Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, FFT

Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for losses arising out of this tenancy and for damage to the 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 their filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Landlord BK (the landlord), who confirmed that they were representing their interests and the interests of their spouse, the co-landlord for this application. Although the landlord gave sworn testimony that they sent the tenant a copy of their dispute resolution hearing package by registered mail to the tenant, the landlord had no details as to when this package was sent or any Canada Post Tracking Number to confirm this registered mailing. The tenant said that they attended the hearing on the basis of information sent to the tenant by email, which included some of the landlords' written evidence on or about January 3, 2019. The tenant said that they received nothing by registered mail from the landlords, nor did they receive anything from Canada Post indicating the availability of a registered mail package for them. While the landlord did not demonstrate service of the dispute resolution hearing package in accordance with section 89(1) of the *Act*, the tenant nevertheless was aware of the $1,999.99 amount claimed in the landlords' application plus the landlords request for the recovery of their

$100.00 filing fee, and had submitted written evidence to question the validity of the landlords' claim. Under these circumstances and in accordance with paragraph 71(2)(c) of the *Act*, I accept that the landlords' dispute resolution hearing and written evidence packages have been sufficiently served to the tenant for the purposes of the *Act*.

The tenant gave sworn testimony supported by written evidence that they served copies of their written evidence to the landlords by registered mail on November 30, 2018. The tenant provided copies of the Canada Post Tracking Number and the Canada Post Online Tracking System, which confirmed that the tenant's written evidence package was returned to the tenant unclaimed on January 2, 2019. Although the landlord said that they had not received the tenant's written evidence, they confirmed that the address where the tenant sent the evidence was correct. In accordance with sections 88 and 90 of the *Act*, I find that the landlord was deemed served with the tenant's written evidence on December 5, 2018, the fifth day after the registered mailing by the tenant.

Near the beginning of this hearing, the landlord testified that the mattress for the futon that comprised $699.00 of the landlords' monetary claim had been located and that the landlords were removing this portion of the claim from their claim for $1,999.99.

Issues(s) to be Decided

Are the landlords entitled to a monetary award for losses and damage arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary award requested? Is the tenant entitled to a monetary award equivalent to double the value of the security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*? Are the landlords entitled to recover the filing fee for this application from the tenant?

Background and Evidence

On September 30, 2017, the parties signed a fixed term tenancy Residential Tenancy Agreement (the Agreement), a copy of which was entered into written evidence by the tenant. According to the terms of the Agreement, the tenancy was to run from October 1, 2017 until August 31, 2018. The tenant moved out of the rental unit on August 31, 2018, the scheduled end date for this tenancy. Monthly rent was set at $1,250.00, payable in advance on the first of each month. The landlords continue to hold the tenant's $625.00 security deposit paid when this tenancy began.

At the hearing, I noted that the provision requiring the tenant to pay their last two month's rent at the time the Agreement was signed was an unconscionable term of the Agreement that the landlords included in this Agreement without legal effect.

The tenant gave sworn testimony and written evidence that the landlords did not conduct a joint move-in inspection of the premises, did not issue any type of joint move-in condition inspection report, and did not request nor conduct any joint move-out condition inspection of the premises at the end of this tenancy. The tenant entered into written evidence copies of emails sent to the landlord requesting a joint move-out condition inspection. The landlord first said that they did not know if inspections were conducted. Later, the landlord said that a joint move-in condition inspection was conducted. The landlord was uncertain as to whether any report was produced by the landlords at the beginning or end of this tenancy. The landlord said that they would need time to check with their spouse regarding these matters. I advised that since the landlords applied to retain the tenant's security deposit, this information needed to be available at the time of this hearing in order to consider this part of the landlords' application.

The tenant gave undisputed sworn testimony that they sent the landlords a copy of their forwarding address in writing four days before this tenancy ended, on August 27, 2018. The landlord confirmed that they received the tenant's forwarding address, the address the landlords used to serve the tenant with the landlords' dispute resolution hearing package.

The landlords applied for dispute resolution on September 14, 2018, with a request for the issuance of a monetary award and for permission to keep the tenant's security deposit.

The landlords entered into written evidence a Monetary Order Worksheet, which appeared to request a monetary award totalling $1,250.00. As the landlords produced no other outline of the amount they were seeking from the tenant, the following amounts were those sought by and referenced by the landlord at this hearing:

Item	**Amount**
Parking Not Included in Rental Agreement $50.00 per month for 8 months = $400.00	$400.00

Internet Not Included in Rental Agreement $50.00 per month for 11 months = $550.00	550.00
Professional Steam Cleaning of Carpets	100.00
Tenant Moved in 1 Day Early ($100.00) and 7 Days Earlier Tenant Brought their Mattress to the Rental Unit ($100.00)	200.00
Total of Above Items	**$1,250.00**

At the hearing, the landlord confirmed that neither parking nor internet were included in the Agreement, points noted in the landlord's own Monetary Order Worksheet.

The landlord maintained that the tenant did not obtain professional steam cleaning of the carpets at the end of this tenancy. The tenant testified that they rented a professional steam cleaner from a local grocery store and steam cleaned the carpets themselves at the end of this tenancy. They provided photographs of the condition of the carpets at the end of this tenancy as well as the receipt for their rental of the steam cleaner.

The landlord testified that their spouse originally allowed the tenant to move into the rental unit a day early without any mention of a charge for doing so at the time. Similarly, the landlord testified that their spouse let the tenant bring their mattress to the rental unit a week before the tenancy was to begin. The landlord was unable to identify any provision in the Agreement or in any other form of written agreement with the tenant whereby the tenant was obligated to pay anything extra to the landlords for the landlords' permission to start the tenancy a day early or to store their mattress in the suite before the tenancy began. The landlord said that they added this charge after the tenancy ended because they did not like how the tenant had interacted with them during this tenancy.

The landlord also said that they were planning to take legal action against the tenant for disputes that arose over access to the landlords' internet security. I noted that such issues extend beyond the scope of the *Act*.

Analysis - Landlords' Claim for a Monetary Award

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. 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 of the *Act* 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. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

At the hearing, I noted that if there was no provision in the Agreement for the payment of a monthly parking fee by the tenant to the landlords that there was no basis for me to make a finding that a monetary award should be issued in accordance with the *Act*. I dismiss this element of the landlords' application without leave to reapply. As this was not part of the Agreement between the parties, any action that the landlord may have in this regard would lie outside the jurisdiction of the *Act*.

For similar reasons, there is no basis for me to issue a monetary award for the tenant's use of the landlord's internet, as this once again formed no part of their Agreement. In fact, one of the Other Terms of the Agreement between the parties was that Telephone and Cable were not provided as part of this Agreement. There is no mention whatsoever in this Agreement covering the tenant's use of the landlord's internet. I dismiss this part of the landlords' claim without leave to reapply.

Term 5 of the Other Terms of the Agreement required the tenant to undertake professional steam cleaning of the carpets at the end of this tenancy. The tenant was to supply a receipt to demonstrate this professional steam cleaning. In the absence of the tenant producing such a receipt, this Term required a payment of $100.00 by the tenant to the landlords. Since there is undisputed evidence that the tenant did not obtain professional steam cleaning of the carpets at the end of this tenancy and I do not consider the tenant's rental of a steam cleaner and performance of this work themselves satisfied this portion of the Agreement, I allow the landlords' claim for $100.00 as a payment for professional steam cleaning of the premises.

The landlord was unable to point to any provision in the Agreement or the legislation that would allow the landlords to obtain the $100.00 payment requested for the tenant moving into this rental unit with Landlord SK's permission one day early. The landlord could not provide any legal justification for charging the tenant $100.00 extra for storing their mattress in the rental unit seven days before this tenancy began, again with

Landlord SK's permission. I dismiss both of these portions of the landlords' claim without leave to reapply as there was no basis for these claims made after this tenancy ended and after Landlord SK gave permission to allow these actions without any mention of payment to be made in exchange for granting permission to the tenant.

Since only a very small portion of the landlords' claim for a monetary award has been allowed, I make no order requiring the landlords' claim for recovery of their filing fee from the tenant.

Analysis - Security Deposit

Sections 23 and 24 of the *Act* establish the rules whereby joint move-in condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy.
Section 23 of the *Act* reads in part as follows:

> **23** *(1) The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.*
>
> *(3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.*
>
> *(4) The landlord must complete a condition inspection report in accordance with the regulations.*
>
> *(5) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.*
>
> *(6) The landlord must make the inspection and complete and sign the report without the tenant if*
>
> > *(a) the landlord has complied with subsection (3), and*
> >
> > *(b) the tenant does not participate on either occasion...*

Section 24(2) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

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*

(a) does not comply with section 23 (3) [2 opportunities for inspection]*,*

(b) having complied with section 23 (3), does not participate on either occasion, or

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

Sections 36 and 37 of the *Act* establish similar provisions regarding a joint move-out condition inspection and the report to be produced by the landlord(s) regarding that inspection.

In this case, I find that the landlord has provided insufficient evidence to dispute the tenant's very clear and consistent sworn testimony and written evidence that the landlords did not conduct a joint move-in or joint move-out condition inspection, nor did the landlords produce any reports of any inspections the landlords claim may have occurred. On this basis, I find that the landlords' right to apply to retain the tenant's security deposit was extinguished at the beginning of this tenancy and certainly by the time the landlords applied to retain the tenant's security deposit on September 14, 2018.

Section 38 of the *Act* requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing as long as the landlord's right to apply to retain the deposit had not been extinguished. If that does not occur or if the landlord applies to retain the deposits within the 15 day time period but the landlord's right to apply to retain the tenant's deposit had already been extinguished, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* that is double the value of the deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the deposits to offset damages or losses arising out of the tenancy.

In this case, while the landlords filed the application to retain the security deposit within 15 days of the end of this tenancy on August 31, 2018 and after receiving the tenant's

forwarding address, the landlords' right to even apply to retain the deposit was extinguished at the beginning of this tenancy pursuant to section 24(2) of the *Act*.

As there is no evidence that the tenant has given the landlords written authorization at the end of this tenancy to retain any portion of the security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit. There is also no evidence that the tenant ever waived their right to obtain monies owed to the tenant arising out of their payment of the security deposit to the landlords.

The following provisions of Policy Guideline 17 of the Residential Tenancy Branch's Policy Guidelines would seem to be of relevance to the consideration of this application:

Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:

- *If the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;*
- *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;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the value of their security deposit with interest calculated on the original amount only. No interest is payable.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant an award of double their security deposit, less the amount of the $100.00 monetary award in the landlords' favour for professional steam cleaning of the carpets:

Item	Amount
Return of Double Security Deposit as per section 38 of the Act ($625.00 x 2 = $1,300.00)	$1,300.00
Less Professional Steam Cleaning of Carpets	-100.00
Total Monetary Order	**$1,200.00**

The tenant is provided with these Orders in the above terms and the landlord(s) must be served with this Order as soon as possible. Should the landlord(s) 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: January 17, 2019

Residential Tenancy Branch