Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW HEARING DECISION

Dispute Codes MNDL-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 damage to the rental unit, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for his 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 landlord and the two tenants (male and female) attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

"Witness TS" testified, under oath, on behalf of the landlord at this hearing. She confirmed that she was the landlord's fiancée. Both parties had equal opportunities to question the witness.

This hearing lasted approximately 104 minutes. The landlord spoke for approximately 70 minutes of the hearing time, his witness spoke for approximately 5 minutes of the hearing time, and the tenants spoke for approximately 17 minutes of the hearing time. The remainder of the 12-minute hearing time was spent discussing service of documents and the hearing and settlement process.

Preliminary Issue - Previous Hearings and Service of Documents

This matter was previously heard by me on February 8, 2019 and a decision and monetary order were both issued by me on February 11, 2019 ("original hearing" and "original decision" and "original monetary order"). Both parties and witness TS attended the original hearing. The original decision granted the tenants' application for the return of their original security deposit amount of $1,575.00 and provided the original monetary order to the tenants for $1,575.00. The original decision dismissed the landlord's entire application and the tenants' application to recover their $100.00 filing fee.

The landlord applied for a review of the original decision and a new review hearing (this current hearing on May 3, 2019) was granted by a different Arbitrator, pursuant to a "review consideration decision," dated March 14, 2019. The Arbitrator in the review consideration decision ordered that the new review hearing be conducted by me as the original Arbitrator.

By way of the review consideration decision, the landlord was required to serve the tenants with a copy of the review consideration decision, new notice of review hearing, and the landlord's current address for service, within three days of receiving the review consideration decision. The tenants confirmed that they received the above required review documents from the landlord. In accordance with sections 89 and 90 of the *Act*, I find that the tenants were duly served with the landlord's review documents.

The review consideration decision indicated at page 6 that both parties were required to serve the other party with any evidence that they intended to rely upon at the review hearing. The landlord stated that he did not serve the tenants with the two-page document entitled "C2. New and Relevant Evidence" or an audio recording from a conversation with an RTB information officer on February 15, 2019, from his review application. The tenants confirmed that they did not receive this document or the audio file from the landlord. Accordingly, I notified the landlord that I could not consider this document or the audio file at the review hearing or in my decision because they were not served to the tenants as required.

Both parties confirmed receipt of the other party's original application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I found that both parties were duly served with the other party's original application.

The tenants confirmed receipt of the landlord's new evidence package entitled ""NewEvidenceApr13" of 40 pages from the landlord. In accordance with sections 88 and 90 of the *Act*, I find that the tenants were duly served with the landlord's new evidence package.

The tenants confirmed that they did not serve any new evidence for this hearing to the landlord and they were relying on their original evidence packages from the original hearing. The landlord confirmed that he was also relying on his original evidence packages from the original hearing.

Preliminary Issue – Joining the Tenants' Application with Landlord's Application

At the outset of the hearing, the tenants confirmed that they filed an application for dispute resolution against the landlord. 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. The landlord confirmed that he received the tenants' application and evidence.

Both parties consented to the tenants' application being heard at the same time as the landlord's application at this hearing.

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:*
>
> *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 same landlord and tenants are named in both applications, both applications deal with the same rental unit, the remedies sought in both applications relate to the same issue of the security deposit, and the same facts and law regarding the security deposit will be considered 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. Both applications were heard together at the original hearing.

Issues to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit?

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 the landlord's witness, 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 November 3, 2015 and ended on September 30, 2018. Monthly rent in the amount of $3,320.00 was payable on the first day of each month. A security deposit of $1,575.00 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 and the move-out condition inspection report, both on September 30, 2018. The landlord did not have any written permission to keep any amount from the tenants' security deposit. The landlord filed his application to retain the security deposit on October 14, 2018. Written tenancy agreements were signed by both parties. The rental unit is the upper portion of a house, where the basement was occupied by different occupants.

The landlord seeks a monetary order of $4,532.22 plus the $100.00 application filing fee. The tenants seek a return of double the amount of their security deposit of $1,575.00, totalling $3,150.00, plus the $100.00 application filing fee.

The landlord seeks $2,646.00 and $472.50 for the first and second phases of a driveway repair at the rental property because he said the tenants destroyed it with chloride-based salt, due to the snow. The landlord provided photographs, invoices, text messages, a witness statement from the contractor and documentary information regarding the salt and the snow.

The landlord said that he tracked down the contractor who completed the work, had him buy a receipt book, and created four receipts on February 12, 2019, after the landlord received my original decision. The landlord submitted this as new evidence for this review hearing. The landlord said that he was told by two RTB information officers that he did not have to produce receipts for the original hearing, as invoices were sufficient. The landlord provided two receipts for $1,000.00 each, one receipt for $646.00, and another receipt for $472.50, indicating that the money was received by the contractor in October 2017 and October 2018. The landlord also produced his bank documents from October 2017 and October 2018 to show that the cheques were cashed and he withdrew cash in order to support the above payments.

The landlord stated that the driveway was done in 2012, he bought the property in 2015, and the tenants moved in November 2015. He claimed that the damage occurred in February 2017 and the tenants failed to notify him until May 18, 2017. He said that he came to inspect on May 18, 2017, he pressure-washed the concrete a few days later, and then he had a company come in to pressure wash, re-colour and re-seal the concrete. He said that he contacted the contractor about the driveway on May 19, 2017, the day after he was notified by the tenants, and he produced text messages of same. He maintained that he dealt with the top two people at the company because other people refused to do the work, since the driveway was so badly damaged. He claimed that the salt was corrosive, corroded the concrete, exposed the aggregate, and the seal did not adhere. He explained that the company has to come back every year to fill it. The landlord said that he had two years after the end of the tenancy to file a claim against the tenants, so he was not required to claim for it during the tenancy even though it occurred while the tenants were still residing in the rental unit.

The landlord's witness TS, who agreed that she was not a professional expert in this area, claimed that the tenants should have read the instructions on the salt bag they used on the driveway. The landlord said that the tenants should not have used that salt because there was a warning on the bag. Witness TS said that the salt was not to be used on stamped concrete, which the landlord confirmed as well. She stated that it was her opinion that the tenants used ¾ of the salt bag, which was 30 pounds, on the driveway of the rental unit and that only ¼ or 10 pounds of the bag was unused.

The tenants dispute the landlord's claim for the driveway repair. They provided photographs and documentary information regarding the snow and salt. They agreed that they used a minimum amount of salt on the driveway because it was one of the harshest winters in the area and there was a lot of snow. They maintained that they took care of the driveway, and used plastic instead of metal shovels. They said that they were never told by the landlord that they could not use salt on the driveway or what type of salt to use if they could use it. They explained that the landlord never included any information about using salt or not using salt in their tenancy agreement, addendum to the tenancy agreement or any other written contracts. They claimed that they did not use an entire bag of salt on the driveway and that they stopped using salt once they noticed damaged to the driveway.

The tenants stated that other occupants, who lived in the basement of the same rental house, also used this walkway and these occupants provided a statement in support of the tenants' version of events. The tenants maintained that they were required to clear the driveway in order for mail personnel to deliver their mail or they were told the mail

would not be delivered to the rental property. They also stated that they were away for one week on vacation in winter and the other occupants were required to clear the driveway in order to allow access for mail personnel onto the property but they did not know if the occupants used salt or not during this time.

The tenants questioned when the landlord completed both phases of the driveway repair because they said the first was done in October and November 2017, much later than the reported issue in May 2017, claiming dry summer conditions were needed when it would have been raining at this time. They maintained that the landlord did not tell them they were responsible for any damage at the time but then the landlord claimed for damages two years later at the end of the tenancy. They disagreed that they caused damage and they claimed that the landlord indicated he would keep their security deposit towards the driveway repair. The tenants disputed the new receipts from the landlord, questioning when the amounts were paid and the fact that the dates of the receipts were after my original decision was sent to the landlord.

The landlord seeks $840.26 for parts and $408.45 for installation for the glass stove cooktop and the refrigerator door shelves. The landlord provided photographs, an email for the installation, and the invoice for the parts order. The landlord confirmed that the installation occurred on the day before the original hearing, February 7, 2019, because it took so long for the parts to arrive. The landlord submitted as new evidence, a credit card statement from witness TS for the $840.26 purchase on January 12, 2019. The landlord also submitted a newly-created invoice and credit card receipt, both dated February 7, 2019, which was not provided for the original hearing. The receipt indicates that a balance of $492.45 was paid but the landlord claimed that only $408.45 related to this tenancy. He said that $209.00 was for the glass stove cooktop and $180.00 was for the refrigerator door shelves, and that GST tax of 5% should be added, for a total of $408.45. The landlord was initially confused about the amounts, adding $80.00 total to it, but then revoking this and claiming it was incorrect. The landlord stated that the tenants scratched the glass stove cooktop so he had to replace it. The landlord said that the shelves in the refrigerator door were cracked.

The tenants disputed that they were responsible for damage to the refrigerator door shelves and the glass stove cooktop. They said that they hired a cleaner to clean every two weeks during their tenancy. They stated they caused scratches to the stove cooktop but they were reasonable wear and tear. The tenants explained that they did not know that there were any cracks in the refrigerator door shelves so they did not point it out to the landlord on the move-out condition inspection. They maintained that if they caused the damage to the refrigerator door shelves that it was reasonable wear

and tear and it was not discussed with the landlord or noted by the landlord on the move-out condition inspection report.

The landlord seeks $165.01 to replace a dead tree at the rental property. He provided an invoice for this amount. The landlord also provided a newly-created receipt, dated February 13, 2019, for the above amount, after receiving my original decision. The landlord said that the damage was not noted on the move-out condition inspection report because he did not notice it during the move-out condition inspection. He stated that the tenants did not report this damage to him.

The tenants dispute the landlord's claim for the dead tree. They said that they were responsible for the tree and gardens at the rental property, as per the parties' written addendum. They maintained that the tree had an irrigation system where it was watered according to a timing system. The tenants explained that they told the landlord that the tree outside needed more water from the irrigation system. They said that no indication of this damage was contained in the move-out condition inspection report. They questioned the new receipt from the landlord, indicating that it was created after my original decision and did not state when the landlord paid the amount, noting only "(Nov 26/18)" beside the landlord's name on the receipt, but not indicating that this was the date of payment.

Analysis

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 receipts provided by the landlord for all of the above damages, were created after the landlord received my original decision, dated February 11, 2019. The landlord created receipts on February 7, 12 and 13, 2019 and submitted them for this review hearing. The receipts were created months and even years after the original work was completed. The tenants questioned the validity of these receipts being created so long after the original work was done.

The tenants disputed that they were responsible for the damage to the driveway. I find that the landlord did not advise the tenants, whether verbally or in writing, that they should not have used salt on the driveway. The landlord said that he did not do so because the tenants should have read on the salt bag that they could not use that salt on stamped concrete. He also claimed that his property management company drafted the addendum to the tenancy agreement and told him that he did not need to include a list of each product the tenants should or should not have used on the driveway. Yet, the landlord agreed that he amended this addendum in 2017, the last year of tenancy, to advise the tenants not to use salt and just to use sand on the driveway with a plastic shovel. The tenants claimed that the property management company left after 2015 and that the landlord drafted his own addendums but failed to include the salt information until the last addendum in the last year of tenancy. I find that the landlord is responsible to advise the tenants if they are not to use certain products, such as salt, on the driveway and by failing to do so, the landlord assumes the damage to the driveway and the subsequent repairs.

I find that the damage to the tree and the refrigerator door shelves were not contained on the move-out condition inspection report or discussed between the parties during the move-out condition inspection. The landlord even agreed that he did not notice these damages during the move-out condition inspection, he only noticed it after, despite claiming it was so obvious that the tenants should have told him about them, like the huge dead tree at the front of the rental property. The tenants did not know about the damage to the refrigerator door shelves. The landlord must complete his own due diligence during the move-out condition inspection, not rely on the tenants to advise him of everything, particularly items they were not aware of, if the landlord is filling out the report and claiming against the tenants' security deposit for it. As noted above, the landlord has the burden of proof, on a balance of probabilities to prove his monetary application.

I note that the damages to the glass stove cooktop and the refrigerator door shelves are all reasonable wear and tear during a tenancy of almost three years. I find that the tenants notified the landlord about the need for more water to the tree at the front of the property, as required by their addendum, as the tenants did not control the irrigation system installed by the landlord, which is the responsibility of the landlord.

Since the landlord was not successful in his application, I find that he 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. The tenancy ended on September 30, 2018. The tenants provided a written forwarding address to the landlord on September 30, 2018. The tenants did not give the landlord written permission to retain any amount from their deposit. The landlord did not return the deposit to the tenants. However, the landlord made an application on October 14, 2018, which is within 15 days of the end of tenancy on September 30, 2018, to claim against the deposit. Although the tenants did not receive the landlord's application until December 24, 2018, due to some administrative issues, the landlord still filed it within the required timeline. Therefore, I find that the tenants are not entitled to receive double the value of their security deposit, only the regular return of $1,575.00.

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.

Review Decision

Section 82(3) of the *Act* states:

> *Following the review, the director may confirm, vary or set aside the original decision or order.*

I confirm the original decision and original monetary order, both dated February 11, 2019.

Further Review Applications by the Landlord

I caution the landlord to take note of the following section 79(7) of the *Act* (my emphasis added):

> *Application for review of director's decision or order*
> *(7) A party to a dispute resolution proceeding may make an application under this section* ***only once*** *in respect of the proceedings.*

Since the landlord has already filed one review with respect to this proceeding, he is not permitted to file any future reviews of this decision.

Conclusion

The original decision and original monetary order, both dated February 11, 2019, are confirmed.

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 3, 2019

Residential Tenancy Branch