



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT MNSD FFT

Introduction

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

- the return of the security deposit pursuant to section 38 of the *Act*;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement, pursuant to section 67 of the *Act*; and
- recovery of the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenants were represented at the hearing by their agents K.C. and Kr.C., herein referred to as the "tenants' agent". The landlord attended with her daughter M.V. acting as her agent, herein referred to as "the landlord".

As both parties were present, service of documents was confirmed. The tenants' agent testified that the landlord was served with the Notice of Dispute Resolution Proceeding package by Canada Post registered mail on February 27, 2019, and served with the tenants' evidence also by Canada Post registered mail on May 16, 2019, which was confirmed received by the landlord. The landlord testified that the tenants were served with the landlord's evidence by Canada Post registered mail on May 30, 2019 which was confirmed received by the tenants' agent. Based on the undisputed testimonies of the parties, I find that the landlord was served with the notice of this hearing in accordance with section 89 of the *Act*, and the evidence of both parties was served in accordance with section 88 of the *Act*.

Issue(s) to be Decided

Are the tenants entitled to the return of the security deposit? If so, are the tenants entitled to a monetary award equivalent to the value of the security deposit because of the landlord's failure to comply with section 38 of the Act?

Are the tenants entitled to monetary for the landlord's failure to comply with the Act, regulations or tenancy agreement?

Are the tenants 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 copy of the written tenancy agreement was submitted into documentary evidence by both parties. The parties confirmed the following information pertaining to the tenancy agreement:

- This fixed-term tenancy began on August 1, 2018, with a scheduled end date of August 1, 2019.
- Monthly rent of \$2,200.00 was payable on the first day of the month.
- The tenants paid a security deposit of \$1,100.00 at the beginning of the tenancy, which the landlord continues to hold.

Both parties confirmed that a written inspection report was never prepared or provided to the tenants at move-in.

The tenants gave notice to end the tenancy on December 7, 2018 and the tenancy ended on December 31, 2018.

Both parties confirmed that a written inspection report was never prepared or provided to the tenants at move-out.

The landlord confirmed receiving the tenants forwarding address provided in an email on December 12, 2018.

The landlord confirmed that the tenants did not provide written authorization to the landlord for any specified deductions from the security deposit.

The landlord did not file an application for dispute resolution to retain the security deposit.

The tenants are seeking the return of their security deposit and monetary compensation equivalent to the amount of the security deposit. The tenants are also seeking the equivalent of one month's rent as compensation for loss of quiet enjoyment for the alleged entry of the landlord into the rental unit on September 29, 2018, in contravention of section 29 of the *Act*.

The tenants submitted into evidence an email communication between the landlord and the tenant K.M. on the morning of September 29, 2018 in which the landlord asked when the tenants would be home so that the landlord could attend at the rental unit to access the laundry area to turn on the furnace. The tenant K.M. responded:

If I have 24 hours notice. So anytime after 1pm tomorrow. Or you could tell me how to do it.

The landlord testified that they were travelling out of town on the morning of September 30, 2018 and therefore they attended at the rental unit in the afternoon on September 29, 2018, and spoke directly with tenant K.M. who agreed at that time to let them access the furnace closet, which was located in the laundry area of the basement rental unit, in an area separate from the living area of the rental unit.

The landlord alleged that the tenants ended their fixed-term tenancy in contravention of the *Act*, and were responsible for damages, including rubbish removal costs and cleaning deficiencies.

I explained to the parties that the only matter before me for decision at this hearing was to make a determination on the tenants' application for the return of the security deposit, and that any testimony in relation to the alleged damages and cleaning deficiencies was not relevant for making a determination in this matter. I informed both parties that they were both at liberty to make claims for damages in relation to the tenancy in accordance with the time limits provided by the *Act*.

I further explained that the *Act* contains statutory provisions which can require that in certain circumstances a landlord must repay a tenant double the security deposit. If a

tenant is entitled to doubling of the deposit, I must award the tenant double the deposit unless the tenant expressly waives entitlement. Accordingly, I have considered whether the tenants are entitled to the doubling provision in making this decision.

Analysis

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

The burden of proof is on the claimant to prove the existence of the damage or loss and that it stemmed directly from a violation of the tenancy agreement or contravention of the *Act* on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally, it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

I have addressed the tenants' claims for compensation of loss of quiet enjoyment and for return of the security deposit separately below.

1) Claim for Loss of Quiet Enjoyment

Section 28 of the *Act* provides that a tenant is entitled to quiet enjoyment, including but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Section 29 of the *Act* sets out the parameters for a landlord's access to the rental unit as follows:

- (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

- (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
 - (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
 - (i) the purpose for entering, which must be reasonable;
 - (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
 - (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
 - (d) the landlord has an order of the director authorizing the entry;
 - (e) the tenant has abandoned the rental unit;
 - (f) an emergency exists and the entry is necessary to protect life or property.
- (2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

In this matter, the landlord provided testimony that they did not enter the living area of the rental unit, which is separated by a door from the laundry area, but only accessed the furnace closet located in the laundry room. The landlord submitted photographic evidence of the laundry room and furnace closet in support of their testimony.

Further to this, the landlord testified that the tenant K.M. allowed them access when they attended at the rental unit on September 29, 2018 to explain that they needed to access the furnace closet to turn the furnace on as they were travelling out of town the next day.

I accept the landlord's testimony that permission was granted by the tenant K.M. for the landlord to access the furnace room at the time of entry as tenant K.M. was not in attendance at the hearing as a witness to dispute the testimony.

Although I accept that the tenants had requested to be provided with 24 hours notice I also find that it would be reasonable for the tenant to permit the landlord access at the time of entry to turn on the furnace since the furnace was not located in the living area of the rental unit, and the tenants would require the furnace to be turned on to provide heat to the rental unit, for their own comfort and well-being.

As explained at the beginning of the “Analysis” section, a claimant must prove that the damage or loss stemmed directly from a violation of the tenancy agreement or contravention of the *Act* on the part of the respondent.

Section 29(1)(a) of the *Act* allows a tenant to give permission to a landlord access to the rental unit at the time of entry. Although the evidence is clear that the tenant K.M. requested 24 hours notice of entry in her earlier email, I do not find any evidence submitted by the tenants to dispute the landlord’s testimony that the tenant K.M. permitted access to the landlord to the laundry area upon the landlord’s attendance at the rental unit. I find it reasonable to believe that the tenant K.M. permitted access at the time of entry upon explanation that the access would only take a few minutes, was necessary to provide heat to the rental unit, and that the landlord would be leaving town the next morning.

Therefore, based on the testimony and evidence before me, on a balance of probabilities, I find that there is not sufficient evidence to establish that the landlord accessed the rental unit in contravention of section 29 of the *Act*, resulting in a loss of quiet enjoyment to the tenants pursuant to section 28 of the *Act*. As such, the tenants claim for compensation on this issue is dismissed.

2) Return of the Security Deposit

The *Act* contains comprehensive provisions on dealing with security deposits. Under section 38 of the *Act*, the landlord is required to handle the security deposit 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,

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 December 31, 2018, and the parties agreed that the landlord was in receipt of the tenants' forwarding address as of December 12, 2018.

The landlord confirmed that she did not file an application for arbitration to retain all or a portion of the security deposit, as required under section 38 of 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 deposit 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.

Because the landlord extinguished the right to the security deposit at the beginning of the tenancy, it is a moot point that a move-out condition inspection of the rental unit was not done at the end of the tenancy.

The landlord may only keep all or a portion of the security 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.

I note that the landlord provided verbal testimony and documentary evidence about the issue of damages and cleaning deficiencies left by the tenants; however, the landlord is unable to make a monetary claim through the tenants' Application.

The landlord may still file their own Application for compensation for the alleged damages and cleaning deficiencies caused by the tenants; however, the issue of the security deposit has now been conclusively dealt with in this hearing.

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 equivalent to the value of double the amount of the security deposit withheld by the landlord, with any interest calculated on the original amount only. No interest is payable for this period.

Therefore, the tenants are entitled to a monetary award of \$2,200.00 as compensation for the landlord's failure to address the security deposit in accordance with section 38 of the *Act*.

As the tenants were successful in obtaining a monetary award through their dispute, I find that the tenants are entitled to recover the \$100.00 filing fee paid for this application.

In summary, I order that the landlord pay the tenants the sum of **\$2,300.00** in full satisfaction of the security deposit and recovery of the filing fee paid by the tenants for this application.

Conclusion

I issue a Monetary Order in the tenants' favour in the amount of \$2,300.00 pursuant to sections 38, 67 and 72 of the *Act*.

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: June 24, 2019

Residential Tenancy Branch