Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, MNDL-S, FFL

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking to retain the tenant's security and pet damage deposits. The hearing was conducted via teleconference and was attended by the landlord and the tenant. No issues relating to the service of documents was identified by either party.

At the outset of the hearing, I clarified with the landlord compensation in the amount of $920.00 was the total amount sought plus the filing fee. The Application for Dispute Resolution, as submitted, had indicated that he was requesting double that amount ($1,840.00) plus the filing fee. As a result, I amend the landlord's Application for Dispute Resolution to the amount claims as $920.00 plus filing fee.

In addition, the landlord clarified that he was seeking retention of the deposits solely on the basis that the tenant breached Section 35 of the *Residential Tenancy Act (Act)*, not for any specific damage or losses resulting from the tenancy.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order to retain the security and pet damage deposits and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 35, 36, 38, 67, and 72 of the *Act.*

Background and Evidence

The landlord submitted into evidence a copy of a tenancy agreement signed by the parties on February 11, 2021 for a ten month fixed term tenancy beginning on March 1, 2021 for a monthly rent of $920.00 due on the 1st of each month with a security deposit of $460.00 and a pet damage deposit of $460.00 paid. The tenancy ended on October 30, 2021.

The landlord submitted that he had attempted to contact the tenant to try to set up a move out inspection. In support of this he provided a copy of a text message dated

October 29, 2021 at 7:40 p.m. where he states: “Ok. Let’s schedule a time to get on the phone tomorrow and go over things” and the tenant responded in the affirmative.

The landlord provided further text messages including the following:

Date and time	Message
October 30, 2021 – 11:59 a.m.	From Landlord: “When is a good time to chat?”
October 31, 2021 – 6:00 a.m.	From Tenant: “Hi Marc, sorry yesterday I was really sick and not on my phone. How about this evening at 4pm?”
October 31, 2021 – 8:01 a.m.	From Landlord: “Oh no, I’m sorry you are sick. I will make 4pm today work.”

The landlord provided a recording of the telephone conversation between himself and the tenant that occurred in accordance with their text messages. In this recording the tenant informs the landlord that she had provided keys to the unit to the new occupant of the rental unit and that the new occupant had already started moving into the rental unit. Both parties discussed the condition of the unit and whether or not the tenant took any photographs that the landlord could get from the tenant and about whether or not some repairs could be made.

The landlord suggested he would discuss with the new occupant wanted the repairs made or if they should come up with an amount to cover off the costs of painting part of the rental unit floor.

The landlord also submitted into evidence a string of emails between the two parties beginning on November 1, 2021 and ending on November 23, 2021. In the first email the landlord suggests he has obtained costs for the minor repairs he was looking to have completed resulting from some damage to the paint on the floors and walls of the unit.

The tenant responded, on November 2, 2021, by disagreeing with the deductions due to the wording in the tenancy agreement and asks for the landlord to return her deposit and she provides her forwarding address. A discussion follows again for the possibility of the tenant doing the work herself.

On November 4, 2021 the landlord writes back to the tenant that he is trying to get a hold of the Residential Tenancy Branch for advice on how to deal with the situation of not completing a move out inspection prior to the tenant giving the rental unit keys to the incoming occupant.

The landlord reported back to the tenant that he had received information that he was to send a Notice of Final Opportunity to Schedule a Condition Inspection (RTB22). An inspection time was set for November 22, 2021.

The final email submitted is one from the landlord which states that they did meet on November 22, 2021 at the rental unit and that an attempt was made to settle the matters but that the tenant only wanted her deposits back. In the email the landlord goes on to say that if the tenant does not agree to settle, he will have to submit an Application for Dispute Resolution. He also states that by her giving the key to the other occupant and allowing her to move into the rental unit she has materially breached Section 35 of the *Act* and that the consequences of doing so are not limited to the two deposits totalling $920.00.

The landlord provided video recordings of the inspection conducted on November 22, 2021 and a copy of the a Condition Inspection Report (CIR). I note the CIR records only the condition of the rental unit at the start of the tenancy.

Analysis

Section 35(1) of the *Act* states the landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit

(a) on or after the day the tenant ceases to occupy the rental unit, or
(b) on another mutually agreed day.

Section 35 (2) requires the landlord to offer the tenant at least 2 opportunities, as prescribed, for the inspection. Section 17(1) of the Residential Tenancy Regulation requires that the landlord offer the tenant a first opportunity to schedule an inspection by proposing one or more dates and times.

If the tenant is not available on the dates provided under Section 17(1) the tenant may propose an alternate time which the landlord must consider and if that time is not acceptable the landlord must then propose a second opportunity by providing the tenant with a notice in the prescribed form, pursuant to Section 17(2) of the regulation. I note the prescribed form is the RTB 22 noted above.

In addition, Section 35(3) prescribes that the landlord must complete a condition inspection report in accordance with the regulations and 35(4) states that both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

Section 35 (5) allows the landlord may make the inspection and complete and sign the report without the tenant if

(a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
(b) the tenant has abandoned the rental unit.

Section 36 (1) states 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.

Section 36 (2) provides that unless the tenant has abandoned the rental unit, 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

(a) does not comply with section 35 (2) [2 opportunities for inspection],
(b) having complied with section 35 (2), does not participate on either occasion, or
(c) 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.

The legislation and regulation outline the landlord is the responsible party for ensuring a move out inspection is completed prior to a new occupant moving into the rental unit and on or after the day the tenant moves out of the rental unit.

As such, I find the landlord in this case was required to propose to the tenant, pursuant to Section 17(1) one or two dates and times for completing a move out inspection. However, the landlord's evidence shows that on October 29, 2021 the landlord proposes that they "get on the phone to cover over things" the following day. There is no mention of setting a time to complete a move out inspection.

Despite the non-response from the tenant on October 30, 2021 they do agree to call each other at 4:00 p.m. on October 31, 2021 – again there is no mention of scheduling a move out condition inspection.

As such, I find that as of 4:00 p.m. on the last day of the tenancy, the landlord has not yet proposed a single time to complete a move out inspection. I also accept that during the phone conversation the tenant informed the landlord that the new occupant had already started moving into the rental unit because she had given her key to the new occupant.

However, I find that this did not prevent the parties from meeting on that day – October 31, 2021 to complete the move out inspection – either by both attending the rental unit or by them sending their respective agents to complete an inspection.

I find, instead, the parties put their minds to discuss damage that the landlord already was aware of but never did then set a time on that date or any other to complete the inspection. After consultation with the Residential Tenancy Branch the landlord issued a Form RTB 22 setting the inspection date as November 22, 2021.

Again, from the landlord's email submission, he confirmed that the tenant did attend the move out condition inspection on November 22, 2021.

As it was incumbent upon the landlord to propose times to set up a move out inspection but instead set up a telephone call to "go over things", I find that the landlord did not begin to propose times to have a move out inspection until 4:00 p.m. on October 31, 2021 and that he did not provide a Notice of Final Opportunity until November 12, 2021 to schedule the inspection until November 22, 2021.

While I do agree that the tenant's actions were contrary to her obligations under the *Act*, I find that she violated Section 37 and not Section 35 as she did attend the move out inspection that the landlord had scheduled. Section 37 of the *Act* stipulates that when a tenant vacates a rental unit, the tenant must:

a) Leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and
b) Give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

As a result, I find it was the landlord who failed to comply with the requirements set forth under Section 35 of the *Act* and Section 17 of the Regulations to schedule a move out inspection in time for it to be completed prior to a new tenant moving in. Therefore, pursuant to section 36, I find the landlord has extinguished his right to claim against the security and pet damage deposits for any damage to the rental unit and must return the deposits.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

As I have found the landlord is not entitled to retain either the security deposit or the pet damage deposit I must consider if the tenant is entitled to return of double the deposits pursuant to Section 38 of the *Act*.

As the tenant had vacated the rental unit by October 31, 2021 and the landlord provided evidence that the tenant provided her forwarding address to the landlord on November 2, 2021, I find the landlord had until November 17, 2021 to submit his Application seeking to claim against the deposit. The landlord submitted his Application on November 26, 2021.

As such, I find the landlord failed to comply with the requirements under Section 38(1) and normally, the landlord would be required to pay double the amount of the deposits held, pursuant to Section 38(6).

However, as it was the tenant's actions that lead to the confusion on what steps to take when she failed in her obligation to return the keys to the landlord as required under Section 37 of the *Act*, I find it is unfair to penalize the landlord. I have made this determination, because had it not been for the tenant's actions I find, on a balance of probabilities, the landlord would have submitted his application to claim against the deposits within the 15 day required timeframes.

Conclusion

Based on the above, I dismiss the landlord's Application for Dispute Resolution, in its entirety without leave to reapply. However, I note that this does not prevent the landlord from filing a new Application for Dispute Resolution seeking any damages that he feels he may have suffered as a result of this tenancy, pursuant to any applicable time restrictions.

In addition, I find the tenant is entitled to a monetary order in the amount of **$920.00** for the return of security and pet damage deposits. This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) and 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: March 02, 2022

Residential Tenancy Branch