary package which were served to them by way

of e-mail, as per an order for substituted service from the Residential Tenancy Branch (RTB) dated August 02, 2018. In accordance with section 71 of the *Act*, I find that the tenant is duly served with the Landlord's Application and an evidentiary package.

Preliminary Matter- Service of Tenant's Application and Evidence

The tenant testified that they sent the Tenant's Application for Dispute Resolution (Tenant's Application) and an evidentiary package to the landlord by way of e-mail on February 07, 2018, and another evidentiary package to the landlord by way of e-mail on August 27, 2018.

The landlord stated that they were not aware of the Tenant's Application for Dispute Resolution (Tenant's Application) until receiving an e-mail from the Residential Tenancy Branch notifying them of the deadline for submitting evidence as a respondent on August 24, 2018. The landlord stated that they were unaware that the tenant was applying for compensation related to a rent increase. The landlord indicated that they were unable to access any of the tenant's evidence which was served to them by e-mail and referred to evidence provided which shows their attempts to open the files sent by e-mail from the tenant.

Section 89 of the Act does not permit service of the Tenant's Application by e-mail; however, I find that there is a letter provided in evidence by the landlord dated January 16, 2018, in which the tenant clearly states their intentions to make an application for dispute resolution in order to pursue their security deposit as well as to seek compensation for the rent increase and that the landlord knew the tenant's claims against him.

I further find that one of the documents that the landlord is shown as trying to access on February 08, 2018, is titled Dispute Notice with instructions on the landlord's monitor which advises to contact the person who created the file to fix the problem. As the landlord had just recently made their own Landlords' Application and in consideration of the tenant's letter provided in January 2018, I find that it is unreasonable that the landlord did not know that there was a dispute against him. I further find that the landlord did not demonstrate that they mitigated the circumstances by providing evidence of advising the tenant that they were not able to access the file as instructed.

For the above reasons I find that the landlord is duly served with the Tenant's Application in accordance with section 71 of the Act and I will consider it as I find the

landlord is not prejudiced by its consideration as they were previously notified of the tenant's claims against them.

I accept the landlord's testimony and evidence which shows they were not able to fully access any of the evidence sent by e-mail to the tenant. As section 88 of the Act does not recognize service of evidence by e-mail and as the landlord provided testimony and evidence they were not able to access it, I find that I will not consider the tenant's evidence.

Issue(s) to be Decided

Are the landlords entitled to a monetary award for damage to the rental unit?

Are the landlords entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order?

Are the landlords entitled to recover the filing fee for the Landlord's Application from the tenant?

Is the tenant entitled to a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Is the tenant entitled to obtain a return of all or a portion of their security deposit?

Is the tenant entitled to authorization to recover the filing fee for the Tenants' Application from the landlord?

Background and Evidence

Written evidence was provided that this tenancy began on August 01, 2015, with a monthly rent of $2,000.00, due on the first day of each month. The landlord testified that they continue to retain a security deposit in the amount of $1,000.00. The landlord and the tenant agreed that the rent was increased to $2,200.00 effective as of August 2017 until the end of the tenancy in January 2018.

The landlord and the tenant agreed that the tenant moved out of the rental unit on January 12, 2018.

The landlord provided in written evidence:

- Various pictures showing the landlord trying to access the tenant's e-mailed evidence from February 08, 2018 and August 27, 2018;
- A copy of a move-in and move-out Condition Inspection Report signed by both parties at the beginning of the tenancy but only signed by the landlord for the move-out inspection completed on March 07, 2018;
- A copy of a Monetary Order Worksheet detailing the landlords' monetary claim which consists of $472.50 for the repair of a wall, $844.28 for a damaged garburator, $399.00 for cracked paint, $200.00 for mould around tub, $635.47 for cleaning of blinds, $272.85 for professional cleaning and $25.00 for a missing parking pass;
- Copies of invoices for the garburator replacement and the cleaning of the blinds as well as estimates for the painting, cleaning and tub mould remediation;
- Copies of e-mails exchanged between the landlord and the tenant discussing the tenant paying a property manager for one year of services to complete the condition inspection at move-out and to find new occupants for the unit;
- Copies of e-mails exchanged between the landlord and a property manager discussing the management of the rental unit, including one on December 15, 2017, in which the landlord requests the property manager to complete the condition inspection on the landlords' behalf with the tenant on January 12, 2018; and
- Various pictures of the renal unit.

The landlord testified that the rental unit was damaged and dirty at the end of the tenancy. The landlord confirmed that they did not have an agent attend the rental unit to complete the move-out condition inspection with the tenant. The landlord stated that they had an agreement with the tenant who was supposed to hire and pay a property management company to complete the condition inspection with the tenant on the landlord's behalf.

The tenant stated that they did not agree to anything regarding hiring a property manager for the landlord and that they had notified the landlord that they were moving to a different country on January 12, 2018. The tenant testified that they had the rental unit professionally cleaned before they left.

The tenant submitted that they were forced to accept a rent increase which was above the rent increase permitted under the *Act* and that they were requesting to be compensated for paying an additional $200.00 in rent from August 2017 to January 2018 for a total of $1,200.00.

Analysis

Pursuant to section 67 of the Act, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. In this case, to prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenant in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Having reviewed all documentary evidence and affirmed testimony, I find that the landlord has not demonstrated that they suffered a monetary loss for the painting, cleaning and tub mould remediation as the evidence provided are for estimates of work to be done and not proof of the actual amounts required to compensate the landlords for any claimed loss or to repair any damage. I further find that the landlord has not provided any evidence of their monetary loss for the parking pass. For the above reasons, I find that the landlords have not established that they have incurred any actual monetary loss for these items.

In regards to the garburator and the blinds as well as the above items that the landlord is claiming a loss for damage to the rental unit, I find that the landlord did not attend or have an agent attend the rental unit to complete a condition inspection report with the tenant at the end of the tenancy which would confirm the items the landlord is claiming and which would establish a loss exists. I find that, without the Condition Inspection Report completed at move-out, the landlord is not able to establish that the damaged garburator is due to the actions or neglect of the tenant or that the blinds were actually dirty and required professional cleaning. I accept the tenant's testimony that he had the rental unit professionally cleaned as there is no condition inspection completed at the end of the tenancy which would demonstrate otherwise.

For the above reasons, I find that the landlord has not provided sufficient evidence that they incurred a loss for damage to the rental unit due to the actions or neglect of the tenant. Therefore, I dismiss the Landlords' Application for a monetary award for damage to the rental unit, without leave to reapply.

Section 5 of the Act states that landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act is of no effect.

Section 35 of the *Act* states that the landlord must offer the tenant at least two opportunities to inspect the condition of the rental unit with the tenant and complete a condition inspection report in accordance with the Residential Tenancy Regulations (the *Regulations*) before a new occupant occupies the rental unit on or after the day the tenant ceases to occupy the rental unit or on another mutually agreed day.

Section 17 of the *Regulations* provides that a landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times, and that if the tenant is not available at the first times offered, the tenant may propose an alternative time to the landlord. The Regulations goes on to state that the landlords must consider the tenants' proposed time before proposing a second opportunity to the tenants, different from the first opportunities described above, by providing the tenant with a notice in the approved form.

Section 36 (2) of the *Act* establishes that, unless the tenant has abandoned the rental unit, the right of a landlord to claim against a security deposit for damage to the rental unit is extinguished if, having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

Section 7 of the Act states that a landlord who claims compensation for damage must do whatever is reasonable to minimize the loss. I find that it was unreasonable for the landlord to hold the tenant responsible for hiring and paying a management company for a year, on behalf of the landlord, to complete the inspection report and find new occupants. In accordance with the Act, as well as the Regulations, I find that it was the responsibility of the landlords to have an agent attend the rental unit and to complete the Condition Inspection Report with the tenant at the end of the tenancy.

I find that the landlord did not provide any evidence that they attempted to schedule or that they attempted to complete a Condition Inspection Report with the tenant, which is not in compliance with sections 35 (2) and 36 (2) the *Act*. I find that the landlord's right to retain all or a portion of the security deposit was extinguished when they failed to complete a Condition Inspection Report with the tenant at the end of the tenancy.

For the above reason, the Landlords' Application to retain all or a portion of the security deposit is dismissed, without leave to reapply. As the landlords have not been successful in their application to keep the security deposit, I dismiss the landlords' request to recover the filing fee, without leave to reapply.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

RTB Policy Guideline # 17 C 3. states that unless a tenant has specifically waived the doubling of the deposit, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the *Act*.

As I have dismissed the Landlords' Application to retain the security deposit due to the extinguishment of their right to keep it under the *Act* due to the incomplete condition inspection report, I find that the tenant is entitled to a monetary award of $2,000.00 for double the return of their security deposit.

In regards to the tenant's request for compensation due to being forced to accept a rent increase in the amount of $200.00 paid over six months, using the same test for a monetary loss as the landlords' test above, I find that the tenant has not demonstrated that they incurred a loss due to the actions of the landlords in violation of the Act, regulations or tenancy agreement.

I find that section 14 of the Act allows for the terms of the tenancy agreement to be amended by mutual agreement. I find that the tenant agreed to the rent increase and that that there is no evidence of duress. I find that the potential of being forced to move out of the rental unit at the end of a fixed term tenancy is not considered duress.

For the above reasons, the Tenant's Application for compensation for loss under the Act, Regulations or tenancy agreement is dismissed, without leave to reapply.

As the tenant has been successful in obtaining the return of their security deposit, I allow them to recover their filing fee from the landlord in the amount of $100.00.

Conclusion

Pursuant to section 67 of the *Act*, I grant a Monetary Order in the tenant's favour under the following terms, which doubles the return of the security deposit and allows the tenant to recover the filing fee:

Item	**Amount**
Return of the Security Deposit with doubling provision ($1,000.00 X2)	$2,000.00
Filing Fee for the Tenant's Application	100.00
Total Monetary Order	**$2,100.00**

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: September 20, 2018

Residential Tenancy Branch