Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFT
MNDCL-S, MNDL-S, MNRL-S, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the "Application") filed by the Tenant under the *Residential Tenancy Act* (the "*Act*"), seeking:

- The return of double their security deposit; and
- Recovery of the filing fee.

This hearing also dealt with a Cross-Application for Dispute Resolution that was filed by the Landlord under the *Residential Tenancy Act* (the "*Act*"), seeking:

- Compensation for damage to the rental unit;
- Compensation for loss of rent;
- Compensation for other money owed;
- Retention of the Tenant's security deposit; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant and the agent for the Landlord (the "Agent"), both of who provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. Neither party raised any concerns regarding the service or receipt of the Applications or the Notice of Hearing.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"); however, I refer only to the relevant facts and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email address provided in the hearing.

Preliminary Matters

Although the Agent acknowledged that the Landlord received the Tenant's documentary evidence on September 28, 2018, which was sent by registered mail on September 27, 2018, the Tenant denied receipt of any documentary evidence from the Landlord other than a copy of the Application and Notice of Hearing. When asked how the documentary evidence before me from the Landlord was served on the Tenant, the Agent testified that the Landlord's documentary evidence was only uploaded into the online Application system and never served on the Tenant.

Rule 3.14 of the Rules of Procedure states that documentary and digital evidence intended to be relied on by the Applicant at the hearing must be received by the Respondent and the Residential Tenancy Branch (the "Branch") directly or through a Service BC Office not less than 14 days before the hearing. Rule 3.15 states that the Respondent must ensure evidence that they intend to rely on at the hearing is served on the Applicant and submitted to the Branch not less than seven days before the hearing. As the Landlord is both an Applicant and a Respondent, I therefore find that the evidence in support of their own claim was required to be served on the Tenant at least 14 days before the hearing and that any evidence in response to the Tenant's claim or documentary evidence, was to be served on the Tenant at least seven days before the hearing.

Further to this, rules 3.5 and 3.16 of the Rules of Procedure states that at the hearing, the parties must be prepared to demonstrate to the satisfaction of the arbitrator that each Applicant or Respondent was served with all their evidence as required by the *Act* and the Rules of Procedure. As the Agent testified that none of the Landlord's documentary evidence was served on the Tenant, I find that the Landlord has failed to comply with the *Act* and the Rules of Procedure with regards to the service of evidence.

As the ability to know the case against you and to provide evidence in your defense are fundamental to the dispute resolution process, I find that it would be administratively unfair and a breach of both the Rules of Procedure and the principles of natural justice to accept the Landlord's documentary evidence for consideration in this matter as it was not served on the Tenant. Further to this, the Agent made no arguments that this evidence is new and relevant and therefore should be accepted pursuant to rule 3.17 of the Rules of Procedure. As a result, I have excluded all of the Landlord's documentary evidence from consideration in this matter. The hearing therefore proceeded based only

on the Tenant's documentary evidence and the testimony presented by the parties in the hearing.

Issue(s) to be Decided

Is the Tenant entitled to the return of double their security deposit?

Is the Landlord entitled to compensation for damage to the rental unit, loss of rent, or other money owed?

Is the Landlord entitled to retain the Tenant's security deposit?

Is either party entitled to recovery of the filing fee?

Background and Evidence

The Tenant sought the return of double their security deposit as they believe the Landlord did not comply with section 38 (1) of the *Act*. Although the Landlord's Application itself contained few details regarding the $6,300.00 claim other than to specify that $300.00 was for cleaning, and was not accompanied by a Monetary Order Worksheet breaking down the claim in detail; in the hearing the Agent testified that the Landlord is seeking $4,500.00 for loss of rent, $300.00 for cleaning costs, and $1,500.00 for the cost of replacing or repairing the kitchen tap and counter, plus recovery of the $100.00 filing fee.

The parties agreed that the one year fixed term tenancy began on November 15, 2016, and that rent in the amount of $2,450.00 was due on the 15th day of each month. The parties also agreed that a $1,225.00 security deposit was paid, which the Landlord still holds.

The Tenant testified that on January 28, 2018, they served the Landlord with written notice to end the now periodic tenancy effective February 28, 2018, along with a cheque for the next month's rent. In support of this testimony the Tenant provided a copy of their written notice to end tenancy, the rent cheque and copies of several text messages. The Agent did not dispute the Tenant's testimony or documentary evidence as summarized above.

Both parties agreed in the hearing that the Tenant ultimately vacated the rental unit on or before 5:00 P.M. on March 15, 2018, when the parties met in order for the Tenant to

return the keys and garage remotes for the rental unit. While the Agent testified that one garage remote was not returned until March 16, 2018, the Tenant testified that all keys and garage remotes were returned on March 15, 2018, and provided a signed receipt dated March 15, 2018, showing their return. Both parties also agreed that no walk-through or condition inspection report was completed on March 15, 2018.

Despite the foregoing, the Tenant testified that she was notified by the Landlord on March 18, 2018, that the rental unit was not clean enough, and that despite their belief that it had been thoroughly cleaned, they returned to the rental unit to complete additional cleaning for the Landlord. The Tenant stated that a walk-through was then scheduled for March 28, 2018, at which time they were presented with a typed document from the Landlord regarding complaints about the cleanliness of the rental unit and allegations that they had damaged the kitchen tap and counter. The Tenant testified that they did not damage the kitchen tap or counter during the tenancy, that the document authored by the Landlord dated March 28, 2018, did not meet the requirements for a condition inspection report and that they neither signed the document nor agreed with it as the walk-though occurred almost two weeks after their tenancy ended and after the Landlord had already allowed contractors into the rental unit to complete work unrelated to their tenancy. As a result, the Tenant argued that the damage to the rental unit and any lack of cleanliness was actually caused by the Landlord or the contractors they allowed access to the rental unit after the tenancy ended but before the walk-through was completed.

The Agent acknowledged that the walk-through was completed some time after the end of the tenancy and that contractors had been granted access to the rental unit during that time in order to complete work unrelated to the Tenant's actions or inactions during the tenancy. However, they disputed that the rental unit was either clean or undamaged at the end of the tenancy. The Agent testified that the kitchen counters were approximately five or six years old at the start of the tenancy and both parties agreed that they were in good condition at that time. Although the Tenant denied causing any damage to the kitchen counters or taps, the Agent testified that the tap was broken and that there were two chips in the counter approximately ¼ of an inch each, at the end of the tenancy. While the Agent agreed that contractors were in the rental unit, he argued that they could not have caused this damage as they were not there to do any work in the kitchen. The Agent testified that the counters, which are natural stone, cannot be repaired and would cost approximately $1,700.00 to replace. The Agent also stated that the broken tap was replaced at a cost of $150.00. The Agent stated that as the counter was not new at the start of the tenancy but was in good and undamaged condition, the

Landlord is only seeking $1,500.00 for the replacement of both the kitchen tap and the counter.

Despite the Tenant's testimony that the unit was cleaned several times at the end of the tenancy, the Agent testified that it was still unclean and the Landlord was required to hire a cleaner at a cost of $300.00. When asked for details about this cleaning, the Agent testified that it did not occur for approximately 1.5 months as the Landlord's preferred cleaner was ill. When asked if the Landlord made attempts to find another cleaner who was available earlier, the Agent at first said no, and then changed their testimony stating that the Landlord did find another available cleaner but was unwilling to pay their $450.00 cleaning fee which was $150.00 higher than their preferred cleaner's rate. Again, the Tenant denied that the rental unit was not reasonably clean at the end of the tenancy and stated that the Landlord's standards are simply higher than the standard required by the *Act*.

The Agent also testified that the Landlord suffered a $4,500.00 loss in rent as the rental unit was not able to be re-rented until June 15, 2018. When asked for details about this delay in re-rental and the efforts made by the Landlord to mitigate this loss, the Agent testified that the primary reason for the delay in re-rental was the unavailability of the Landlord's preferred cleaner until sometime in early June and the need for contractors to do work in the rental unit unrelated to the actions or inactions of the Tenant during their tenancy. Although the Agent stated that an advertisement was placed for re-rental, he stated that this was not done until either the end of May or the start of June. The Tenant stated that they should not be responsible for any loss of rent as they gave the Landlord proper notice under the *Act* to end their Tenancy and left the rental unit relatively clean and undamaged at the end of the tenancy.

Analysis

Although the parties disagreed about the date upon which all keys and garage door remotes were returned, the parties were in agreement that the Tenant moved out their belongings and returned the majority of the keys and access devices for the rental unit on March 15, 2018. Further to this, the Tenant provided a signed receipt stating that all keys and garage door openers had been returned as of March 15, 2018. As a result, I find on a balance of probabilities that the tenancy ended on March 15, 2018. The Tenant also testified that their forwarding address was sent to the Landlord, by mail, on April 5, 2018, and provided a copy of the letter sent to the Landlord containing their forwarding address. As the Agent did not dispute receipt, I find that the Tenant's

forwarding address was therefore deemed received by the Landlord on April 10, 2018, five days after it was mailed pursuant to section 90 of the *Act.*

Rule 6.6 of the Rules of procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities and that the onus to prove their case is on the person making the claim. As a result, I find that it is incumbent upon the parties to satisfy me, that it is more likely than not, that they are entitled to the amounts claim by them in their Applications.

First I will address the Tenant's Application seeking double the amount of their security deposit. Section 38 (1) of the *Act* states that except as provided in subsection (3) or (4) (a), of the *Act*, within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

However, section 36 of the *Act* states that unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not comply with section 35 (2) of the *Act* and offer the tenant at least 2 opportunities, as prescribed, for the move-out inspection, having complied with section 35 (2), does not participate on either occasion, or 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.

Based on the documentary evidence and testimony before me for consideration from both parties, it is clear that the Tenant did not abandon the rental unit. Further to this, there is no evidence before me that the Landlord had authority to withhold any portion of the Tenant's security deposit at the end of the tenancy pursuant to section 38 (3) or 38 (4) (a) of the *Act*.

In addition to this, there is no testimony or documentary evidence before me from either party indicating that a move out condition inspection report was either completed by the Landlord which complies with section 20 of the regulation, or that a copy of any such report was provided to the Tenant in compliance with the *Act* or section 18 of the regulation. Although the Tenant provided a typed document dated March 28, 2018, addressed to them from the Landlord and stating their concerns about the cleanliness and general condition of the rental unit, this document does not contain the information

required for a condition inspection report under section 20 of the regulation including but not limited to the correct legal names of the landlord and the tenant, the address of the rental unit being inspected, the date on which the tenant is entitled to possession of the rental unit, the address for service of the landlord, the date of the condition inspection, a statement of the state of repair and general condition of each room in the rental unit as well as any floor or window coverings, appliances, furniture, fixtures, electrical outlets and electronic connections provided for the exclusive use of the tenant as part of the tenancy agreement, appropriate space for the tenant to indicate agreement or disagreement with the landlord's assessment of any item of the condition of the rental unit and contents, and any additional comments, a space for the signature of both the landlord and tenant, and the following statement:

“I, ...

Tenant's name

[ ] agree that this report fairly represents the condition of the rental unit.

[ ] do not agree that this report fairly represents the condition of the rental unit, for the following reasons:……..;”

As a result, I therefore find that the Landlord extinguished their right to file a claim against the Tenant’s security deposit for damage to the rental unit pursuant to section 36 of the *Act*. Based on the above, I therefore find that the Landlord was either obligated to return the Tenant’s security deposit to them, in full, or to file a claim against it for compensation unrelated to damage to the rental unit no later than April 25, 2018, which is 15 days after the Landlord is deemed to have received the Tenant’s forwarding address in writing. The parties agreed in the hearing that the Landlord still holds the Tenant’s $1,225.00 security deposit and Branch records indicate that the Landlord did not file their claim seeking retention of the Tenant’s security deposit until June 13, 2018. As a result, I find that the Landlord failed to comply with section 38(1) of the *Act*.

Section 38 (6) of the *Act* states that if f a landlord does not comply with subsection (1), the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. Based on the above, I therefore find that the Tenant is entitled to the return of double their security deposit. As the security deposit was paid in 2016, no interest is payable on the security deposit and the Tenant is therefore entitled to $2,450.00. As the Tenant was successful in their Application, I also grant them recovery of the $100.00 filing fee pursuant to section 72 of the *Act*.

Having made the above findings, I will now turn my mind to the Landlord’s claim for $6,300.00 in damage, cleaning costs, and loss of rent. Section 37 of the *Act* states 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. Section 7 of the *Ac*t states that if a landlord or tenant does not comply with the *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. It also states that landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with the *Act*, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline #16 states that the purpose of compensation under the *Act* is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred and sets out a four-part test as follows for determining whether compensation is due:

- Did a party to the tenancy agreement fail to comply with the *Act*, regulation or tenancy agreement?
- Did loss or damage result from this non-compliance?
- Did the party who suffered the damage or loss prove the amount of or value of the damage or loss? and
- Did the party who suffered the damage or loss act reasonably to minimize that damage or loss?

Although the Landlord alleged that the rental unit was dirty at the end of the tenancy and that the kitchen countertop and faucet were damaged by the Tenant, the Tenant denied these allegations. As stated above, I have already found that no condition inspection report was completed by the parties at the end of the tenancy in compliance with the *Act* or the regulation. Section 35 of the *Act* requires the landlord and tenant to inspect the rental unit together at the end of the tenancy and to complete and sign a condition inspection report which complies with section 20 of the regulation. Although section 35 of the *Act* allows the parties to inspect the rental unit on or after the day the tenancy ends and up to the point at which a new tenant begins to occupy the rental unit, the purpose of the move-out condition inspection and the move-out condition inspection report is to allow the parties, together, at the time the tenancy ends, to inspect the rental unit for damage caused by the Tenant or deficiencies in cleanliness on the part of the tenant. While I do not find the lack of a move-out condition inspection report, in and of itself, determinative in relation to whether the rental unit was reasonably clean and undamaged at the end of the tenancy, the lack of such a report leaves the Landlord in a difficult position in terms of meeting the burden of proof placed upon them by the *Act* to establish that the rental unit was *not* reasonably clean and undamaged at the end of the tenancy.

Although the Agent testified that the rental unit was damaged and unclean at the end of the tenancy, the Tenant denied these allegations and no documentary or other corroborative evidence was accepted by me for consideration in the hearing in support of this testimony from either the Landlord or the Agent. In addition to this, I note that the document submitted by the Tenant dated March 28, 2018, stating the Landlord's concerns regarding the cleanliness of the rental unit and damage to the kitchen counter was authored 13 days after the tenancy ended and after the Landlord allowed contractors into the rental unit to complete various work on the rental unit. As a result, I find that I cannot be satisfied, on a balance of probabilities, that any damage or lack of cleanliness alleged by the Landlord or the Agent to have been caused by the Tenant was not in fact caused by the Landlord, the contractors, or other persons permitted access to the rental unit after the Tenant vacated the rental unit.

Based on the above, the Landlord has failed to satisfy me, on a balance of probabilities, that the rental unit was not left reasonably clean and undamaged, except for reasonable wear and tear, at the end of the tenancy and I therefore dismiss the Landlord's $1,500.00 claim for repair or replacement of the kitchen faucet and counter as well as the $300.00 in cleaning costs without leave to reapply.

The Landlord also sought $4,500.00 in lost rent based on their alleged inability to re-rent the rental unit due to the damage and lack of cleaning by the Tenant. Although I have already found above that I am not satisfied that the Tenant damaged the rental unit or left it in an unacceptable state of cleanliness, I find it important to note here that the Agent testified that the Landlord did not have the rental unit cleaned for at least 1.5 months after the end of the tenancy due to the lack of availability of their "preferred" cleaner and that the Agent acknowledged in the hearing that much of the work being done in the rental unit after the Tenant vacated was unrelated to their tenancy. As a result, I find that even if I had been satisfied by the Agent that the Tenant did not leave the rental unit reasonably clean and undamaged, which I am not, I find that the need for the Landlord's claim for $4,500.00 in lost rent has occurred primarily due to the Landlord's failure to mitigate their loss by hiring a different cleaner at a significantly earlier date and their choice to delay occupancy by a new tenant in order to complete work in the rental unit unrelated to the actions, or lack thereof, by the Tenant during their tenancy. As a result, I therefore dismiss the Landlord's $4,500.00 claim for loss of rent without leave to reapply. As the Landlord has been unsuccessful in all of their claims, I decline to grant them recovery of the $100.00 filing fee.

Based on the above, and pursuant to section 67 of the *Act*, the Tenant is therefore entitled to a Monetary Order in the amount of $2,550.00; $2450.00 for return of double the amount of their security deposit, plus $100.00 for recovery of the filing fee.

Conclusion

Pursuant to section 67 of the *Act*, I grant the Tenant a Monetary Order in the amount of $2,550.00. 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 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 7, 2018

Residential Tenancy Branch