



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Regius Investment Corp
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL-S, MNDCL-S, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for damage or compensation, pursuant to section 67;
- a Monetary Order for damage, pursuant to section 67;
- authorization to retain the tenant's security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 1:40 p.m. in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 p.m. The landlord's owner (the "owner") and property manager (the "property manager"), collectively (the "agents"), attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlords and I were the only ones who had called into this teleconference.

The agents confirmed the landlord's email address for service of this Decision and Order.

The agents testified that the tenant was served with the landlord's application for dispute resolution via registered mail on February 15, 2021. A Canada Post registered mail receipt stating same was entered into evidence. I find that the tenant was deemed served with the landlord's application for dispute resolution on February 20, 2021, five days after its mailing, in accordance with section 89 and 90 of the *Act*.

The agents testified that the landlord's evidence was served on the tenant via registered mail on April 14, 2022. In the hearing the agents provided a registered mail tracking number for the above mailing which is located on the cover page of this decision. I accept the agents undisputed testimony that the landlord's evidence was mailed to the tenant via registered mail on April 14, 2022. I find that the tenant was deemed served with the landlord's evidence on April 19, 2022, five days after its mailing, in accordance with section 88 and 90 of the *Act*.

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to retain the tenant's security deposit, pursuant to section 38 of the *Act*?
4. Is the landlord entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*?

Background and Evidence

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

The agents provided the following undisputed testimony. This tenancy began on June 1, 2021 and ended on January 31, 2022. This was a fixed term tenancy originally set to end on May 31, 2022. Monthly rent in the amount of \$1,695.00 was payable on the first day of each month. A security deposit of \$847.50 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The property manager testified that the landlord received the tenant's forwarding address on February 4, 2022. The landlord filed this application for dispute resolution on February 6, 2022.

The property manager testified that she completed a move in condition inspection report with the tenant on May 27, 2021 and a move out condition inspection report with the tenant at the end of the tenancy. The agents entered into evidence a copy of the move in/out condition inspection report, both of which are signed by the property manager and the tenant. The move in and out condition inspection report states that the tenant agrees that the reports fairly represent the condition of the rental unit on move in and move out.

The property manager testified that the tenant broke the toilet seat which was brand new and in excellent condition at the start of this tenancy. A photograph of a cracked toilet seat was entered into evidence. The property manager testified that the toilet seat cost \$42.54 to replace, a receipt for same was entered into evidence. The landlord is seeking the replacement cost in the amount of \$42.54.

The move in condition inspection report states that a new toilet was installed at the start of the tenancy. The move out condition inspection report states that the toilet seat is cracked.

The agents testified that the tenant damaged the walls in the subject rental property by installing a huge wall fan in the bedroom. The agents entered into evidence photographs of the installed fan and photographs showing large holes left behind when the fan was removed.

The agents testified that the tenant also damaged the walls in the living room and kitchen by installing shelves which left large holes when they were removed. The agents entered into evidence photographs of the installed shelves and the holes left when they were removed.

The agents testified that the subject rental property was newly painted when the tenants moved in and that it cost \$140.00 to repair the holes left by the tenant. A receipt for same was entered into evidence.

The move in condition inspection report states the following condition of the walls in the kitchen, bedroom and living room:

- Kitchen- good
- Living room- good
- Master bedroom- Freshly painted, good

At section Z. End of Tenancy the following damages were noted:

- Holes in bedroom w/wall
- Holes in kitchen e/wall
- Few holes in various walls
- Toilet seat is cracked

The agents testified that the tenant breached the fixed term tenancy agreement by ending the tenancy before the end of the fixed term. The agents testified that the tenant informed them of her intention to break her lease via email on January 1, 2022, the aforementioned email was entered into evidence. On January 3, 2022 the tenant emailed the landlord with an attached letter which provided the landlord with formal written notice to end her tenancy effective January 31, 2022.

The agents testified that the landlord is seeking liquidated damages for breach of the tenancy agreement in the amount of \$600.00. The agents testified that the tenancy agreement provides for liquidated damages in the amount of one month's rent (\$1,695.00) but that the property manager informed the tenant during the move out condition inspection report that the landlord was only seeking \$600.00 in liquidated damages.

The agents testified that the landlord was able to secure a new tenant for February 1, 2022.

The tenancy agreement states at section 10:

10. Early Termination- The tenant, as allowed by the RTA may have an early end to the term of the tenancy by assignment. The RTA does not give the tenant the right to sever the agreement midterm. Sourcing a suitable tenant, processing and validating all information are the obligations of the tenant. The landlord offers the tenant the option to terminate the lease by compensating the landlord as per page 8 of 8 of this agreement for further details.

The tenancy agreement entered into evidence by the agents only has seven pages. The landlord testified that the last sentence of section 10 of the tenancy agreement should have read:

The landlord offers the tenant the option to terminate the lease by compensating the landlord as per page 7 of 7 of this agreement for further details.

Page 7 of the tenancy agreement is titled: "AGREEMENT TO ASSIGN OR TERMINATE LEASE". Page 7 provides the tenant with a document to be filled out and signed by the tenant if the tenant intends on assigning or terminating the lease early. Page 7 is not filled out or signed but does bear the tenant's initials at the bottom of the page.

Section 2 of page 7 of the tenancy agreement states in part:

(2) **Early Termination of Lease**

- A fee equal to 1 (one) month's rent is due upon the tenant's written notice to vacate.

The tenancy agreement does not mention liquidated damages.

Analysis

Section 67 of the *Act* states:

Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To be successful in a monetary claim, the applicant must establish all four of the following points:

1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Failure to prove one of the above points means the claim fails.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

Section 37(2)(a) of the *Act* states that when tenants vacate a rental unit, the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Based on the agents' undisputed testimony and the move in and out condition inspection reports, I find that the toilet seat was new at the start of the tenancy and was cracked at the end of the tenancy, contrary to section 37(2)(a) of the *Act*. I find that replacing the toilet seat constitutes a repair to the toilet as the new toilet seat would not increase the useful life of the toilet overall. I therefore decline to conduct a useful life calculation and award the landlord the cost of repairing the toilet damaged by the tenant, that being \$42.54 as proved by the receipt entered into evidence.

Based on the agents undisputed testimony and the move in and out condition inspection reports, I find that the walls were newly painted at the start of the tenancy and were damaged, beyond reasonable wear and tear, at the end of the tenancy, contrary to section 37(2)(a) of the *Act*. I find that a few nail holes from the hanging of art and frames constitutes reasonable wear and tear; however, the large holes from the shelves and huge fan installed by the tenant are too large to be considered reasonable wear and tear. I award the landlord the cost of repairing the damage caused by the tenant, that being \$140.00, as proved by the receipt entered into evidence.

Residential Tenancy Branch Policy Guideline #4 states:

....A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable....

Section 2 of page 7 of the lease states:

A fee equal to 1 (one) month's rent is due upon the tenant's written notice to vacate

The tenancy agreement does not state that liquidated damages, which are a genuine pre-estimate of loss, are owed by the tenant if the tenant ends the tenancy early. The tenancy agreement states that if the tenant ends the tenancy agreement early, the landlord is entitled to a **fee** of one month's rent.

Section 7 of the Residential Tenancy Branch Regulation (the "Regulation") sets out the allowable fees a landlord may charge:

- 7** (1)A landlord may charge any of the following non-refundable fees:
- (a)direct cost of replacing keys or other access devices;
 - (b)direct cost of additional keys or other access devices requested by the tenant;
 - (c)a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
 - (d)subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
 - (e)subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;
 - (f)a move-in or move-out fee charged by a strata corporation to the landlord;
 - (g)a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

I find that the tenancy agreement did not contain a liquidated damages clause and that section 2 of page 7 of the tenancy agreement is a fee clause. I find that the landlord is not entitled to liquidated damages because a liquidated damage clause was not in the tenancy agreement.

I find that the fee found at section 2 of page 7 of the tenancy agreement is not an allowable fee as set out in section 7 of the Regulation. I therefore find that the landlord is not entitled to recover said fee.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenant, pursuant to section 72 of the *Act*.

Section 38(1) of the *Act* states that 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, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
 - (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security deposit pursuant to section 38(1)(a) and 38(1)(b) of the *Act*.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain \$282.54 from the tenant's security deposit. I Order the landlord to return the remaining \$564.96 to the tenant.

Conclusion

I issue a Monetary Order to the tenant under the following terms:

Item	Amount
Security deposit	\$847.50
Less toilet repair	-\$42.54
Less wall repair	-\$140.00
Less filing fee	-\$100.00
TOTAL	\$564.96

The tenant is provided with this Order in the above terms and 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: May 10, 2022

Residential Tenancy Branch