Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNSDB-DR / MNDL-S, MNDCL-S, FFL**

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's for:

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $5,060 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenants' for:

- a monetary order for $1,070 representing two times the amount of the security deposit and pet damage deposit, pursuant to sections 38 and 62 of the Act.

All 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 by an advocate ("**MB**").

Preliminary issue – Tenants' Advocate

At the outset of the hearing the landlord objected to the presence of the tenants' agent MB. He asked that she not be permitted to attend the hearing as it would be unfair to him given that he was not represented. He argued that if MB were lawyer her presence would be permitted but given that she was an advocate she should be excluded.

Rule of Procedure 6.7 states:

> **6.7 Party may be represented or assisted**
> A party to a dispute resolution hearing may be represented by an agent or a lawyer and may be assisted by an advocate, an interpreter, or any other person whose assistance the party requires in order to make their presentation.

Accordingly, I find that the tenants have the right for MB to represent them at the hearing. The landlord is also permitted to be represented at this hearing. The fact that he has not availed himself of this right does not cause the tenants to be denied theirs.

Preliminary Issue - Service

MB stated, and the landlord confirmed, that the tenants served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and MB confirmed, that the landlord served the tenant with his notice of dispute resolution form. However, MB stated that neither she nor the tenants had received the landlord's evidence package.

The landlord testified that he had emailed photographs to MB and the tenants on prior occasions as well as an invoice for damages incurred. MB confirmed that she had received photographs at various times from the landlord, but she was not aware landlord and tenant to rely on these photographs at the hearing. She was unaware if she had received an invoice from the landlord.

For the procedure 3.13 and 3.14 require the landlord to serve his documentary evidence on the tenants in a single package no later than 14 days before the hearing. The landlord did not do this. Accordingly, I find that the landlord has not served as evidence in accordance with the Act.

However, I permitted the photographs the landlord submitted to the Residential Tenancy Branch (the "**RTB**") to be entered into evidence on a provisionary basis, on the condition the tenants of MB confirm they had received the photos he would reference during his submissions. If they confirmed they had received the photograph prior to the hearing, I would admit it into evidence. As it happened, the landlord only referred to two photographs (one of a chip in the floor and another of the baseboard) and the tenants confirmed they had only received one of them (that of the chip in the floor). Accordingly, I admit the photo of the floor submitted by the landlord into evidence. All other photos are excluded.

I did not permit the invoice to be entered to evidence as the tenants cannot confirm they received it and also as the landlord have not provided a copy of the invoice to the RTB.

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $5,160;
2) recover their filing fee; and
3) retain the security deposit in satisfaction/partial satisfaction of the monetary orders made?

Are the tenants entitled to:

1) a monetary order of $1,070?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written fixed-term tenancy agreement starting June 25, 2019 and ending June 25, 2020. Monthly rent was $1,850 and is payable on the twenty-fifth of each month. The tenants paid the landlord a security deposit of $925 and a pet damage deposit of $500. Additionally, the tenants paid the landlord a key fob deposit of $300. However, MB advised me that the tenants do not consider this amount to be part of the security deposit for the purposes of their application.

The parties entered into a mutual agreement to end tenancy on June 4, 2020. In part, it states:

> The landlord holds $1,725 in deposits from the tenants and agrees to apply $1,190 of the amount to pay the rent owing for the period of May 25 to June 25, 2020.
>
> […]
>
> The tenants will return vacant possession of the Unit, in a clean and re-rentable condition, on or before June 25, 2020. At the same time, they will return all keys and fobs for the Unit, and at that time the landlord will return the balance of the tenants' deposits, $535, to the tenants by etransfer.

In her affidavit, tenant MM affirmed that, on June 25, 2020, the tenants provided the landlord with vacant possession of the rental unit, after having cleaned it. The tenants returned their fobs and keys to the landlord at this time as well. She attached an email from the landlord to her affidavit which was sent on June 25, 2020 by the landlord which states: "confirming recoving [sic] key and parking tag".

The tenants also entered a video into evidence taken on June 25, 2020 of the landlord wherein he states "I'm going to send you and email… to confirm receiving key and parking pass". The landlord testified that the tenants returned the apartment key, the mailbox key and the fob. He testified that the tenants did not return the storage key.

The tenants denied this. MB stated that all keys were returned to the landlord.

The landlord did not return the balance of the deposit ($535) to the tenants as agreed to in the mutual agreement to end tenancy. He alleged that the tenants at caused damage to the rental unit.

In his application for dispute resolution the (Landlord) indicated he had incurred damages as follows:

- $1,200 for painting the hallway kitchen living room
- $375 for flooring to the kitchen
- $350 for cleaning the apartment
- $300 for moving in and moving out fees by strata
- $420 for pet damage replacement and painting
- Locker room replacement key (he did not specify any amount)

Landlord did not provide any invoices, emails, or other documentation supporting these alleged expenses. Additionally, the landlord did not conduct a move-in condition inspection report at the start of the tenancy. He provided no evidence as to the condition of the rental unit at the start of the tenancy. He testified that the baseboard had teeth marks from pets on it, the rental unit needed to be repainted, and that the tenants chipped the flooring in the kitchen.

The tenants denied they caused any of the alleged damage. They submitted photographs of the rental unit taken before they vacated which show it to be reasonably clean.

The tenants argued that the landlords claim for compensation was without merit. They denied causing any damage to the baseboards or floor. They testified that the walls did not require repainting. They testified that the rental unit did not require any additional cleaning at the end of the tenancy.

The tenants seek the return of double the amount of the balance of the security deposit.

The tenants provided their forwarding address to the landlord via email on July 3, 2020. Later that day the landlord replied to this email, the content of which was unrelated to the forwarding address (it related to the replacement of lightbulbs in the rental unit). MB submitted that this response indicated that the landlord had received the forwarding address on July 3, 2020.

The tenants sent the forwarding address to the landlord by registered mail on July 27, 2020. Landlord filed his application to retain deposit on July 31, 2020.

In her submissions, MD argued that:

> The landlord's right to claim against the security deposit and pet damage deposit for damage to the rental unit is extinguished by his failure to participate in and provide a condition inspection report on move in or move out.
>
> […]

> […] the landlord did not return the deposit, or file to retain it with 15 days of receiving the tenants' forwarding address by email and therefore, section 36(6) [of the Act] applies: the landlord may not make a claim against the deposit, and must repay the tenants double the deposit.
>
> [emphasis original]

Analysis

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied 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:
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> - 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 "**Four-Part Test**")

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> 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. In most circumstances this is the person making the application.

So, in order for the landlord to obtain the relief he seeks, he must prove it is more likely than not that the tenants breach the Act, that he suffered a quantifiable loss as a result of this breach, and that he acted reasonably to minimize his loss.

The basis for the tenant's monetary claim is not one that rests in proving that they suffered damages but rather rests on the operation of the Act itself. The tenants must

prove it is more likely than not that the landlord failed to return the balance of the security deposit to them in accordance with the Act.

1. Landlord's Claim

It is not necessary for me to examine each element of the landlord's claim for damage. Similarly, it is not necessary for me to determine if the landlord caused the damages as alleged. The third part of the Four-Part Test requires the landlord to prove the amount of value of the loss he suffered. The landlord has not provided any documentary evidence which supports his monetary claim. I note that the amounts set out in his description of the loss suffered amount to $2,645, and not $5,060, as he claimed his loss to be on the application for dispute resolution. I cannot say how he arrived at this amount.

I find that, not only has the landlord failed to show how he arrived at the total for the amounts of damages he alleges to have suffered, but he has failed to prove that he incurred the costs of the specific damages he alleges to have suffered. Without invoices, receipts, or other such corroborating documentation, I cannot find that the landlord has satisfied the third part of the Four-Part Test.

As such, I dismiss the landlord's claim, in its entirety, without leave to reapply.

2. Tenants' Application

I find that the tenants are entitled to the return of double the deposits on two separate bases.

i. Landlord's right to claim against the security deposit is extinguished

It is not disputed that the landlord failed to complete a move-in condition inspection report.

The completion of the move-in report at the start and end of the tenancy is required by sections 23(4) of the Act, which states:

> **Condition inspection: start of tenancy or new pet**
> 23(4) The landlord must complete a condition inspection report in accordance with the regulations.

The consequences for the failure to complete such a report are set out at sections 24(2) of the Act:

> **Consequences for tenant and landlord if report requirements not met**
> 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

> (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

I find that, in accordance with sections 24(2)(c) of the Act, the landlord's right to claim against the security deposit is extinguished for failure to complete a condition inspection report at the start of the tenancy.

Residential Tenancy Policy Guideline 17 states:

> C3. 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
>
> […]
>
> - if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;
>
> […]
>
> - whether or not the landlord may have a valid monetary claim.

The tenants have not specifically waived the doubling of the deposits. The landlord's right to claim against the deposits is extinguished. Therefore, the tenant is entitled to receive double the amount of the balance of the deposits from the landlord.

ii. Landlord failed to apply to retain the deposit within 15 days of receiving the forwarding address

Section 38(1) of the Act states:

> **Return of security deposit and pet damage deposit**
> 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.

Based on the testimony of the tenants, I find that the tenancy ended on June 25, 2020 and that the tenants provided their forwarding address in writing via email to the landlord on July 3, 2020.

Section 71(2)(c) states:

> (2) In addition to the authority under subsection (1), the director may make any of the following orders:
> […]
> (c) that a document not served in accordance with section 88 or 89 [which do not include service by email] is sufficiently given or served for purposes of this Act.

I think it appropriate to find that the forwarding address was sufficiently service on July 3, 2020 via email in light of the facts that:

1) the documentary evidence supports that he received the email on July 3, 2020, as is evidenced by his replying to it (albeit not explicitly confirming receipt); and
2) the landlord regularly communicated with the MB and the tenants via email (as is evidenced by his testimony that he emailed them photos of the rental unit at various time prior to this hearing).

I find that the landlord has not returned the security deposit to the tenants within 15 days of receiving their forwarding address, or at all.

I find that the landlord has not made an application for dispute resolution claiming against the security deposit within 15 days of receiving the forwarding address from the tenants.

It is not enough for the landlord to allege the tenants caused damage to the rental unit in that 15-day window. He must actually apply for dispute resolution, claiming against the security deposit, within 15 days from receiving the tenants' forwarding address.

The landlord did not do this. Accordingly, I find that he has failed to comply with his obligations under section 38(1) of the Act.

Section 38(6) of the Act sets out what is to occur in the event that a landlord fails to return or claim the security deposit within the specified timeframe:

> (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 language of section 38(6)(b) is mandatory. As the landlord has failed to comply with section 38(1), I must order that they pay the tenants double the amount of the balance of the deposits ($1,070).

As the tenants have been successful in their application, I order that the landlord reimburse them their filing fee ($100).

Conclusion

Pursuant to sections 38, 62, and 72 of the Act, I order that the landlord pay the tenants $1,170, representing the reimbursement of their filing fee plus the return of double the amount of the balance of the security deposits.

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: November 23, 2020

Residential Tenancy Branch