Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the Landlord: MNDL-S, FFL
For the Tenants: MNSD, FFT

Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* ("Act") by the Parties.

The Landlord filed a claim for:

- $2,700.00 compensation for damage caused by the tenant, their pets or guests to the unit, site or property – holding the pet or security deposit; and
- recovery of the $100.00 Application filing fee.

The Tenant filed a claim for:

- the return of double the security deposit and pet damage deposit in the amount of $5,400.00; and
- recovery of the $100.00 Application filing fee.

The Tenants and the Landlord appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process.

During the hearing the Tenants and the Landlord were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"). However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing.

The Landlord testified that she served the Tenants with her Notice of Hearing documents by Canada Post registered mail, sent on September 8, 2019. The Landlord provided a Canada Post tracking number as evidence of service. She said she served the rest of her evidentiary documents on the Tenants in person on December 18, 2019. I find that the Tenants were served with the Notice of Hearing documents in accordance with the Act.

The Tenants said they served their Notice of Hearing documents by Canada Post registered mail sent on September 9, 2019, and other documentary evidence by registered mail on December 24, 2019, after unsuccessfully having tried to deliver this evidence in person to the Landlord. The Landlord said that she did not receive the second registered mail package. The Canada Post tracking website states that a notice card was left for the Landlord indicating where and when to pick up the item on December 30, 2019.

According to RTB Policy Guideline 12, "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." Accordingly, I find the Tenants served their second documentary evidence on the Landlord on December 29, 2019. I find on a balance of probabilities that the Landlord was served with the Tenants' packages in compliance with the Act.

Preliminary and Procedural Matters

The Parties provided their email addresses at the outset of the hearing and confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

Issue(s) to be Decided

- Is the Landlord entitled to a monetary order, and if so, in what amount?
- Is the Tenant entitled to a monetary order, and if so, in what amount?
- Is either Party entitled to recovery of the filing fee?

Background and Evidence

The Parties agreed that the fixed term tenancy began on August 15, 2018, and was to run to July 15, 2019, with a monthly rent of $2,700.00, due on the fifteenth day of each month. The Parties agreed that the Tenants paid a security deposit of $2,700.00, and

no pet damage deposit. The Parties agreed that the rental unit has four bedrooms and three bathrooms.

The Parties agreed that they did not conduct an inspection of the condition of the rental unit before or at the start of the tenancy; however, the Landlord submitted a copy of a condition inspection report ("CIR") dated August 14, 2019, regarding an inspection she conducted with the Tenants at the end of the tenancy.

In the hearing, the Parties disagreed as to when the Tenants vacated the rental unit - on August 14, 2019, said the Landlord, or August 15, 2019, according to the Tenants. The CIR contains the Tenants' written forwarding address.

The Landlord applied for dispute resolution at the RTB on August 28, 2019. The Tenants applied for dispute resolution on September 9, 2019.

LANDLORD'S CLAIMS

Cleaning

The Landlord said that after she did the move-out condition inspection that she called the cleaning company right away: "I called her in tears, because of the condition of my home. She came the next day and did a walk-through with me. She said she wouldn't go above the amount she quoted, even if she did more."

The Landlord said she contacted the same cleaning company she had used to clean the rental unit prior to the tenancy ("Cleaner"). She said that having the rental unit cleaned after the tenancy ended cost her $1,112.19, including taxes. The Landlord said she did not obtain any quotes from other cleaning companies, but went with the Cleaner she had used prior to the tenancy. The Landlord submitted the Cleaner's receipt, which states that 22.5 hours of cleaning were done at a cost of $47.50 per hour plus 5% taxes.

The Tenant said that the Cleaner's invoice was dated August 15, 2019, which was the day they moved out. The Tenant questioned how it was possible to do 22.5 hours of cleaning on the day they moved out. The Landlord said that the move out date was actually August 14, 2019, and that they did a walk-through inspection of the rental unit that day.

The Tenants submitted a letter from a neighbour, D.N. ("Letter"), who said he was

present during the Parties' move-out inspection on August 14, 2019 after 5:40 p.m. D.N. spoke of the Tenants as having been their neighbours since November 2018, after his family purchased a neighbouring property.

> The 'move out inspection' was scheduled for 5.00 pm on Aug. 14th and had obviously not proceeded until I arrived at 5.40 pm. . ..
> . . .
> Ms. [S.] started to list several complaints she has regarding the state of the house and accused Mr. [E.] of delivering the house in a dirty and damaged state. I can confirm that the house has been cleaned, kitchen and bathrooms, carpets cleaned, and the over-all impression was ready to be delivered back to landowner. I took some photos.
>
> Mr. [E.] had requested another neighbour the day before to go through the house and eventually point out things he could have possibly missed to make sure the move-out Inspection goes smoothly. Ms. [S.] pulled the couch seat cushions apart to prove to me there were some crumbs. In between she tried to argue with Mr. [E.] if the carpets had been cleaned professionally or not. Mr. [E.] confirmed he had rented a carpet cleaning machine, Ms. [S.] said she would believe it when she sees the receipts. I offered that Mr. [E.] could make another attempt the next day to clean the house closer to her expectations and offered to assist. I had a 5-star tourism cottage rental for many years, trained chambermaids and understand ultra clean. Ms. [S.] said she will have the house professionally cleaned and present the invoice.
>
> The entire situation was very offensive and neither Mr. [E.], or I responded specifically because Ms. [S.]'s approximately 7-year-old daughter witnessed the entire odd deal. A normal dialogue was not possible.
>
> One of Mr. [E.'s] remarks was that he admits he had been forgotten to clean behind the fridge and he could clean there right now. Already at the door Ms. [S.] demanded to know what he means with 'right now'. He answered with 'it means right now, he can do it if she wants' . She said " well then do it right now'. I was utterly shocked, but accompanied Mr. [E.] back in to the vacuum, we pulled the fridge forward and cleaned behind it. I found this unnecessarily humiliating and rude. The entire treatment, wait time, accusations, rudeness was unacceptable. Family [E.] are both professionals and in the process of immigrating to Canada, I was deeply embarrassed.

Both Parties submitted numerous photographs to support their respective positions. I reviewed approximately 25 of each Party's photographs in reviewing the evidence before me.

Painting

The Landlord identified the painting company she used and submitted an estimate from them setting out the "Scope of Work" as: "second bedroom, walls only (1 coat) $385.00" and for "baseboard at top of stairs (clock wall) $35.00" (plus GST). This estimate indicated the that the work done would include:

> All dents, dings, holes and gouges to be filled, sanded and spot primed.
> 1 full coat, colour to match existing, in same product as original paint job, to all areas listed above
> Trim finish will not match, as the trim will not be resprayed (baseboard on clock wall specifically)
>
> All additional work beyond Scope of Work will be billed hourly at $55/hour plus materials

The Landlord submitted another estimate from this company and said:

> They did the original painting and did touch ups before the Tenants came in. I went to them again for a quote: $1450.00, plus GST, and she hasn't completed it yet. She hasn't invoiced me the whole amount. I've paid probably over $1,000.00 already. She has to paint one more bedroom.

The Landlord did not supply any documentary evidence of the amount she has paid in this regard.

The Tenants said that the Landlord had an estimate prepared to have the entire house painted, although, they said it is unclear why this was necessary, especially given the first, smaller estimate. The Tenants said that the Landlord accessed the rental unit on June 10, 2019, to do an interim inspection, two months prior to their vacating the premises. They said the Landlord emailed them stating that there would need to be "small touch-ups of paint and paint in the bedrooms." The Tenant said this was not a mutual report. There were some points to repair, but he queried why the Landlord would need this amount of painting two months later - how did it get to that stage? he asked. He said: "In the last month, I was alone – how could I make such extensive damage?"

The Landlord said that the first, lower estimate for painting was for the bedroom. She said the painter is a business friend of hers. “We have a really good work relationship. I needed her advice on what condition the house was in. That was her estimate for the second bedroom and the baseboard at top of stairs.” The Landlord went on to say:

> Between the time of the inspection on the 15th [the Tenants] had touched up the whole house with a completely different colour paint. It all had roller marks and was all in a different shade of paint. From that inspection to the final inspection there was a large discrepancy. Her suggestion was to wash the walls with a micro fiber cloth. Instead they rolled it all with a different colour paint. It was two shades different. The grey bedroom was two shades lighter. In my hallways, stairwells, it was two shades lighter.

The Landlord included a photograph labelled “officerollermarks” which appears to be an imperfection in the paint near the baseboard in one spot. One photograph labelled: “ensuitepaintedwindowsill” shows that the paint does not extend to the edge of the window sill on the wall beneath the sill.

The Tenants said: “The spare paints were in the garage, all saying where they are to be used – walls, ceiling…; there was no room to make any errors. I asked a construction friend to come and check it. It’s not even true that we used different colours. The paints were well-marked and organized. We did little fixes and repairs.

TENANT’S CLAIM

In their Application, the Tenants said they seeks the return of double the security deposit in the amount of $5,400.00, because the Landlord did not return it to them within 15 days of the end of the tenancy. They also said that they were not served with the Landlord’s Application within 15 days of the move-out date, therefore, they say the Landlord is in breach of the Act.

The Tenants said:

> Our main claim is very simple. We left the house in reasonable condition, and we acted in good faith to repair. The house was brand new, but the furniture and carpets were not brand new. The couch was fraying. The floors are not all carpeted. We shampooed them and included the invoices of them. We cleaned the house entirely. We showed it to outsiders, had them take a look to see if

> there's any missing things. We gave a 30-minute tour to people who are also a landlord. It was looking above reasonable, looking great. We did the move in inspection with the new landlord – different from the Landlord [here]. We tried to fix things, we spent money on things. There's a standard that's not the standard of the Landlord; it's what's reasonable for everyone in the province. We're confident and comfortable with the evidence. See our pictures and videos of our walk-through, compared to Landlord's comments as [the rental unit being] filthy and unbearable.

The Landlord said: "He is correct the furniture was not all brand new – see the chart with age. The couch repair is not on the claim. The carpets – I flipped them around; they have large stains. There was fingernail paint on top of one."

The Landlord said that when they did the move-out walk-through, the female Tenant tried to bargain with the Landlord, saying 'we could clean this house in one day'. The Landlord said she looked at the male Tenant, who said, "No, I'm not spending any more time in this house."

The Landlord said: "There was mould, it was disgusting, they barely vacuumed floors. It was not in the state I handed it to them. The appliances weren't cleaned behind. Mould was in tubs and showers."

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

Pursuant to sections 23, and 35 of the Act, a landlord must complete a CIR at both the beginning and the end of a tenancy, in order to establish that any damage claimed actually occurred as a result of the tenancy. Landlords who fail to complete move-in or move-out inspections and CIRs extinguish their right to claim against the security and/or pet damage deposits for damage to the rental unit, pursuant to sections 24 and 36. Further, landlords are required by section 24(2)(c) to complete and give tenants copies CIRs in accordance with the regulations.

Section 32 of the Act requires a tenant to make repairs for damage that is caused by the action or neglect of the tenant, other persons the tenant permits on the property, or the tenant's pets. Section 37 requires a tenant to leave the rental unit undamaged and reasonably clean. However, sections 32 and 37 also provide that reasonable wear and

tear is not damage, and that a tenant may not be held responsible for repairing or replacing items that have suffered reasonable wear and tear.

Policy Guideline #1 (“PG #1”)helps interpret these sections of the Act:

> 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), or for cleaning to bring the premises to a higher standard than that set out in the *Residential Tenancy Act* or *Manufactured Home Park Tenancy Act* (the Legislation).
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> Reasonable wear and tear refer to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant. An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant.

Policy Guideline #16 (“PG #16”) 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 claiming compensation to provide evidence to establish that compensation is due.”

The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the Act. Further, an applicant claiming compensation for damage must prove the following, pursuant to PG #16:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

[the “Test”]

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. According to PG #16:

> A party seeking compensation should present compelling evidence of the value of the damage or loss in question. For example, if a landlord is claiming for carpet cleaning, a receipt from the carpet cleaning company should be provided in evidence.

LANDLORD'S CLAIMS

The Landlord does not have a move-in CIR to compare the condition of the rental unit to the move-out CIR when the tenancy ended. However, I find the Landlord provided evidence that the rental unit was newly renovated and in reasonably good condition at the start of the tenancy. This assists in determining the reasonableness of the Landlord's claim for damages; however, pursuant to section 24 of the Act, the Landlord has extinguished her right to claim against the security and pet damage deposits.

Cleaning

In the Tenants' photographs I reviewed, I found the rental unit to look reasonably clean and tidy. In contrast, on review of the same number of the Landlord's photographs, I found her complaints to be rather finnicky. For instance, the photograph labelled "pinkmoldinshower" shows a minute amount of what could be pink mould in a crevice of the shower.

However, I find that the windows in the living room did looked smudged. PG #1 states that tenants are responsible for cleaning the inside windows and tracks during, and at the end of the tenancy, regardless of the condition of the windows at the beginning of the tenancy.

Further, the Landlord's photographs of apparent damage to such things as carpets cannot be compared to their condition at the start of the tenancy, because a condition inspection was not done at the start of the tenancy. Further, I find it unclear from some of the Landlord's photographs as to what dirt or damage is evidenced. The Landlord submitted a photograph entitled: "faucets-polishcomingoff". Again, there is insufficient evidence as to the state of the faucet in question at the beginning of the tenancy.

The Landlord submitted a photograph labelled "dirtyfloors-whererugwas"; however, with the pattern in the laminate, it is difficult to see the dirt she states is present.

Based on the Parties' photographs, their testimony in the hearing, and the Letter from the neighbour, I find that the residential property was left "reasonably clean" by the Tenants. As noted above, PG #1:

> An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant.

I find it more likely than not that the Landlord was holding the Tenants to a higher standard than is required under the Act and Policy Guidelines. I find the Landlord did not pass the first step of the Test in establishing on a balance of probabilities that the Tenants violated the Act, regulation or tenancy agreement in terms of the cleanliness of the rental unit at the end of the tenancy.

Further, the Landlord acknowledged that she did not investigate other options before agreeing to retain the Cleaner, who took 22.5 hours to clean the rental unit at a cost of $47.50 per hour. I find that this hourly rate is much higher than the standard rate of approximately $25.00 to $30.00 per hour. As such, I find the Landlord did not attempt to minimize or mitigate her claimed damage in this regard by finding someone to clean at a reasonable rate. I find she thereby failed step four of the Test. Based on these considerations of the evidence, I dismiss this part of the Landlord's application without leave to reapply.

Painting

I find that the Landlord's photographs reveal some damaged items and examples of imperfect painting touch-ups at the end of the tenancy; however, without the Parties having completed a condition inspection at the start of the tenancy, there is nothing to which we can compare the damaged or imperfect items at the end of the tenancy.

The Tenants acknowledged having done "little fixes and repairs" to the rental unit with the paint that was stored in the residential property, identified for the rooms to which the paint related. As such, I find it unlikely that the Tenants would have used the wrong colour paint. I find that the Tenants were complying with their obligations under sections 32 and 37 to "leave the rental unit undamaged and reasonably clean". Accordingly, I find that some of the imperfections noted in the Landlord's evidence may have been caused by the Tenants' attempt to do repairs; however, based on the evidence before me in this matter overall, I find that the Landlord did not establish that the Tenants' actions were so extensive that the entire house required repainting.

According to section 7(2) of the Act, step four in the Test, and Policy Guidelines #5 and 16, the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible.

The Landlord claimed $2,700.00 for cleaning and painting, based on estimates when she applied for dispute resolution. However, she did not indicate that she sought out other estimates from other suppliers, which goes against her requirement to mitigate her losses. In addition, the Landlord submitted estimates of the painting cost, rather than costs which she has incurred. I find this indicates that the Landlord failed step three of the Test to establish the value of the loss. In addition, I find that steps were not taken to minimize the loss, in accordance with PGs #5 and 16, and section 7 of the Act.

I have found that the Landlord suffered some undisputed loss in terms of painting imperfections, as the Tenants acknowledged having done some touch-ups themselves, rather than having had them professionally done; however, I find on a balance of probabilities that the Landlord provided insufficient evidence to prove steps 3 and 4 of the Test -- that she had complied with section 7 of the Act in proving the value of the loss or that she mitigated the loss. Nevertheless, I find the Landlord did suffer a loss due to the condition in which the Tenants left the rental unit. Therefore, I award the Landlord a nominal amount of 10% of her claim or **$270.00**; otherwise, I dismiss the Landlord's application wholly without leave to reapply.

TENANT'S CLAIMS

The Tenants' applied for recovery of double their security deposit. This claim is governed by section 38 of the Act, which states:

> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (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:
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> (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.

The consequences for a landlord of failing to comply with the requirements of section 38(1), are set out in section 38(6)(b) of the Act:

(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.

The Act states that a landlord must return the security deposit or apply for dispute resolution within 15 days of the latest date; it does not say that the application must be served on the tenants within this deadline, as the Tenants had suggested.

I find that the Tenants provided their forwarding address to the Landlord on August 14, 2019, and that it is more likely than not that the tenancy ended on the day of the move-out condition inspection, August 14, 2019. Therefore, pursuant to section 38(1), the Landlord was required to return the $2,700.00 security deposit within fifteen days of August 14, 2019, namely by August 29, 2019, or apply for dispute resolution to claim against the security deposit within that time. The Landlord provided no evidence that she returned any of the deposit; however, the Landlord applied for dispute resolution, claiming against the security deposit on August 28, 2019. I, therefore, find the that Landlord complied with her obligations under Section 38(1), and is not subject to the consequences of section 38(6).

I order the Landlord to return the $2,700.00 security deposit to the Tenants. There is no interest payable on the security deposit.

Set-Off of Claims

I have granted the Landlord a nominal monetary award of $270.00 for damages, and the Tenant a monetary order of $2,700.00 for the return of the security damage deposit. I find that the Landlord's award meets the criteria under section 72(2)(b) of the Act to be offset against the Tenants' security deposit of $2,700.00, in partial satisfaction of the Landlord's monetary award. I authorize the Landlord to retain $270.00 of the Tenants'

security deposit and return the remaining $2,430.00 to the Tenants, as soon as possible.

As a caution to the Landlord, section19 of the Act states that a landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of **half** of one month's rent payable under the tenancy agreement.

Given that the Parties were both partially successful in their claims, I decline to award either the recovery of their $100.00 Application filing fee.

Conclusion

The Landlord applied for compensation for damage she said she incurred in the form of cleaning and painting, given the condition in which the Tenants left the rental unit. However, I found there was limited evidence before me of the condition of the rental unit at the start of the tenancy, compared to that at the end of the tenancy. Further, the Landlord failed to mitigate or minimize her stated losses by investigating cleaning and painting options.

I found that the Tenants left the rental unit in a reasonably clean, minimally damaged condition. I granted the Landlord a nominal award of 10% of her claim in the amount of $270.00 as compensation for the minimal damage left behind.

The Tenants' claim for recovery of double the security deposit is unsuccessful, because the Landlord complied with section 38(1) of the Act in applying for dispute resolution within 15 days of the later of the end of the tenancy and receipt of the Tenants' written forwarding address. Accordingly, the Landlord was responsible for returning only the Tenants' $2,700.00 security deposit.

Given their respective partial success, neither Party is awarded recovery of their $100.00 Application filing fee.

After setting off the awards, I grant the Tenants a monetary order pursuant to section 67 of the Act from the Landlord in the amount of **$2,430.00**.

This Order must be served on the Landlord by the Tenants and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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 15, 2020

Residential Tenancy Branch