Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MIRAGE TRADING CORPORATION and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL, MNSD, FF

Introduction

This hearing was convened in response to applications by the landlords and the tenants filed under the Residential Tenancy Act, (the "Act")

The landlords' application filed on September 4, 2020, is seeking orders as follows:

1. For a monetary order for damages to the rental unit;
2. For a monetary order for compensation or loss under the Act;
3. To keep all or part of the security deposit; and
4. To recover the cost of filing the application.

The tenants' application filed on September 14, 2020, is seeking orders as follows:

1. Return of double the security deposit; and
2. To recover the cost of filing the application.

Both parties appeared, gave affirmed testimony, and were provided the opportunity to present their evidence orally and in written and documentary form, and make submissions at the hearing. The parties confirmed they were not making a prohibited record of this hearing.

In this case, this matter commenced on December 15, 2020, which was before a different Arbitrator. The Arbitrator had made three (3) interim decisions; however, due to unforeseen circumstances, the Arbitrator was unable to complete the hearing. As a result, this matter was scheduled to be reheard, with a new hearing. I am not bound by any findings that may have been made in any of the previous interim decisions.

At the outset of the hearing, I confirmed with the parties that the tenants' petition to the supreme court is abandoned and not an issue for me to consider. This was related to the tenant's application to obtain an order of the possession of the rental unit. The tenant's application was dismissed on September 14, 2020. Filed in evidence is a copy of that decision. I have noted the file number on the covering page of this decision.

At the outset of the hearing the landlords' legal counsel confirmed they had received the tenant's evidence package.

At the outset of the hearing the tenants' legal counsel confirmed they had received the landlord's original evidence. I had addressed the tenant's original concern that they had received some evidence late which were marked exhibits 29, 30, 31, and 32. I have not considered exhibits 29 or 30 as they are not related to the issues before me. I do not find exhibit 31 prejudicial to the tenant as this is simply a copy of a prior decision that relates to this tenancy. I do not find exhibit 32 is prejudicial to the tenant as it is their own document that was submitted as evidence at a prior hearing, I do not know if these documents are relevant at this time; however, I will allow exhibit 31 and 32 to be considered.

At the outset of the hearing, I find the tenants' application for the return of double the security deposit was made prematurely as it was filed on September 14, 2020. The landlord was not required to repay the security deposit or make their application claiming against the security deposit until September 15, 2020.

Furthermore, the landlord had already made their application claiming against the security deposit on September 4, 2020, which was within the statutory time limit. However, I still must consider the issue of the security deposit at the hearing to determine if the landlords are entitled to keep any portion.

Issues to be Decided

Are the landlords entitled to a monetary order for loss or compensation under the Act?
Are the landlords entitled to a monetary order for damages to the rental unit?
Are the landlords entitled to keep all or a portion of the security deposit?
Are the tenants entitled to the return of double the security deposit?

Background and Evidence

The tenancy began on September 1, 2019. Rent in the amount of $9,500.00 was payable on the first day of each month. A security deposit of $5,000.00 was paid by the tenant. The tenancy ended on August 31, 2020 by a signed mutual agreement to end the tenancy. This is a commercial tenant that re-rents the premises under a sublease agreement.

Counsel for the landlord submits that the landlord is claiming for compensation for loss or other money owed, for damages to the rental unit as well as the extinguishment provisions under section 36 of the Act, because the tenant failed to participate in the move-out condition inspection report. Counsel submits that the tenant was given two opportunities to schedule an inspection and the tenant was issued a Notice of Final Opportunity to Schedule a Condition Inspection. Filed in evidence are documents to support this.

Counsel for the tenant submits that the landlord breached the Act first, because the landlord failed to do the move-in condition inspection report. Counsel submits that the landlord did not give the tenant two opportunities or a Notice of Final Opportunity to Schedule a Condition Inspection as required by section 24 of the Act. Counsel submits on October 10, 2020, the tenant simply received a blank condition inspection report. This is supported by the landlord's evidence as the move-in condition inspection report is blank.

Counsel for the tenant submits that the landlords' right to claim against the security deposit for damages is extinguished and the tenant should be entitled to double the return of their security deposit.

The landlords claim as follows:

a.	Moving and storage costs	$2,067.03
b.	Cleaning	$ 393.75
c.	Credit given to incoming tenant	$ 667.00
d.	Damage to unit	$5,000.00
e.	Filing fee	$ 100.00
	Total claimed	**$8,127.78**

Moving and storage costs

Counsel for the landlord submits that on August 31, 2020 the tenant was required to vacate the premises by 12:00pm as shown in the mutual agreement to end the tenancy. Filed in evidence is a copy of the mutual agreement to end the tenancy.

Counsel submits that the landlord, the tenant's representative, and the subtenants of the tenant were at the rental unit on August 31, 2021, at which time the tenant's representative was doing the move-out inspection with the subtenant. Counsel submits the subtenants vacated the premises and their personal property was removed. This was confirmed by the bailiffs. Filed in evidence is an email to support this.

Counsel for the landlord submits that the rental unit is partly furnished by the landlord and the tenant also had some furniture in the premises. Counsel submits that the landlord was told by the tenant's representative that the tenant's moving truck was delayed and that they would meet at the rental unit at 4:00 pm to do the move-out condition inspection; however, the tenant never removed their furniture and did not attended to complete the final inspection. Filed in evidence is an email sent on August 31, 2020 at 2:47pm from the building concierge saying that the elevator that was booked for 1:30pm, but the movers did not show.

Counsel for the landlord submits because the landlord had a new renter moving in on September 1, 2020, and that they had no choice but to hire a moving company to remove and store the tenants' furniture on September 2, 2021. The landlords seek to recover the cost of $2,067.03. Filed in evidence is a moving invoice dated September 2, 2020.

The tenant testified that they were locked out of the premises because the landlord had deactivated their fobs and were unable to obtain their belongings. The tenant stated that their moving truck was waiting in the loading zone for approximately 90 minutes at 12:30pm and the fob they had given to the moving company was not working, and when a second fob was used at 3pm that was also not working. The tenant stated that the fobs were deactivated, which was confirmed in an email dated September 1, 2020 at 7:56am. Filed in evidence is a copy of that email. I note it does not say a time the fobs were deactivated.

The landlord's agent argued that the fobs do not work in the loading zone area which the tenant is fully aware of and that you must go to the concierge desk for access. The agent stated that the building loading zone is also used for commercial purpose and there is no way that a moving truck would be allowed to simply sit there for 90 minutes.

The agent stated that the tenant is simply not telling the truth as they did not have a moving truck there to retrieve their belongings. The agent stated that they were waiting in the lobby with the landlord's real estate agent until approximately 4:20 pm and at no time did a moving truck show up or the tenant, or their representative. Filed in evidence is an email from the landlord's real estate agent dated September 4, 2020. This is also confirmed in the August 31, 2020 email for the building concierge that I have previously referred to in this decision.

Cleaning cost

Counsel for the landlord submits that the landlord also had to have the premises cleaned. The landlord seeks to recover the amount of $393.75. Filed in evidence is a copy of the receipt.

The landlord's agent testified that the tenant's subtenants did not clean the premises as the subtenant's did not feel it was their responsibility and it was not ready for the next tenant. The agent stated that the bathrooms needed to be cleaned, there were marks on the walls, the balcony was really dirty, and there was a stain in the bedroom carpet.

Counsel for the tenant submits that there is no evidence that the rental unit was left unreasonably clean.

Credit given to incoming tenant

Counsel for the landlord submits because the landlord had to remove the tenant's belongings and have the rental unit cleaned and that the landlord's new renter was not able to move into the premises on September 1, 2020. Counsel submits that the new renter could not move into the rental unit until September 3, 2021 and as a result the landlord had to prorate the new renters rent by the amount of $667.00. The landlords seek to recover the amount of $667.00.

The tenant testified that the rental unit was not rented as they had found an advertisement posted on September 28, 2020 and they called the real estate agent and were informed it had been vacant for the last four weeks. Filed in evidence is a copy of the advertisement which shows the rental unit was available for September 2020. I note it also shows that it had been posted for 25 days.

Counsel for the landlord argued that they notified the tenant by email in August that the landlord had a new renter for September 1, 2021. The new renter paid a security

deposit on August 23, 2020 and was to move into the premise on September 1, 2020. Filed in evidence is a copy of the security deposit cheque and a copy of the first page of the tenancy agreement. Filed in evidence is a copy of the email sent to the tenant from the landlords' legal counsel.

Damage to unit

The landlord's agent testified that the tenant caused damage to the leather door, that there were TV mounts mounted to the walls, and chips in the cabinetry. The agent stated the value of the damage far exceeds the security deposit.

The tenant testified that they did not cause any damage to the rental unit. The tenant stated that the heater on the patio was dented when they took possession of the rental unit and it was not weighed down and would fall over in a windstorm, which was always an issue for them. The tenant stated that the leather on the door was scratched when they moved in and it is not uncommon when it is 10 years old. The tenant stated that there were minor chips in some of the cabinetry; however, it was there when the tenancy started, and this is wear and tear due to the aging process.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the landlords have the burden of proof to prove their claim.

Section 7(1) of the Act states that if a landlord or tenant does not comply with the Act, regulation, or tenancy agreement, the non-comply landlord or tenant must compensate the other for damage or **loss that results**.

Section 67 of the Act provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

In this case, I find the landlord's application for dispute resolution was filed within 15 days of the tenancy ending claiming against the security deposit as required by section 38 of the Act. I accept the landlord did not comply with the provision of section 25 the

Act as I am not satisfied that the tenant was given two opportunities to schedule a move in condition inspection or a Notice of Final Opportunity to Schedule a Condition Inspection.

However, I also find that the landlord's monetary claims are not solely related to damages to the rental unit. The landlords are also claiming for other loss or compensation under Section 7(1) of the Act arising from the tenancy. I find the landlords were entitled to retain the security deposit until such time as those issues were heard. Therefore, I find the doubling provision of section 38 of the Act would not apply in this matter.

Moving and storage costs

I do not accept the tenant's evidence that they were locked out of the premises at approximately 12:30pm on August 31, 2020. This is not supported by the tenants' email dated September 1, 2020, which in part states the following

> "The 2 fob we have for 4306 stopped working yesterday evening."
>
> [Reproduced as Written.]

This leads me to believe that it was likely 6pm or a later, if I use the basic definition of evening. I find this could not be mistaken for 12:30pm in the afternoon as testified by the tenant.

Further, I do not accept the tenant's evidence that they had a moving truck on site at 12:30pm, which waited for approximately 90 minutes to move their belongings and could not access the premises. I find if that was true why would the tenant say in the email on August 31, 2020 at 6:44pm, which was after the tenancy had ended by their mutual agreement the following,

> "We are aware of our right to extend this tenancy on a month to month basis at the same monthly rent … We demand that you immediately stop occupying the property and entering the premise without our consent.".
>
> [Reproduced as Written.]

I find this statement is just not logical based on the tenant's testimony that they were prepared to have their belongings moved in the early afternoon on August 31, 2020.

I further find that it is more likely than not that the tenant had no intentions of removing their furniture because the tenant also applied for an order of possession on August 31, 2020 at 8:39 pm arguing the tenancy had not ended, and of which that application was dismissed on September 14, 2020. This application is not logical if they were locked out an unable to get their belonging as it would have been reasonable to be applying for an order for the return of the property; rather than to be applying for the tenancy to continue.

Based on the above, I find the tenant lacks credibility on this issue. It simply does not have the ring of truth and is illogical.

I accept that the landlord's waited for the tenant or their representative to return to the rental property at 4:00pm on August 31, 2020, which was discussed earlier in the day with the landlord's representative, at which time no one appeared. I find the landlord was entitled to cancel the fobs at that time as the tenancy was over at 12:00pm by the mutual agreement and the tenants did not attend by 4:00pm the date in the Final Notice of Inspection.

I find that it was not unreasonable for the landlord to decide on September 2, 2020, to have the tenant's furniture removed. This was to mitigate their loss and to ensure the tenancy for the incoming renter; who was to move into the premises on September 1, 2020. Therefore, I find the landlords are entitled to recover the moving and storage costs of **$2,067.03.**

Cleaning cost

The landlords are claiming cleaning costs; however, I find the landlords have failed to provide sufficient evidence to support this portion of their claim. At the very least expect I would have expected to see photographs to show that the rental unit condition did not comply with section 37 of the Act. I also note that the email from the landlord's real estate agent dated September 4, 2020 does not state the rental property was left unreasonably clean. Therefore, I dismiss this portion of the landlords' claim due to insufficient evidence, without leave to reapply.

Damage to unit

The landlords are claiming damage to the rental property; however, I cannot determine if they were pre-existing as a move-in condition inspection was not completed and I have no photographs of the premises prior to the tenant taking possession. Further,

this could simply be wear and tear due the aging process and in addition, there is no evidence to support the value before me. Therefore, I dismiss this portion of the landlords' claim due to insufficient evidence, without leave to reapply.

Credit given to incoming tenant

I prefer the evidence of the landlord over the tenant's that the premises was rented for September 1, 2020 for the following reasons.

Firstly, the landlord's version is supported by the letter sent to the tenant from the landlord's legal counsel dated August 14, 2020 stating the landlord has a new tenancy commencing on September 1, 2020. This is also supported by the security deposit being paid on August 23, 2020, and a signed copy of the form K, although this was signed on September 3, 2020, the actual date the new renter moved into the premises.

Second, I afford little weight, if any, on the tenant's testimony because I am not satisfied that the advertisement the tenant submitted in evidence was printed in late September 2020. I find it more likely than not that this was printed in August 2020, as it says the rental unit is available for September 2020 and had been posted for 25 days at the time.

Thirdly , I afford little weight, if any, on the tenant's testimony that they were informed on September 28, 2020 by a telephone conversation that the premises was still not rented. At the very least I would have expected to hear a recording of this conversation or see an email communication sent through the advertisement site asking if the rental unit was available and neither of which were before me.

Finally, as I have found the rental unit was rented for September 1, 2020 and was due to the tenant's actions of not removing their furniture as required on August 31, 2021. I accept the new renter could not move into the premises until September 3, 2020. Therefore, I find it not unreasonable that the landlords compensated the new renter for the two days they did not have the premises. Therefore, I find the landlords are entitled to recover the compensation they had to give to the new renter in the amount of **$667.00.**

Given the above, I find that the landlords have established a total monetary claim of **$2,934.03** comprised of the above described amounts and the $100.00 fee paid for this application.

I authorize the landlords retain from the security deposit of **$5,000.00** the amount of **$2,934.03** in full satisfaction of the landlords' monetary award. This leaves a balance due to the tenant in the amount of **$2,065.97.** Therefore, I grant the tenants a formal monetary order for the balance remaining of their security deposit.

Conclusion

The landlords are authorized to retain $2,934.03 from the tenants' $5,000.00 security deposit in full satisfaction of their claim. The tenants are granted a monetary order for the balance due of their security deposit in the amount of $2,065.97.

The tenants are not entitled to their filing fee as their application was filed prematurely and the landlords had already made an application claiming against the security deposit.

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: September 23, 2021

Residential Tenancy Branch