



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, FFL

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. A Monetary Order for damages to the unit - Section 67;
2. An Order to retain the security deposit - Section 38; and
3. An Order to recover the filing fee for this application - Section 72.

The Parties were each given full opportunity under oath to be heard, to present evidence and to make submissions.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Relevant Background and Evidence

The following are agreed facts: The tenancy under written agreement started on October 1, 2020 and ended on December 31, 2020 by mutual agreement. The Tenant moved out of the unit on December 1, 2020 and returned the keys to the unit on December 19, 2020. Rent of \$1,950.00 was payable on the first day of each month. At the outset of the tenancy the Landlord collected \$975.00 as a security deposit and \$975.00 as a pet deposit. On December 29, 2020 the Landlord returned the pet deposit to the Tenant and the Tenant received it that day. The Parties mutually conducted a move-in inspection with a completed report copied to the Tenant. The Landlord provided a copy of the move-in report for the proceedings.

The Landlord states that the Parties mutually conducted a move-out inspection on December 12, 2020 but that the Tenant refused to sign the inspection report. The Landlord states that they did not complete the report while the Tenant was present and that the report was sent to the Tenant by email. The Landlord also states that it did not complete any report and that it only sent an incomplete inspection report. The Landlord states that the Tenant left before the inspection was completed because the Tenant disagreed that the Tenant damaged the garburator. The Landlord did not respond to the question of whether the report was provided as evidence for these proceedings.

The Tenant states that no inspection report was filled out or provided to the Tenant while the Tenant was present. The Tenant states that the inspection was "cut short" as the Tenant felt intimidated by the Landlord and her spouse who were unprofessional. The Tenant states that the Landlord was told to contact the Tenant when they want to finish the inspection. The Tenant states that the Landlord did not contact the Tenant to finish the inspection and that the Tenant did not subsequently receive any inspection report.

The Landlord states that the Tenant never asked the Landlord to contact her other than in relation to repairs and that the Tenant offered the Landlord's \$50.00 for any damages because the Tenant did not want to return. The Landlord states that they did not agree to that offer.

The Landlord states that the Tenant damaged the two walls in the living room, one wall in the bathroom, and two walls in the second bathroom. The Landlord claims \$1,620.00 as the costs for this damage. The Landlord provides an estimate and states that the walls were never painted as the new tenants accepted the walls in that state. The Landlord states that the unit was rented to the new tenants for January 1, 2021 at a monthly rental rate of \$1,980.00.

The Landlord states that the Tenant damaged the garburator causing it to leak. The Landlord did not have the garburator inspected for repair and claims the replacement cost of \$358.00. The Landlord states that the garburator was new to the condo that was 10 years old at the time. The Landlord states that the garburator was checked for its operations at the move-in inspection without problem. The Landlord states that at the move-out they retrieved a metal ball through the sink drain. The Landlord states that the garburator continued to work but that it was leaking. The Landlord states that it did not seek any repairs as they believed that the repairs would be equal to the replacement cost. The Landlord states that its belief is based on the Landlord "kinda knowing what a technical person charges". It is noted that the move-in report indicates some damage to the garburator as follows "bottom cracked garburator switch" without any notation of repairs to that item at the start of the tenancy.

The Tenant states that the Landlord did not check the operation of the garburator at move-in and that the Tenant told the Landlord at move-in that the Tenant would never use the garburator because of a childhood injury by a garburator. The Tenant states that the garburator was not turned on during the tenancy and that the side of the sink that drained into the garburator was covered with a plug and a metal rack to ensure that her child would not be injured. The Tenant provides a photo of the sink. The Tenant states that at move-out they never saw the Landlord remove anything from the garburator, that the garburator was not turned on while the Tenant was there and that the Landlord's spouse only produced a metal ball. The Tenant states that another person was present with the Tenant during the move-out inspection and that this person could provide supporting evidence that the garburator was not turned on. The Tenant confirms that this person did not provide a witness statement for these proceedings.

The Tenant does not dispute the Landlord claim for a cracked fridge shelf and the Parties agreed to settle the Landlord's claim of \$51.49 for **\$50.00**.

The Landlord states that it also wants to claim \$300.00 that was given to the Tenant as a gift. The Landlord confirms that this claim was not included in the monetary order worksheet or detailed in the application. The Landlord confirms that the application was not amended to include this claim.

Analysis

Section 35(2) of the Act provides that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the move-out inspection. Section 17(2) of the Regulations provides that if the tenant is not available at the time offered for the first opportunity, the landlord must propose a second opportunity, different from the first opportunity, to the tenant by providing the tenant with a notice in the approved form. Section 36(1) of the Act provides that the right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if

- (a) the landlord complied with section 35 (2) [*2 opportunities for inspection*], and
- (b) the tenant has not participated on either occasion.

Given the undisputed evidence that the Tenant attended the inspection that lasted for 45 minutes, I find that the Tenant's obligation to participate was substantially met and that the Tenant's right to return of the security deposit was not extinguished. Even if the inspection was not concluded due to the Tenant leaving, there is no evidence that the Landlord made a second offer to conclude the inspection.

Section 36(2)(a) of the Act provides that the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord, having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations. I found the Landlord's evidence of the completion of the inspection report to be confusing and inconsistent. No inspection report, either complete or

incomplete, could be found in the Landlord's evidence submissions. For these reasons and regardless of whether the Landlord completed the report, I prefer the Tenant's evidence and find on a balance of probabilities that no report was provided to the Tenant for signature or as a final copy of a duly completed report. As such, I find on a balance of probabilities that the Landlord's right to claim against the security deposit was extinguished at move out.

Section 38 of the Act provides that within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit or make an application for dispute resolution claiming against the security deposit. Where a landlord fails to comply with this section, the landlord must pay the tenant double the amount of the security deposit. Policy Guideline #17 provides that return of double the deposit will be ordered 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. As the Landlord's right to claim against the security deposit was extinguished, I find that the Landlord's only option at the end of the tenancy was to return the security deposit. The Landlord could still proceed with its claim for damages however since the Landlord did not return the security deposit and held it for their claim without right, I find that the Landlord must now pay the Tenant double the security deposit plus zero interest of **\$1,950.00**.

Section 37 of the Act provides that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. In a claim for damage or loss under the Act, regulation or tenancy agreement, the party claiming costs for the damage or loss must prove, inter alia, that costs for the damage or loss have been incurred or established. Whether or not the Tenant left the paint on the walls damaged, given the Landlord's evidence that

no costs or losses were incurred from any wall damage, I find that the Landlord has not substantiated its claim for paint costs and I dismiss this claim.

The Landlord did not dispute that they were informed by the Tenant at the onset of the tenancy that there would be no use of the garburator during the tenancy. The Tenant's evidence of not using the garburator during the tenancy held a ring of truth. The move-in report notes damage to the garburator switch without repairs to be done and I consider that this also supports that the Tenant did not use the damaged, and perhaps unsafe, garburator during the tenancy. Even if the Tenant did cause the garburator to leak, given the age of the damaged garburator, the Tenant would only be liable for some proportionate cost and not for the cost of a new garburator as claimed by the Landlord. The Landlord did not seek to mitigate its costs by having the garburator inspected to determine if repairs could be made or to determine if the costs for the repairs would outweigh the costs of a new garburator. For these reasons I find that the Landlord has not substantiated their claim for the garburator replacement costs and I dismiss this claim.

As the Parties have agreed on the Landlord's reimbursement of **\$50.00** for the cracked fridge shelf, I find that the Landlord has substantiated this entitlement.

Rule 2.2 of the Residential Tenancy Branch Rules of Procedure provides that claims are limited to what is stated in the application. As the Landlord did not include the claim for return of the \$300.00 gift in the total amount claimed in the application and as the Landlord made no amendment to the application to add this claim I find that the Landlord may not now have this claim considered. I dismiss this claim.

As the Landlord's claims have resulted in an entitlement of an amount less than the filing fee and given the Landlord's evidence of being offered the same amount from the Tenant at the end of the tenancy, I find that the Landlord is not entitled to recovery of

filing fee. Deducting the Landlord's entitlement of **\$50.00** from the Tenant's entitlement of **\$1,950.00** leaves **\$1,900.00** owed to the Tenant.

Conclusion

I grant the Tenant an order under Section 67 of the Act for **\$1,900.00**. If necessary, this order may be filed in the Small Claims 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 Act.

Dated: May 12, 2021

Residential Tenancy Branch