



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WITMAR HOLDINGS 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* ("Act") for:

- a monetary order for damage to the rental unit, pursuant to section 67;
- authorization to retain the tenant's security and key deposits, pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord's agent ("landlord"), the tenant, and the tenant's advocate attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 61 minutes.

At the outset of the hearing, I informed both parties that they were not permitted to record the hearing, as per Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure* ("Rules"). The landlord, the tenant, and the tenant's advocate all affirmed under oath that they would not record this hearing.

I explained the hearing and settlement processes to both parties. Both parties had an opportunity to ask questions. Neither party made any adjournment or accommodation requests. Both parties confirmed that they were ready to proceed with the hearing, they wanted me to make a decision, and they did not want to settle this application.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing package and the landlord confirmed receipt of the tenant's evidence. The landlord said his office received the tenant's evidence, not him personally, as he did not have it in front of him during this hearing. In accordance with sections 88, 89 and 90 of the *Act*, I

find that the tenant was duly served with the landlord's application and the landlord was duly served with the tenant's evidence.

Issues to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit?

Is the landlord entitled to retain the tenant's security and key deposits?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on September 1, 2015 and ended on January 31, 2021. Monthly rent in the amount of \$825.00 was payable on the first day of each month. A security deposit of \$375.00 and a key deposit of \$10.00 were paid by the tenant and the landlord continues to retain both deposits in full. A written tenancy agreement was signed by both parties. A move-in condition inspection report was completed by both parties, but a move-out condition inspection report was only completed by the landlord, without the tenant present. The landlord did not provide the tenant with two opportunities to conduct a move-out condition inspection. The landlord did not provide the tenant with the RTB approved form for a final opportunity to schedule a move-out condition inspection. The landlord did not have written permission to retain any amount from the tenant's security or key deposits. The landlord filed this application to retain the tenant's security and key deposits on February 12, 2021. A written forwarding address was provided by the tenant to the landlord by way of a letter, which the landlord received on February 9, 2021.

The landlord seeks a monetary order of \$629.88, to retain the tenant's security and key deposits totalling \$385.00, and the \$100.00 application filing fee. The landlord provided copies of the move-in and move-out condition inspection reports, photographs, invoices, and other documentary evidence. The tenant disputes the landlord's application and provided copies of photographs, letters, and other documents.

The landlord testified regarding the following facts. The landlord's agent S ("landlord's agent") gave him information after the tenant moved out. Cleaning and maintenance were not done by the tenant. The landlord referenced photographs of the bathtub that had to be replaced, cobwebs on the walls, and dust on the floors and walls. The landlord spent four hours cleaning at \$25.00 per hour, for a total of \$100.00. The landlord does not know when the cleaning invoice was paid and did not provide a copy of the cleaning invoice or receipt for this hearing. The landlord's photographs show that the cleaning took days to complete. The landlord replaced the bathtub for \$222.38 and provided an invoice for same, that was paid by cheque, but the landlord does not know when it was paid. No receipt or cancelled cheque was provided for this cost. The landlord had to repaint the walls because the tenant smoked in the rental unit and it smelled like nicotine, contrary to section L of the tenancy agreement. Painting invoices were provided for \$124.15 and \$183.35 but no receipts were given, even though they were paid by cheque, but the landlord does not know when. The landlord did not provide an invoice for the \$400.00 to replace the bathroom tile, so he is withdrawing this claim, and understands he cannot reapply for it later. The landlord does not know the age of the paint or the bathtub in the rental unit. The flooring, bathtub and tiles in the bathroom were all replaced in one day, after the tenant moved out, since the unit was re-rented immediately. In response to the tenant's question as to how the renovation was done so quickly, the landlord then claimed that the unit was re-rented in March 2021, after he checked his records.

The tenant testified regarding the following facts. The rental unit was dirty when he moved in, as he noted on the move-in condition inspection report. The rental building was built in 1972 and has the original paint, carpet and bathtub. The tenant experienced repeated flooding in his unit, which the landlord never cleaned or replaced the carpet. The landlord just had quick fixes for the flooding. The tenant had cheap rent because the unit and building were so old. He was told by the landlord that the rental unit would be "gutted" and renovated when he moved in, but it was never done. He was told by the landlord, when he provided notice to move out, not to bother cleaning the rental unit because it would be "gutted" when he moved out. The rental unit was remodeled after the tenant moved out. The tenant is willing to pay \$50.00 towards the landlord's cleaning costs of \$100.00 total, as the unit is only a one-bedroom apartment. The person that helped the tenant move out of the rental unit wrote a letter, dated June 16, 2021, confirming that he and other people helped the tenant move on January 31, 2021, and no "manager" or anyone showed up to do a "walk through." The tenant provided a copy of the letter and read it aloud to the landlord during this hearing. The letter indicates the rental unit address and the name of the mover along a copy of his business card and phone number.

The tenant's advocate stated the following facts. The move-in condition inspection report indicates that there are minor holes and scuffs on the walls and stains on the bathtub. A copy of Residential Tenancy Policy Guideline 40 was provided by the tenant to show the useful life of paint and the bathtub. The tenant lived in the rental unit for 5.5 years. The paint was more than four years old, which is past its useful life. The bathtub and carpets were not replaced while the tenant was living there. The landlord did not provide the tenant with two opportunities to conduct a move-out condition inspection or report, and did not use the RTB approved form either, which is contrary to section 17 of the *Residential Tenancy Regulation* ("Regulation").

Analysis

Credibility

Overall, I found the tenant to be a credible witness. He provided his testimony in a calm, candid and straightforward manner. His testimony was consistent and did not change throughout the hearing. The tenant admitted when his version of events was unfavourable to him.

Conversely, I found the landlord to be a less credible witness. I found that he provided his testimony in an upset, agitated, and confusing manner. The landlord's testimony repeatedly changed throughout the hearing. The landlord frequently interrupted and argued with the tenant and me, while we were speaking. When I asked the landlord questions about the tenancy, he became upset, changed his answers, asked me questions, and asked the tenant to answer these questions.

When I asked the landlord why his testimony kept changing throughout the hearing, he became angry and combative. He asked what testimony changed. When I provided him with examples, he argued with me and interrupted me. I reminded the landlord that he was under oath at this hearing.

The landlord initially indicated that a move-out condition inspection and report were completed by the landlord with the tenant present. He then asked the tenant if he was present at the inspection. The tenant said that he was not present. The landlord then stated that the tenant was not present. The landlord claimed that he gave the tenant two opportunities to conduct a move-out inspection. When I asked for the dates, he said it was usually done within the last couple days of the tenancy. When I asked for specific dates, he said he had to look them up and then was unable to find them. The tenant stated that he was told to meet the landlord's agent at 1:00 p.m. on January 31,

2021, at the rental unit to do a move-out inspection but the landlord never showed up. The landlord then claimed that the landlord's agent was present at 1:00 p.m. on January 31, 2021 to conduct a move-out inspection, but the tenant never showed up. The landlord then agreed that he did not give the tenant two opportunities to conduct a move-out inspection. When I asked the landlord if he served the approved RTB form to schedule a move-out inspection, he said he did. When I asked for the date of service and the form, since it was not contained in the landlord's evidence, he said that the form was not given to the tenant. He then asked what the form was, since he had never heard of it before.

When the tenant referenced a letter from his mover from June 2021, the landlord became upset and asked why the letter was from June when the tenant moved out in January 2021. When the tenant said that the letter was responding to the landlord's application, the landlord asked what time the tenant filed it. He complained that the tenant did not provide his evidence within 3 days of the landlord making this application. When I informed the landlord that this rule applied to service of the landlord's application to the tenant, the landlord said that he did not know the rules.

The landlord spoke for the majority of the 61-minute hearing time, as compared to the tenant. Rather than presenting his application, the landlord was more focussed on arguing with the tenant and me.

Findings

The following RTB *Rules* are applicable and state the following, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim.

The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

On a balance of probabilities and for the reasons stated below, I make the following findings based on the testimony and evidence of both parties.

At the outset of the hearing, I informed the landlord that as the applicant, the landlord had the burden of proof to present and prove this application and claims. I find that the landlord did not properly present his evidence, as required by Rule 7.4 of the RTB *Rules*, despite having the opportunity to do so during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules*.

This hearing lasted 61 minutes so the landlord had ample opportunity to present his application and respond to the tenant's submissions. During the hearing, I repeatedly asked the landlord if he had any other information that he wanted to add to his submissions. However, the landlord failed to properly go through his documents that were submitted for this hearing. The landlord focussed more on arguing with the tenant and me, than presenting his claims.

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

- 1) Proof that the damage or loss exists;
- 2) Proof that the damage or loss occurred due to the actions or neglect of the tenant in violation of the *Act*, *Regulation* or tenancy agreement;
- 3) Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- 4) Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I award the landlord \$50.00 for cleaning, as the tenant agreed to pay this amount during the hearing.

I dismiss the remainder of the landlord's application of \$979.88 without leave to reapply. This includes the remaining \$50.00 for cleaning that the tenant did not agree to pay, \$222.38 for a replacement tub, \$124.15 and \$183.35 for painting, and \$400.00 for bathroom tile.

During the hearing, the landlord withdrew his claim of \$400.00 for bathroom tile. He said that because he did not provide an invoice to support this estimate, he was no longer seeking it. I notified him that this claim was dismissed without leave to reapply,

so he would not be able to pursue it in the future. The landlord confirmed his understanding and agreement to same.

No invoice, estimate, quote, receipt, proof of payment or other documentary evidence was provided to show if, when or how any payment was made by the landlord for cleaning of \$100.00. The landlord did not have this information when questioned during this hearing. The tenant even made a notation indicating “found unit to be in very rough shape very old” in the move-in condition inspection report. The landlord did not dispute this. The tenant agreed to pay half of the cost of \$50.00 and I find that the landlord failed to provide proof of the remaining \$50.00 for cleaning. I find that \$50.00 is a reasonable amount to clean the tenant’s one-bedroom rental unit.

The landlord provided two invoices of \$124.15 and \$183.35 for painting, with balances due. The landlord did not provide any receipts, cancelled cheques, or proofs of payment to state if, when or how any payments were made by the landlord. The landlord claimed that the invoices were paid by cheque but did not know the dates of payment. The invoices do not indicate the specific rental unit address, only the landlord’s name and building address. The landlord did not make any specific notations regarding the walls or painting in the move-out condition inspection report. The landlord only indicated “dripping with nicotine” and “unit was smoked in heavily” in the move-out condition inspection report. The walls and trim in every room of the tenant’s rental unit is marked separately as “minor holes/scuffs,” including the entry, kitchen, living room, dining room, stairwell and hall, main bathroom and master bedroom (1) in the move-in condition inspection report. The tenant even made a notation indicating “found unit to be in very rough shape very old” in the move-in condition inspection report. The landlord did not dispute the above information at the hearing or in the report. The tenant questioned the age of the paint on the walls and the landlord did not know when it was last painted. The tenant submitted that the rental building was built in 1972 and the paint was never changed, and the landlord did not dispute these facts. The tenant submitted that as per Residential Tenancy Policy Guideline 40, painting is to be done by the landlord every four years, so the landlord is required to do this in any event and the tenant is not responsible for painting the unit. I agree. Residential Tenancy Policy Guideline 40 states that interior painting is to be done every four years and if the rental unit has not been repainted since the building was built in 1972, it has been 49 years. These claims are dismissed without leave to reapply.

The landlord provided an invoice of \$222.38 to replace the bathroom tub, with a balance due. The landlord did not provide any receipt, cancelled cheque, or proof of payment to state if, when or how any payment was made by the landlord. The landlord claimed that

the invoices were paid by cheque but did not know the dates of payment. The invoices do not indicate the specific rental unit address, only the landlord's name and building address. The landlord did not make any notations regarding the bathtub in the move-out condition inspection report. In fact, the notation under the main bathroom section of tub/shower/taps/stopper is "very stained" in the move-in condition inspection report. The tenant made a notation indicating "found unit to be in very rough shape very old" in the move-in condition inspection report. The landlord did not dispute the above information at the hearing or in the report. The tenant questioned the age of the bathtub and the landlord did not know when it was last replaced. The tenant submitted that the rental building was built in 1972, the bathtub was never replaced, and the landlord did not dispute these facts. The tenant submitted that as per Residential Tenancy Policy Guideline 40, bathtub replacement is to be done by the landlord every twenty years, so the landlord is required to do this in any event and the tenant is not responsible for replacing the bathtub. I agree. Residential Tenancy Policy Guideline 40 states that bathtubs are to be replaced every twenty years and if the rental unit bathtub has not been replaced since the building was built in 1972, it has been 49 years. This claim is dismissed without leave to reapply.

As the landlord was mainly unsuccessful in this application, except for what the tenant agreed to pay during the hearing, I find that the landlord is not entitled to recover the \$100.00 filing fee from the tenant.

Security and Key Deposits

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

I make the following findings on a balance of probabilities and based on the evidence of both parties. The tenancy ended on January 31, 2021. The landlord did not have written permission to retain any amount from the tenant's security deposit. The tenant provided a written forwarding address by letter, which the landlord confirmed he

received on February 9, 2021. The tenant provided a copy of the letter for this hearing. The landlord's application to retain the deposit was made on February 12, 2021, which is within 15 days of the later written forwarding address date of February 9, 2021.

However, the landlord's right to retain the tenant's security deposit for damages was extinguished. The landlord failed to provide the tenant with two opportunities to complete a move-out condition inspection, at least one using the approved RTB form, as required by section 36(2)(a) of the *Act* and section 17(2)(b) of the *Regulation*.

The landlord continues to hold the tenant's security deposit of \$375.00. Over the period of this tenancy, no interest is payable on the deposit. In accordance with section 38 of the *Act* and Residential Tenancy Policy Guideline 17, I find that the tenant is entitled to double the value of his security deposit of \$375.00, totalling \$750.00, from the landlord. Even though the tenant did not apply for the return of his security deposit, I am required to consider it on the landlord's application to retain it, as per Residential Tenancy Policy Guideline 17.

I order the landlord to retain \$50.00 from the doubling of the tenant's security deposit of \$750.00, in full satisfaction of the monetary award for cleaning. Therefore, the balance due to the tenant is \$700.00.

The landlord continues to hold the tenant's key deposit of \$10.00. The landlord indicated on the move-out condition inspection report that the tenant returned all three keys for the key FOB, mail key and suite key. The landlord did not indicate during the hearing that the tenant failed to return any keys to the landlord upon vacating the rental unit. Accordingly, I find that the tenant is entitled to the return of his key deposit of \$10.00. Although the tenant did not apply for the return of this deposit, the landlord included it as part of the security deposit claim in this application. I find no prejudice to the landlord in making this award, as it is small amount.

Conclusion

I order the landlord to retain \$50.00 from the tenant's security deposit.

The remainder of the landlord's application for \$1,079.88 is dismissed without leave to reapply.

I issue a monetary order in the tenant's favour in the amount of \$710.00 against the landlord. The landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial 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 *Residential Tenancy Act*.

Dated: June 29, 2021

Residential Tenancy Branch