Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Tenants: MNSD, MNDCT, FFT
Landlord: MNDCL-S, FFL

Introduction

This hearing dealt with Applications for Dispute Resolution from both parties, with each party claiming entitlement to the security deposit and each party seeking a monetary order as compensation for damages recovery of the filing fee.

The hearing was originally conducted via teleconference on March 21, 2019. However, as noted in the Interim Decision of the same date, the first Arbitrator found that there were concerns pertaining to the service of the tenants' evidence and as a result, the Arbitrator ordered the hearing to be adjourned to allow for all evidence to be served between the parties.

The reconvened hearing on May 16, 2019 was conducted via teleconference and was attended by both parties.

The parties confirmed that they each had before them the other party's Notice of Dispute Resolution Proceeding package and evidence.

This Decision should be read in conjunction with the Interim Decision rendered on March 21, 2019 on this matter.

Issue(s) to be Decided

Is either party entitled to a monetary award for damages or compensation?

Which party is entitled to the security deposit?
Is either party entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

A written tenancy agreement was submitted into evidence. The parties confirmed the following details pertaining to this tenancy:

- This fixed-term tenancy began October 1, 2017 with a scheduled end date of September 30, 2018.
- Monthly rent of $1,500.00 was payable on the first of the month.
- The tenants were responsible for payment of 40% of the gas and electric utilities.
- At the beginning of the tenancy, the tenants paid a security deposit of $750.00, which continues to be held by the landlord.

The landlord confirmed that a written condition inspection report was never provided to the tenants at the beginning of the tenancy.

The landlord confirmed that a date and time for a move-out condition inspection was never scheduled with the tenants and a written report of the condition of the rental unit was never provided to the tenants at move-out.

The tenants testified that they sent the landlord their forwarding address in writing by Canada Post registered mail on October 9, 2018. The tenants confirmed that the letter was returned to the marked “unclaimed” by the landlord. The tenants submitted into documentary evidence a copy of the Canada Post registered mail receipt with tracking number and a photograph of the letter labelled with a Canada Post sticker with the box ticked for “unclaimed”, in support of their testimony. The landlord acknowledged that she had not been staying at the residence full-time during that period and although she recalled receiving a Canada Post notice card regarding the registered mail, by the time she was able to go and collect it, it had already been returned to the sender. The landlord did not submit any documentary evidence to support her claim that she was unable to collect her registered mail from the tenants, such as proof she was not residing at the address for service she had provided to the tenants on the tenancy agreement, or that she had informed the tenants of a different address for service at any time prior to October 9, 2018.

Therefore, I refer to Section 90 of the *Act* which sets out when documents that are not personally served are considered to have been received. Unless there is evidence to the contrary, a document is considered or 'deemed' received on the fifth day after mailing it is served by mail (ordinary or registered mail).

Residential Policy Guideline 12. Service Provisions provides guidance on determining deemed receipt, as follows:

> *Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision. Where the Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.*

Therefore, I find that the landlord was served with the tenants' forwarding address on October 14, 2018, the fifth day after mailing, in accordance with sections 88 and 90 of the *Act*.

The landlord testified that on September 30, 2018, she tried to contact tenant M.B. on her cell phone at approximately 1:00 p.m. to ensure that the rental unit was vacant so that the new tenants could move in. The landlord was only able to leave a voicemail message. The landlord followed up with subsequent voicemail messages to tenant M.B. at approximately 4:00 p.m. and again at 5:50 p.m.

The tenants contend that they moved all their furniture out of the rental unit on September 29, 2018 and spent time in the rental unit on the morning of September 30, 2018 to complete the cleaning. The tenants claim that they were expecting the landlord to attend at the rental unit around noon on September 30, 2018 so that they could return the keys and collect their security deposit. They stated that they continued to complete touch-ups and cleaning in the rental unit throughout the afternoon as they waited for the landlord. Tenant M.B. confirmed that it wasn't until she returned to her new residence later in the day, where she had left her cell phone plugged in to charge, that she retrieved the messages from the landlord that were left earlier that afternoon. Tenant M.B. called the landlord at approximately 6:30 p.m. and advised her that tenant R.S. was touching up some paint in the bathroom but otherwise the rental unit was available for the new tenants. The landlord testified that during that telephone conversation tenant M.B. stated to her that tenant R.S. was just finishing cleaning as things had taken longer than expected.

The landlord testified that she arrived at the rental unit with the new tenant between 6:30 and 7:00 p.m. At that point, she felt that it was too late in the day and too dark for the new tenants to move in to the rental unit. The landlord submitted documentary evidence to support her monetary claims for the cost of accommodations and reimbursement for lost wages she was obligated to pay for the new tenant in the amount of $520.00, due to the delayed move in.

The landlord has also sought a claim against the tenants for unpaid utilities in the amount of $134.59. I note that the tenancy agreement stipulates that the tenants are responsible for 40% of the gas and electric utilities. During the hearing, I confirmed with tenant R.S. that he had reviewed the landlord's submitted documentary evidence, which included the utility bills, and that he confirmed the landlord's calculations pertaining to the 40% were accurate.

The landlord also claimed $25.00 for the cost of cleaning up garage that had overflowed from the rental property garbage container.

The tenants claimed the landlord failed to return their security deposit in accordance with the *Act* and they are seeking statutory compensation of double the amount of the security deposit pursuant to section 38 of the *Act*.

The tenants also claimed the cost of lost wages due to their attendance at the first hearing and the cost of registered mail for service of documents.

Analysis

Section 67 of the *Act* provides that, where an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement, an arbitrator may determine the amount of that damage or loss and order compensation to the claimant.

The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide sufficient evidence to establish **all** of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; **and**

4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

In this matter, both parties filed applications seeking compensation from the other party. I have addressed each party's claims separately below.

Landlord's Claims

Compensation to New Tenant (Accommodations and Lost Wages)
The landlord acknowledged that she failed to arrange a specific move-out inspection date and time with the tenants. The tenants claim that they were at the rental unit as of noon on September 30, 2018 waiting for the landlord to attend at the rental unit to conduct the inspection and return the security deposit. They claimed that all of their belongings were removed on September 29, 2018 and that they were done the required cleaning by noon on September 30, 2018. As such, the tenants claim that they did not impede the new tenant from moving in. The landlord confirmed that she did not attend at the rental unit at noon on September 30, 2018 but rather she chose to instead call tenant M.B. at 1:00 pm. and leave a voicemail message on her phone. The landlord testified that she did not attend at the rental unit until approximately 6:30 p.m.

Based on the testimony and evidence of both parties, on a balance of probabilities I find that the landlord has failed to provide sufficient evidence that the tenants contravened the *Act* or the tenancy agreement by failing to vacate the rental unit at the end of the tenancy at noon on September 30, 2018. The landlord was not at the rental unit at noon and was therefore unable to submit any testimony or evidence to contradict the testimony of the tenants that the rental unit was vacant and "reasonably clean" as of noon on September 30, 2018, enabling the new tenant to move in. Had the landlord attended at the rental unit at the date and time the tenancy was scheduled to end, noon, the landlord could have confirmed if the rental unit was vacant and "reasonable clean", the standard as required by the *Act*, to allow the new tenant to move in.

Therefore, as the landlord did not meet the burden of proving her claim for compensation as required by the four-point test for compensation explained above, the landlord's claim on this issue fails and is dismissed.

Garbage Disposal
The tenants disputed that this was their fault as the occupants of the rental unit upstairs were also moving out at the same time. The landlord was unable to confirm which occupants were specifically responsible for the overflowing garbage. As such, I find that the landlord has failed to provide sufficient evidence to prove that the tenants contravened the tenancy agreement or the *Act*, as such the landlord's claim fails and is dismissed.

Unpaid Utility Costs
Tenant R.S. confirmed that the calculations were correct and that it was undisputed that the tenants were responsible for the utilities in accordance with the agreed upon terms of the tenancy agreement. Tenant R.S. confirmed that he had not been provided with the bills until they were included in the landlord's evidence package, and as such had not provided payment.

As the requirement for the payment of utilities is clearly set out in the tenancy agreement, and as tenant R.S. confirmed that the landlord's calculation of the utility costs was accurate, I find the landlord's claim for payment of the utilities to be undisputed and award $135.49 in favour of the landlord for the cost of unpaid utilities.

Tenants' Claims

Return of Double the Security Deposit
The *Act* contains comprehensive provisions on dealing with security and pet damage deposits. Under section 38 of the *Act*, the landlord is required to handle the security and pet damage deposits as follows:

> 38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

...

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

…

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

At no time does the landlord have the ability to simply keep all or a portion of the security deposit because they feel they are entitled to it due to damages caused by the tenant. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

In this matter, the tenancy ended on September 30, 2018. I find that the tenants provided sufficient proof that they served the landlord with their forwarding address by Canada Post registered mail on October 9, 2018. As such, I have found that the tenants' forwarding address was deemed received by the landlord on October 14, 2018 in accordance with section 90 of the *Act*. I find that the landlord failed to submit any evidence that she was unable to collect her registered mail at that time in order to dispute the deeming provisions.

Therefore, the landlord had 15 days after the deemed receipt of the tenants forwarding address, which is the later date, to address the security deposit in accordance with the *Act*. As such, the landlord had until October 29, 2018 to return the security deposit or file an Application for Dispute Resolution.

The landlord confirmed that she did not apply file an Application for Dispute Resolution until December 8, 2018, which is past the 15 days provided under the *Act*.

It was confirmed by both parties that the tenants did not provide the landlord with any authorization, in writing, for the landlord to retain any portion of the security deposit.

I further note that the landlord extinguished the right to claim against the security and pet damage deposits by failing to provide a written condition inspection report at the beginning of the tenancy. This extinguishment is explained in section 24(2) as follows:

> 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.

The landlord may only keep all or a portion of the security and pet damage deposit through the authority of the *Act*, such as an order from an Arbitrator, or with the written agreement of the tenant. In this matter, I find that the landlord did not have any authority under the *Act* to keep any portion of the security deposit.

Based on the above legislative provisions and the testimony and evidence of both parties, on a balance of probabilities, I find that the landlord failed to address the security deposit in compliance with the *Act*.

As such, in accordance with section 38(6) of the *Act*, I find that the tenants are entitled to a monetary award of $1,500.00, which is equivalent to double the value of the security deposit paid by the tenants at the beginning of the tenancy, with any interest calculated on the original amount only. No interest is payable for this period.

Lost Wages and Registered Mail Costs

As explained earlier in this Decision, a party is only entitled to compensation under the *Act*, if they can first prove that the other party's contravention of the *Act* led to loss or damages. The tenants attended the first hearing on March 21, 2019 as they were named as respondents in the landlord's claim but also were applicants in their own claim. There was no evidence submitted by the tenants to indicate that the landlord's

claim was frivolous or that she had no right to submit a claim under the *Act*. The tenants were under no obligation to have both tenants attend the hearing as one tenant could have attended on behalf of both the tenants, or the tenants could have asked a friend, or family member to attend as an agent on their behalf. Further, there is no provision under the *Act* for recovery of administrative or disbursement costs, such as mailing costs.

As such, I find that the tenants' claim for these losses cannot be attributed to any contravention of the *Act* by the landlord. Therefore, the tenants' claim on these grounds fails and is dismissed.

Set-off of Claims Against the Security Deposit

In summary, I find that the landlord is entitled to a monetary award for compensation of $135.49 and the tenants are entitled to a monetary award for compensation of $1,500.00.

I find that as neither party was fully successful in the claims, each party shall bear the cost of their own filing fee.

In accordance with the offsetting provisions of section 72 of the *Act*, I set-off the $1,500.00 of compensation owed by the landlord to the tenants against the $135.49 of compensation owed by the tenants to the landlord.

As such, I issue a Monetary Order in the tenant's favour in the amount of $1,364.51, as explained in the following breakdown:

Item	**Amount**
Return of double security deposit to tenants ($750.00 x 2)	$1,500.00
LESS: Monetary Award to landlord for compensation (utilities)	($135.49)
Total Monetary Order in Favour of Tenants	**$1,364.51**

Conclusion

I issue a Monetary Order in the tenants' favour against the landlord in the amount of $1,364.51 for the return of the security deposit and statutory compensation equivalent to the amount of the security deposit, less the amount owed by the tenants for unpaid utilities.

The tenants are 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: May 23, 2019

Residential Tenancy Branch