



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1077036 BC Ltd 1077036 BC
Ltd and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL-S, FFL

Introduction

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

- authorization to retain the tenant's security deposit for compensation for damage or loss under the Act, pursuant section 67 of the Act; and
- authorization to recover the filing fee for this application, pursuant section 72 of the Act.

The landlord was represented by representative LA ("the landlord"). Tenant KD also attended.

As both parties were in attendance, I confirmed that there were no issues with service of the landlord's application for dispute resolution. The tenant confirmed receipt of the landlord's notice of hearing. The landlord confirmed receipt of the tenant's evidence. In accordance with sections 88 and 89 of the Act, I find the tenant was duly served with the landlord's application and the landlord was duly served with the tenant's evidence package.

The landlord affirmed she served the condition inspection report in the same package with the notice of hearing. The tenant affirmed she only got the notice of hearing. Witness BM affirmed she was with the tenant when she opened the landlord's application package and the only document in the package was the notice of hearing.

This landlord's condition inspection report is excluded per section 3.14 of the Rules of Procedure.

All parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Preliminary issue – amendment

The landlord's application claimed for a monetary order of \$1,200.00. During the hearing, the landlord explained she was only pursuing \$375.00 for the damages and the \$100.00 filing fee.

Pursuant to section 4.2 of the Rules and section 64 of the Act, I amend the value of the landlord's monetary claim from \$1,200.00 to \$375.00.

Issues to be Decided

- Is the landlord entitled to retain the tenant's security deposit for compensation for damages caused by the tenant?
- Is the landlord entitled to compensation for the cost of the filing fee?

Background and Evidence

While I have turned my mind to the accepted evidence and the testimony of the attending parties and witnesses, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below. I explained rule 7.4 to the parties; it is their obligation to present the evidence to substantiate their application.

Both parties agreed the tenancy started on January 15, 2013. The tenant moved out on August 31, 2019, at which time the forwarding address was provided to the landlord in writing. Monthly rent was \$862.24, due on the first day of the month. There were no rental arrears. At the outset of the tenancy a security deposit of \$375.00 was collected and the landlord still retains this amount. The landlord filed an application to retain the tenant's security deposit on September 05, 2019.

The landlord testified the tenant smoked in the rental unit during the tenancy and the claims made are not related to painting the rental unit, but to repairing damage from nicotine. TSP had to be applied to doors, cabinets, hinges, knobs, all the hardware, light switches and seal of the fridge. The landlord presented evidence of \$455.00 for shellac coating and \$600.00 for painting to repair the damage.

The landlord also testified the building was purchased the building in July 2016 and, as far as she is aware, it was always a smoke-free building. The bylaw prohibiting smoking within 10 meters from any air intake has been in effect for years. Clause 13 of the signed tenancy agreement states the tenant is responsible for repairing the damages caused by smoking in the rental unit.

Landlord's witness SL testified he has been working in the building since November 2016 and tenants were never allowed to smoke in their units. There are non-smoking signs around the building. He also testified the tenant made an effort to remove the nicotine and clean up the rental unit, but when she left there was about 50% of the original amount of nicotine.

The tenant testified she was allowed to smoke in the rental unit. When she signed the tenancy agreement there was no prohibition of smoking, and the former manager told her she could smoke in the rental unit. When the current owner took over, in July 2016, a smoke-free policy was adopted. The notice addressed to all tenants on November 15, 2016 documents there was a change in the smoking policy.

The tenant also provided a complaint notice dated July 09, 2019 which states: "This letter serves as a reminder of the lease agreement you signed upon move in. If you refer to section 34. [sic] Smoking of any kind is not permitted inside the suite, on the balcony or anywhere near the building."

The tenant also testified she cleaned the rental unit with TSP, and she applied this product to doors, cabinets, hingers, knobs, all the hardware, light switches and seal of the fridge between August 22 to 31, 2019. The photographs provided show the rental unit clean on the move-out date.

Tenant's witness BM testified she also lived in the building and she was allowed to smoke in the rental unit.

Tenant's witness ER testified the tenant was allowed to smoke in the rental unit and when the new landlord bought the building the smoking policy changed.

Analysis

Residential Tenancy Branch Policy Guideline 16 sets out the criteria for when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

The tenancy agreement signed on January 04, 2013 contains 27 clauses and does not prohibit the tenant from smoking in the rental unit. The notice dated July 09, 2019 refers to “section 34” for the prohibition of smoking in the rental unit. Such a section does not exist in the tenancy agreement.

Sections 7 and 67 of the Act state:

Liability for not complying with this Act or a tenancy agreement

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

I find the tenant was not prohibited of smoking in the rental unit. Therefore, the nicotine damage claimed by the landlord is regular wear and tear.

Section 37(2) of the Act states:

Leaving the rental unit at the end of a tenancy

37(2) When a tenant vacates a rental unit, the tenant must

(a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear

Policy Guideline 1 states:

The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises)², or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy Act.

[...]

CARPETS

4. The tenant may be expected to steam clean or shampoo the carpets at the end of a tenancy, regardless of the length of tenancy, if he or she, or another occupant, has had pets which were not caged or if he or she smoked in the premises.

[...]

INTERNAL WINDOW COVERINGS

5. The tenant is expected to clean the internal window coverings at the end of the tenancy regardless of the length of the tenancy where he or she, or another occupant smoked in the premises.

The landlord must keep in mind that he is contractually bound to provide the tenant with the rental unit agreed to in 2013. There is insufficient evidence to demonstrate that when the tenant entered into this tenancy, smoking was prohibited in the rental unit. The landlord may not unilaterally impose restriction on that freedom.

Therefore, the application is dismissed and the landlord must return the tenant the security deposit of \$375.00.

As the landlord was not successful in this application, I find that the landlord is not entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I dismiss the landlord's application for authorization to retain the tenant's security deposit for compensation for damage and order the landlord to return the \$375.00 security deposit to the tenant.

I grant the tenant a monetary order pursuant to section 38 of the Act, in the amount of \$375.00.

This order must be served on the landlord by the tenant. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) to be 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: January 14, 2020

Residential Tenancy Branch