Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

FINAL DECISION

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

Introduction

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

- a monetary order for unpaid rent or utilities, for damage to the rental unit, and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for her application, pursuant to section 72.

This hearing also dealt with the tenants' cross-application pursuant to the *Act* for:

- authorization to obtain a return of double the amount of the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for their application, pursuant to section 72.

The "first hearing" on January 17, 2019 lasted approximately 18 minutes and the "second hearing" on January 31, 2019 lasted approximately 86 minutes.

The landlord and the two tenants (male and female) attended both hearings and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. "Witness HP" testified on behalf of the landlord at the second hearing and "witness MDD" testified on behalf of the tenants at the second hearing. Both parties had equal opportunities to question both witnesses at the second hearing.

Preliminary Issue - Adjournment of First Hearing and Service of Documents

The first hearing on January 17, 2019 was adjourned because the landlord was unable to proceed with the hearing because her uncle passed away and she was organizing the funeral. The tenants had opposed the landlord's adjournment request. By way of my interim decision, dated January 17, 2019, I adjourned the landlord's application to the second hearing date of January 31, 2019. Both parties confirmed receipt of my interim decision and the notices of rescheduled hearing to the January 31, 2019 date and the second hearing occurred on this date. The landlord confirmed that she was ready to proceed with the second hearing.

At both hearings and in my interim decision, I noted that the tenants confirmed receipt of the landlord's application for dispute resolution and notice of hearing. In accordance with sections 89 and 90 of the *Act*, I found that both tenants were duly served with the landlord's application and notice of hearing.

At the first hearing and in my interim decision, I notified the landlord that I could not consider her written evidence package because it was deemed received late by the tenants, who did not actually receive the evidence. The tenants had not submitted any written evidence in response to the landlord's application, prior to the first hearing. Both parties were instructed that the landlord could not re-serve her evidence to the tenants and the tenants could not submit any new evidence prior to the second hearing. I informed both parties at both hearings and in my interim decision, that the purpose of adjourning the first hearing was to continue the hearing process, not to adduce additional documents for the second hearing.

Preliminary Issue – Joining the Tenants' Application with Landlord's Application at Second Hearing

At the outset of the second hearing, the tenants confirmed that they filed an application for dispute resolution against the landlord on December 27, 2018. The file number for that application is contained on the front page of this decision. They confirmed that they filed for double the value of their security deposit and the $100.00 application filing fee. They said that they served their application to the landlord. They stated that their hearing was scheduled for April 18, 2019 at 1:30 p.m. The landlord stated that she did not receive it and she did not know the tenants filed an application.

The tenants confirmed that they served two pages of evidence with their application, one was an undated letter from the tenants to the landlord with their notice to vacate and forwarding address, and the other was a letter, dated August 22, 2018, from the landlord to the tenants stating that she received the tenants' undated letter on August 14, 2018. The landlord stated that she had both documents in her possession.

The tenants asked that their matter be heard at the same time as the landlord's application at the second hearing. The landlord objected to this, stating that she did not receive the tenants' application or have a chance to respond. When I asked the landlord if she would suffer any prejudice as a result of both applications being heard together, she could not identify any.

Rule 2.10 of the Residential Tenancy Branch *Rules of Procedure* states the following:

> *2.10 Joining applications*
> *Applications for Dispute Resolution may be joined and heard at the same hearing so that the dispute resolution process will be fair, efficient and consistent. In considering whether to join applications, the Residential Tenancy Branch will consider the following criteria:*
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> *a) whether the applications pertain to the same residential property or residential properties which appear to be managed as one unit;*
> *b) whether all applications name the same landlord;*
> *c) whether the remedies sought in each application are similar; or*
> *d) whether it appears that the arbitrator will have to consider the same facts and make the same or similar findings of fact or law in resolving each application.*

Residential Tenancy Policy Guideline 17 states the following, in part:

> *The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:*
>
> *• a landlord's application to retain all or part of the security deposit; or*
> *• a tenant's application for the return of the deposit.*
>
> *unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.*
> *…*

> *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…*

The future scheduled hearing on April 18, 2019 is scheduled with me as the Arbitrator. The same landlord and tenants are named in both applications, deals with the same rental unit, the remedies sought in both applications relate to the same issue of the security deposit, and I will be considering the same facts and law regarding the security deposit in both applications.

The landlord filed this application asking to retain the tenants' security deposit and therefore, I am required to consider the doubling provision as part of the landlord's application, even if the tenants do not ask for double and have not filed an application, pursuant to Residential Tenancy Policy Guideline 17.

For the above reasons, I notified both parties that I would be hearing the tenants' application at the same time as the landlord's application. Hearing both applications together would be efficient and consistent, avoiding duplication of facts and procedure. I informed both parties that they were not required to attend the future hearing on April 18, 2019 and it would be cancelled by way of this decision.

The landlord stated that she did not agree with my decision and she would be filing a review of my decision for this reason.

Issues to be Decided

Is the landlord entitled to a monetary order for unpaid rent, for damage to the rental unit and for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to retain the tenants' security deposit?

Are the tenants entitled to the return of double the amount of their security deposit?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties and their witnesses at the second hearing, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on April 30, 2018 and was for a fixed term ending on November 30, 2018. The tenancy ended on August 31, 2018. A security deposit of $625.00 was paid by the tenants and the landlord continues to retain this deposit. Move-in and move-out condition inspection reports were completed for this tenancy. A forwarding address was provided by the tenants to the landlord by way of a letter on August 14, 2018. The landlord filed her application to retain the security deposit on September 17, 2018. A written tenancy agreement was signed by both parties.

The landlord said that she had written permission from the tenants to keep 50% of their security deposit if the tenants' son caused any damages to the rental unit. She claimed that the tenants wrote her a note on April 21, 2018, before the tenancy started, and provided her with a copy of it. She did not provide it with her application. The tenants denied the landlord's allegation, claiming they never provided any written permission to the landlord to keep any part of their deposit.

The landlord seeks a monetary order of $889.79 plus the $100.00 application filing fee. The landlord initially applied for a monetary order of $1,925.00 at the first hearing, but reduced her above claim at the second hearing. The tenants dispute the landlord's entire claim.

The landlord seeks $113.09 for painting, $200.00 for cleaning, $8.93 for a broom, $13.72 for towels and wipes, $8.05 for a key, $200.02 for garbage removal, $145.98 for unpaid utilities, and $200.00 to replace her children's toys. The tenants seek a return of double the amount of their security deposit of $625.00, totalling $1,250.00, plus the $100.00 application filing fee.

The landlord testified that she fully renovated the rental unit before the tenants moved in. She claimed that the move-in condition inspection report records the good condition of the unit when the tenants moved in and the tenants agreed with the condition on the report. She maintained that the tenants disagreed with the condition of the unit on the move-out condition inspection report. She claimed that there were three children and

two adults present on behalf of the tenants when the move-out condition inspection was completed. She explained that the tenants took their belongings, left their garbage in the unit, and left bike tracks inside the unit. She said that she had to remove the garbage and pay her mother and her aunt $100.00 in cash each, for a total of $200.00, for four hours of cleaning at $25.00 per hour. She maintained that she bought cleaning supplies for this. She said that she also had to repaint the living room and the tenants' son's bedroom because the tenants' son left handprints, crayon stains, food and juice stains, and lava lamp stains on the walls. She also seeks utilities for hydro and gas from May 24 to August 9, 2018, explaining that the tenants agreed to pay 2/3 of utilities as per their tenancy agreement, in addition to rent. She explained that the tenants stole her children's toys and there is no value or price that can be put on the toys.

The landlord's witness HP, is the landlord's mother. She testified that the tenants did not clean the basement and left their garbage behind, even though they removed their furniture. She said that when the tenants moved in, the rental unit had been remodeled, painted, and had new tiles. She claimed that during the move-out condition inspection, the female tenant was present with her sister and her sister's baby. Witness HP stated that she cleaned the rental unit for four hours along with her sister-in-law after the tenants vacated. She explained that she cleaned the floors, stove, refrigerator, and the scratches and marks to the doors, tiles, and walls. She maintained that there was no food left in the refrigerator but that there were dirty spots in the refrigerator and freezer. She claimed that she and her sister-in-law were each paid $100.00 to clean, for a total of $200.00. She explained that she used a shampoo machine to clean the two rugs a few days after the tenants vacated. She initially stated that she did not know that the landlord painted the rental unit after she cleaned it, but then said that the landlord told her she painted it but she did not see her paint it. The landlord indicated that witness HP was confused when she made this last statement, because English was not her first language. She said that it was unfair for her mother to have gone through questioning like that from the tenants.

The tenants dispute the landlord's claims. They stated that the rental unit was left cleaner when they moved out, than when they moved in. They said that they did not own a lava lamp, they do not drink juice, and their son did not leave any food or juice stains on the walls. They maintained that the cleaned the unit, including the floors inside, and outside with a hose. They explained that they did not leave any garbage behind, they did not steal the landlord's children's toys, and they wanted to leave the rental unit and receive their full security deposit back. They confirmed that they gave the rental unit key back to the landlord, as this was the first thing they did when they began the move-out condition inspection.

The tenants agreed that they had to pay utilities in addition to rent but indicated that they paid $548.11 in cash for three months for water, gas and hydro to the landlord on August 15, 2018 but they did not receive a receipt from the landlord. They said that from May to July 2018, the utility bills increased so they asked the landlord for copies of the bills, which she provided on August 15, along with her own worksheet admitting she made a miscalculation. They indicated that the landlord attempted to charge them with a cost that was carried over of $99.70 plus a late fee, which was not their responsibility. They also maintained that when they asked for further utility bills after the above months, the landlord did not provide them, but instead gave a levy bill, which included sewer fees, for which they were not responsible. The tenants explained that they overpaid $127.00 to the landlord for the utilities.

The tenants' witness MDD is the female tenant's sister. She said that she was present on the day of the move-out condition inspection with the landlord. She claimed that she arrived earlier than the 1:00 p.m. inspection time on August 31, 2018, in order to help the female tenant to carry out her belongings from the unit. She agreed that her baby son was present and that the male tenant was not present. She said that the rental unit was clean, there were no visible damages, and no garbage left behind by the tenants. She explained that while she did not do a full walk through of the entire basement, she did see it when she was helping to carry items such as bags and her son's car seat outside. She maintained that the rental unit looked fine and empty and she did not notice any broken windows or items that would constitute visible damage. She said that she did not get to participate in the move-out inspection because when the landlord arrived she began banging on the door, was aggressive, told her to leave and closed the door on her so she had to wait outside. She said that the landlord wanted two other women present during the inspection and when the female tenant went to put the recycling outside, the landlord told her to get off the property. She said that she only saw items in the recycling and not in the garbage when the tenants left. The landlord asked witness MDD a number of questions about the difference between garbage and recycling and the definitions of each and whether the tenants adequately separated the garbage from the recycling outside.

Analysis

Credibility

I found the two tenants and their witness MDD to be more credible and forthright witnesses than the landlord and her witness HP. The tenants and their witness provided consistent testimony in a candid manner, without changing their version of

events. They admitted to information that was not helpful to the tenants' case. For example, witness MDD agreed that she did not walk through the entire basement suite when she was present on the move-out inspection day so she did not observe the entire basement. She also agreed that she did not see the garbage, only the recycling, on the move-out inspection day.

Conversely, I found that the landlord did not provide her evidence in a calm and candid manner. She became upset by my questions to her about the tenancy and told the tenants that she was upset with how they questioned her witness HP. The landlord repeatedly asked the tenants' witness MDD the same questions, despite being given the same answers each time, and becoming upset when witness MDD would not change her answers about the recycling and the garbage.

Landlord's Application

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 on a balance of probabilities. In this case, to prove a loss, the landlord must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenants 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.

On a balance of probabilities and for the reasons stated below, I dismiss the landlord's entire application without leave to reapply.

I find that the landlord failed to provide photographs of the condition of the rental unit when the tenants moved in. She also failed to provide photographs of the damages she claimed, when the tenants moved out. The tenants disputed the damages noted by the landlord on the move-out condition inspection report and noted that there were no photographs of the unit when they moved in. Both parties had one witness each to support their version of events. However, as noted above, the landlord has the burden of proof, on a balance of probabilities to prove her monetary application.

I dismiss the landlord's application for $200.00 for cleaning, $8.93 for the broom and $13.72 for the towels and wipes. I find that the tenants and their witness MDD confirmed that the tenants cleaned the rental unit prior to vacating and that no further cleaning was required. The landlord failed to provide photographs of the rental unit when the tenants moved out to show that cleaning was required.

I dismiss the landlord's application for painting of $113.09. I accept the tenants' testimony that they did not leave food stains on the walls or damage the walls. The landlord failed to provide photographs of the rental unit when the tenants moved in to show the condition of the walls at that time or photographs when they moved out to show that damage was caused beyond reasonable wear and tear and that painting was required. Residential Tenancy Policy Guideline 1 indicates that a landlord is required to paint the walls, unless the landlord can show that the tenants willfully or negligently caused damage that is beyond reasonable wear and tear.

I dismiss the landlord's application for replacing the key to the rental unit of $8.05. I accept the tenants' testimony that they returned the key to the landlord at the move-out inspection. The landlord did not note any missing keys on the move-out condition inspection report.

I dismiss the landlord's application for $200.00 to replace her children's toys, that she said the tenants stole from the rental unit. The landlord was unable to justify how she arrived at the above amount, claiming that she could not put a price on the stress, unhappiness and missing toys. The landlord did not provide any receipts, invoices or breakdown of what toys were lost or the value of each toy.

I dismiss the landlord's application for garbage removal of $200.02. The landlord did not provide a receipt or invoice for this amount.

I dismiss the landlord's application for unpaid utilities of $145.98. I accept the tenants' evidence that they paid this amount to the landlord but did not receive any receipt from the landlord.

Since the landlord was not successful in her application, I find that she is not entitled to recover the $100.00 application filing fee from the tenants.

Tenants' Application

Section 38 of the *Act* requires the landlord to either return the tenants' security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenants' provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the deposit. However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

I make the following findings based on a balance of probabilities. I find that the tenancy ended on August 31, 2018. The tenants provided a written forwarding address to the landlord on August 14, 2018. I find that the tenants did not give the landlord written permission to retain any amount from their deposit, despite the landlord's claim that they agreed to 50% before the tenancy started. Section 20(e) of the *Act* prohibits the landlord from automatically keeping all or part of the deposit as a term of the tenancy agreement. The tenants disputed this agreement and did not indicate that the landlord could keep any part of their deposit on the move-out condition inspection report.

The landlord did not return the deposit to the tenants. However, the landlord made an application within 15 days of the end of tenancy on August 31, 2018, to claim against the deposit. Although her application was due by September 15, 2018, this fell on a Saturday so the landlord's application filed on September 17, 2018, was made on the next business day when the RTB offices were open. Therefore, I find that the tenants are not entitled to receive double the value of their security deposit, only the regular return of $625.00.

As the tenants were only partially successful in their application, I find that they are not entitled to recover the $100.00 filing fee from the landlord.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $625.00 against the landlord. 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.

The landlord's entire application is dismissed without leave to reapply.

The tenants' application to recover the $100.00 filing fee is dismissed without leave to reapply.

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: February 08, 2019

Residential Tenancy Branch