Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, FFT

For the tenant: MNSDB-DR, OLC, FFT
For the landlord: MNRL-S, MNDCL-S, FFL

Introduction

The tenant filed an Application for Dispute Resolution (the "tenant Application") on March 5, 2021 seeking an order for the return of the security deposit retained by the landlord since the end of the tenancy.

The landlord filed an Application for Dispute Resolution (the "landlord Application") on March 10, 2021 seeking an order for compensation for damage caused by the tenant, and compensation for unpaid rent. The landlord applies to use the security deposit towards compensation on these two claims. Additionally, the landlord seeks to recover the filing fee for the Application.

The landlord stated that they delivered notice of this dispute, as well as their prepared evidence, to the tenant via Canada Post registered mail on March 17, 2021. A tracking record they provided in their evidence shows this delivery completed on March 19, 2021. The tenant attending the hearing confirmed receipt of the Application and evidence package via registered mail.

The matter was adjourned at the initial hearing on April 26, 2021, with my Interim Decision following on April 28, 2021. This was to allow the landlord a proper amount of time to review two other applications by the tenant. I joined these applications to this hearing, with all Applications concerning the same tenancy. The tenant provided disclosure to the landlord after the adjournment, and I allowed for no further submissions from either party before the reconvened hearing.

The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "Act") on May 5, 2021. Both parties attended the conference call hearing. I explained the process and offered both parties the opportunity to ask questions. Both parties had the opportunity to present oral testimony and present their prepared evidence in the hearing.

Preliminary Matters

On their initial Application on March 5, 2020, the tenant applied for an order that provides for the landlord's compliance with the tenancy agreement and/or the legislation on a discrete issue. At the initial hearing, the tenant stated they were withdrawing this portion of the Application. Their other Applications joined here concern the return of the security deposit; therefore, the focus of the tenant's Application herein is their lawful right to its return.

In the May 5 ,2021 hearing, the tenant added a monetary portion to their claim. This is $600 for moving time when the tenancy ended on March 1, 2021. They stated this is "basically because the move out was not fair" and represents the cost of 6 hours' worth of moving time. The landlord stated their objection to this by submitting there is no basis, neither in the *Act* nor the tenancy agreement, where moving expenses are due. Regarding the fairness aspect of the need to end the tenancy, the landlord reiterated their submissions that they acted in good faith throughout the whole tenancy.

The tenant added this portion of the claim in the reconvened hearing. I adjourned the matter to ensure disclosure of additional material to the landlord, based on two other Applications filed by the tenant. In the Interim Decision, I allowed for no further submissions. In line with this, I dismiss the tenant's claim for this additional amount. I find this portion did not form part of their original Applications and amounts to additional submissions made in the interim. The tenant submitted their invoice for this to this office on April 30, after I adjourned the matter and specified there were no more submissions. I find that were it not for the adjournment, the tenant would not have made this additional claim. Given that the tenant did not apply for this at the outset and did not properly file an amendment to their claim, I dismiss this portion of their claim. There are no circumstances present that were not reasonably foreseeable in relation to this part of their claim, and there is no reason why the tenant did not amend their Application in advance.

Issue(s) to be Decided

- Is the landlord entitled to monetary compensation for unpaid rent and/or damage to the rental unit, pursuant to s. 67 of the *Act*?

- Is the tenant entitled to a monetary order for the return of the security and pet damage deposits pursuant to s. 38(1)(c) of the *Act*?

- Is the landlord entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

- Is the tenant entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

Background and Evidence

In the hearing, the landlord provided that this agreement with the tenant was their own subletting of the unit. This was approved by their own landlord in September 2017, as shown in the provided email dated September 18, 2017. By January 2018, the landlord advised they found a suitable person -- i.e., the tenant here -- who would "take over the unit on April 1st."

Both parties provided a copy of the tenancy agreement and a "Notice of tenant's responsibilities." This shows the tenancy started on April 18, 2018 and was initially set for a fixed term that would end on March 30, 2019. The amount of rent was set at $3,500 per month, payable on the first of each month. The copy in the evidence shows the parties singed the agreement on January 24, 2018.

The landlord's written submission has it that after the first year of the tenancy, they had a discussion with the tenant to extend the tenancy. This same arrangement followed in 2020.

A three-page addendum also forms part of the agreement and was signed by the tenant on January 24, and by the landlord on January 28, 2018. The addendum specifies that no pets are allowed. Also, clause (12) in section 8 provides that the parties "hereby agree to adopt the Move In condition Inspection Report dated April 1, 2018 . . .and bring forward such Report as the Move in Condition Report to this new Tenancy Agreement."

The tenancy agreement also shows an amount of $1,750 paid for a security deposit. Later in the tenancy, the landlord asked for a pet damage deposit from the tenant, and the tenant then paid $500 on November 17, 2020 for this. In the hearing, the landlord stated this was as a result of their visit in October 2020, when they discovered a pet, as well as a roommate who told the landlord they were living in the rental unit since the start of the tenancy. In response to this, the tenant acknowledged there was a pet; however, the pet was there for only a few months.

i. landlord's claim for rent – February 2021

The tenancy ended on March 1, 2021. This is also the date the tenant moved out from the rental unit. In their evidence, the tenant provided an email series starting December 9, 2020, in which the landlord states: "I write to give you formal notice, as per our rental agreement, of the termination of your tenancy effective March 1, 2021." The landlord's own account is that this was due to their personal circumstances and they wanted to move back to the unit.

The tenant replied to ask why the tenancy was ending. The landlord responded that this was for the pet issue, as well as the agreement that stated the tenant here was the sole occupant. The landlord also listed the tenant's failure to pay for a water leak, for which the visiting plumber assessed the cause as "neglect and accumulation of hair in the drain." Additionally, the landlord found the smoke alarm was detached from the wall and a failure to provide post-dated rent cheques. The landlord also provided in this message that the terms of the Addendum in the rental agreement show that both parties agreed to 60 days' notice to the other when they wished to end the tenancy.

The landlord provided an email response from December 16, 2020. They asked for the tenant to sign an "End of Tenancy form" because they had discussed ending the tenancy and had an oral agreement on December 11, 2020. This also sets out that the tenant had asked for a return of the deposits, and they had agreed to pay the final month of rent. In the tenant's own evidence, this piece is provided, and labelled by the tenant as "why [the landlord] is ending the tenancy."

The landlord also issued a Two Month Notice to End Tenancy (the "Two-Month Notice") on December 18, 2020. They provided pages 3 through 4 of this 4-page document in their evidence.

The tenant provided another email dated December 22, 2020 which gives the details of a "Mutual Agreement to End Tenancy". This specifies their own conditions are to be satisfied "on/or before February 28, 2021": return of security and pet damage deposit amounts, "subject

to any valid deductions permitted. . .”; and payment of February rent which “at the option for the Tenant, may be deducted from the deposits. . .”

In their submission, the landlord indicated they could not agree to this. They also ceased communicating directly with the tenant after the tenant advised their own lawyer was involved and that was the only means of communication. Through January, the tenant did not specify a move-out date, and then initiated dispute resolution. Following this, the tenant did not pay rent in February.

The tenant submitted because they received a Two-Month Notice, this entitled them to the final month free of rent. This cancels any other agreement in place, and essentially made the tenancy a month-to-month agreement.

The tenant provided an undated image of a text message from the time when they had finalized the final move-out date. This states: “Just had to pay my security deposit for my new place I am going to use February as the one free month I am entitled to.”

The landlord claims the month of February as unpaid rent. This is based on their assertion that the tenancy ended based on a mutual agreement. In the hearing they also reiterated that the original agreement was a sub-lease agreement, hinging on the original agreement that should either party wish to end the tenancy, they would advise the other of that 60 days in advance. Their reply to the tenant’s text message set out above is: “

> You are not entitled to one month free rent for the sub-lease according to our contract. We both agreed to let the other know 60 days in advance of moving out. This was a sub-lease and, at all times, the intention was that I move back. I would never have sub-leased it at all if I was to pay your rent for the last month.

ii. <u>landlord’s claim for damages to the rental unit</u>

The Addendum to the tenancy agreement signed by both parties on January 28, 2018 contains the following clause:

> The Tenant acknowledges and agrees to mend any holes, touch up or repaint (with the same colour code prior to moving in) the walls and/or any surfaces as the case may be, before moving out. . . .Remedial work for such damages is not considered normal wear-and-tear and will be at the expense of the Tenant.

The landlord here presented that the tenant requested to paint a wall dark blue at the start of the tenancy and said they would repaint it before the landlord would move back into the unit. This was “the tenant’s own promise.”

In their written account, the landlord provided that the tenant requested to paint some walls inside and asked to change the carpet. The tenant and their brother promised they would paint the unit back to the original colour when the landlord moved back into the unit.

On December 9 – the same day the landlord advised they wish to end the tenancy – they asked the tenant to paint the walls back to the original colour, “as you had both promised you would do at the end of your tenancy”. Also: “if you are unable to find the original colour, white is fine.” In the hearing the landlord provided that the tenant’s brother is a painter.

On December 16, 2020, following the parties’ discussion on December 11 about the end-of-tenancy date and payment of February rent, the landlord sent an email to the tenant. They stated: “You had also asked me to paint the unit myself, as opposed to what we had initially agreed with [the tenant’s brother] and I will do so.”

Toward the end of the tenancy on February 3 the landlord asked about the repainting, the tenant “did not commit either way to fulfilling [their] promise to re-paint the unit.” They asked for plans before the end of that week, and the tenant did not respond to this. On February 15, the landlord attended the unit to have the cost of repainting estimated.

On March 1, 2021 when the tenant vacated the rental unit, the landlord and the tenant conducted an inspection meeting. The unit was not repainted. Among other deficiencies, the carpets in the bedroom were not cleaned.

The landlord provided a copy of the Condition Inspection Report. This shows the completed move-out inspection report for March 1, 2021. The tenant wrote they “DO NOT” agree with any deductions from the paid deposits. The document bears the tenant’s forwarding address; however, the tenant did not sign the document on line 5 on page 3 for the move-out.

The report in section J indicates “to be painted” for entry walls and trim. For the bedrooms, there is no indication for the floors or carpets. There is no other indication for carpets or floors in any other room of the rental unit.

The landlord provided an invoice for their claimed amount, dated March 3, 2021, for $992.25. This is for repair to damaged walls and paint for interior walls, for $845 and $100 for carpet

cleaning in 2 bedrooms. The landlord included one image that shows repair to a wall in the rental unit.

In the hearing, the tenant provided that they did not recall the agreement whereby they had to repaint walls upon move out. They also provided that they had carpets professionally cleaned before they left. Further, they stated there was no move-inspection at the start of the tenancy.

More generally, they replied that the landlord's claims here are "vindictive" because the tenant would not pay for a plumbing bill when a leak prompted the strata to respond and repair the leak on an emergency basis.

As part of their claim for the security deposit, the tenant included photos of the rental unit. These are not in colour; however, images of the walls show a darker colour. Images of the rooms inside do show carpeting.

Responding to the tenant's submissions, the landlord provided that the tenant's own conversation shows they did not want to do a move-in inspection. This is undated, showing the tenant's request for "the inspection report from when I moved in". The landlord's response was: "You said that it was fine when you moved in, so I don't have one."

Additionally, the landlord submits they acted in good faith where their visit in October was prompted by the plumbing issue; this visit led to their discovery of other issues within the unit.

iii. tenant's claim for return of the security deposit

The tenant completed their direct request Application for the return of their deposit on April 4, 2021. They requested the full amounts returned for both deposits, $1,750 and $500. In a worksheet they prepared for their direct request, they provided that they did not receive a copy of the move-out condition inspection report. Similarly, they listed that they did not receive a copy of the inspection report when moving in, because "[the landlord] never did a move in inspection."

The tenant also provided an image of the specific form they used to notify the landlord of their forwarding address. This is dated March 15, 2021. The move-out condition inspection report shows the same forwarding address in that provided space in section 5 on page 3. In their evidence, they provided a Canada post tracking number that is purportedly that of the registered mail used to send this information to the landlord.

The tenant provided their message to/from the landlord, undated, regarding the initial move-in inspection. This shows the tenant asking the landlord for a copy of move-in inspection report "from when I moved in". The landlord's response was: "You said that it was fine when you moved in, so I don't have one."

Additionally, the tenant provided 6 photos of carpets and walls in their evidence.

The landlord made their Application to claim against the security deposit on March 10, 2021. This is after the tenancy ended on March 1, 2021.

Analysis

i. landlord's claim for rent – February 2021

The *Act* s. 49(3) provides that a landlord may end a tenancy if they intend in good faith to occupy the rental unit. This required notice to the tenant must specify an end-of-tenancy date that is "not earlier than 2 months after the date the tenant receives the notice". Additionally, s. 51 provides for "an amount that is the equivalent of one month's rent" to the tenant for such a notice from the landlord. This is the piece of the *Act* on which the tenant submits is applicable to the situation here, for their final month of February being rent-free.

I find the onus here is on the tenant to show the landlord delivered a Two-Month Notice that would entitle them to the final month of February as rent-free. The tenant here did not do so. I am not satisfied the landlord issued a valid Two-Month Notice to the tenant. Although a copy of the document supposedly that of the Two-Month Notice appears in the landlord's evidence, the first page of that document does not appear in their evidence, and I cannot verify that they issued a complete, form-specific Two-Month Notice to the tenant.

To be clear: this is not a matter of the landlord having to justify the issuance of a Two-Month Notice; rather, this is the tenant relying on the document to show they are entitled to rent one month free. Because the tenant has not met the burden here, I find it more likely than not that there was an agreement in place at the very start of the tenancy between the landlord and the tenant. This is due to the fact that the landlord is in a sub-lease agreement as they have shown in their initial communication with their own landlord from 2017. The landlord reiterated throughout that the arrangement was for either party to provide 60 days' notice when they wish to end the agreement. I find that this arrangement would not be in place were this not the landlord's own sub-lease agreement.

In line with this, the landlord gave their notice to the tenant that they wish to end the tenancy. They did so on December 9, 2020, for the move-out date of March 1, 2021. This is, in effect, over 60 days' notice. It would appear that a Two-Month Notice is ostensibly the same scheme under the legislation for the landlord to effect an end to the tenancy; however, I accept the landlord's testimony and evidence in the form of their repeated messages to the tenant that the arrangement between the parties was in place for 60 days' notice, regardless of the reasons for ending the tenancy.

The landlord also provided evidence that they wished to end the tenancy for reasons of the tenant's own violation of terms of the agreement. Primarily these were no pets and no additional occupants. In October 2020, the landlord discovered that the tenant breached these conditions. Additionally, there was the tenant's failure to provide post-dated cheques and the dismantling of the smoke alarm in the rental unit. I find it more likely than not these were the additional reasons the landlord wished to end the tenancy and informed the tenant of that via email on December 9, 2020. I find the landlord wished to end the tenancy for basic reasons, for which they advised the tenant, and this is permissible as per their 60-day agreement of one party giving notice to the other.

The tenant replied on December 22 that they wished to withhold the February rent payment. They labelled this a "mutual agreement to end tenancy" in that message, which supports the landlord's point that the end of tenancy *was* a mutual agreement, based on their 60-day notice. Though the tenant stated their wish to withhold the February rent, this is not allowed as per the *Act*, and in this situation, I find s. 51 does not apply. Again, the tenant here did not prove the landlord was ending the tenancy via a s. 49 Two-Month Notice. Additionally, they did not prove the agreement became a month-to-month tenancy after the initial tenancy agreement expired at the end of the first year.

For this portion of the landlord's claim, I award the full amount of February 2021 rent, at $3,500. The landlord's evidence is sound, and they are credible on the point that there was an agreement between the parties reaching back all the way to the very start. I find this was a mutual agreement to end the tenancy, and s. 51 does not apply to this situation.

ii. landlord's claim for damages to the rental unit

Under s. 7 of the *Act*, a landlord or tenant who does not comply with the legislation or their tenancy agreement must compensate the other for damage or loss. Additionally, the party who claims compensation must do whatever is reasonable to minimize the damage or loss. Pursuant to s. 67 of the *Act*, I shall determine the amount of compensation that is due, and

order that the responsible party pay compensation to the other party if I determine that the claim is valid.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

I find the landlord is entitled to cost incurred for necessary repainting within the rental unit. There is evidence the tenant and landlord had an agreement from the beginning of this agreement for the tenant to repaint the unit to the original colour when the tenancy ended. The landlord provided emails on their repeated queries to the tenant, and their statement in the hearing that the tenant's brother is a painter lends credence to their account: I find it more likely than not the landlord conceded to this tenant's request at the outset because the tenant's brother is a painter, and this would ease the transition back to the unit's original state at the start of the tenancy.

Further, I find this was a key point for the landlord to raise as soon as the end of tenancy came to the fore in December 2020. From the outset of the communication between the parties, the landlord mentioned the topic, and made a point of repeating the query to the tenant. This was not an instance of the landlord discovering damage at the end of the tenancy; rather, I find this arrangement even formed part of the agreement. The Addendum makes specific mention for this, signed by both parties at the start of the tenancy.

The only image from the landlord that captures something of the walls is one showing some work being done on one of the walls in the unit. This is wall repair, and this is consistent to what is presented in their provided invoice. The invoice does not specify which walls. The Condition Inspection Report they provided does not give further information.

The tenant's own evidence, however, shows painted walls. From these images, I am satisfied there was a significant amount of painting involved. With reference to the four criteria listed above, I find the landlord has proven through their testimony and evidence that a damage exists, and that it results from the tenant's breach of their agreement. Moreover, I find the landlord took steps to have the tenant restore the paint colour to the original – this is an effort at minimizing any cost involved to repaint.

Given the amount of the expense involved, I find the invoice is accurate when matched with the tenant's own provided pictures. I find the amount of $750 captures the work involved, separating this from repair for a window handle and a damaged ceiling that the landlord did not specifically claim for, and is not shown by photos in the evidence.

There is no evidence the landlord mentioned the need for carpet cleaning to the tenant in the move-out inspection meeting. This is not reflected in the provided report, and the landlord did not provide photos that show the need for this. This piece of the landlord's own receipt is not included in the award – the landlord did not establish that this damage exists.

For the landlord's claim for damages, I so award $787.50, the above amount which includes GST.

iii. tenant's claim for return of the security deposit

The tenant completed their direct request Application for the return of their deposit on April 4, 2021

The *Act* s. 38(1) states:

1) . . .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. . .any security deposit . . . to the tenant
   d) make an application for dispute resolution claiming against the security deposit

Following this, s. 38(4) sets out that the landlord may retain an amount from the security deposit with either the tenant's written agreement, or by a monetary order of this office.

Further, s. 38(6) provides that

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 . . .

In this hearing, I find the landlord had the tenant's forwarding address when the tenant provided that at the move-out inspection meeting on March 1, 2021. I find the landlord properly applied for dispute resolution within the 15 days as set out in the *Act* on March 10, 2021. They thus complied with subsection (1) set out above.

Above, I found the landlord has a valid monetary claim for the rent amount owing ($3,500) and damages to the rental unit ($787.50). The section following on from 38(4) above, is s. 72(2), that which gives an arbitrator the authority to make a deduction from the deposit amounts held by the landlord.

The landlord has established a claim of $4,287.50. After setting off the security deposit ($1,750) and pet damage deposit ($500), there is a balance owing of $2,037.50. I am authorizing the landlord to keep the security deposit and pet damage deposit and award the balance of $2,037.50 as compensation for rent owing and damage to the rental unit.

As a result of the landlord establishing their claim as set out above, the tenant's Application for the return of their security deposit is dismissed, without leave to reapply.

Because the landlord was successful in their claim, I award the $100 Application filing fee. The tenant was not successful in their claim; therefore, their Application for the filing fee is dismissed without leave to reapply.

Conclusion

I order that the tenant pay to the landlord the amount of $2,137.50. I grant the landlord a monetary order for this amount. The landlord may file this monetary order at the Provincial Court (Small Claims) where it will 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 s. 9.1(1) of the *Act*.

Dated: May 31, 2021

Residential Tenancy Branch