Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-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 and for compensation under the *Act, Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenants' security and pet damage deposits (collectively "deposits"), pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord's agent and the two tenants, tenant DM ("tenant") and "tenant JH," 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 52 minutes.

This hearing began at 1:30 p.m. with me, the landlord's agent, and the tenant present. Tenant JH called in late at 1:32 p.m. Tenant JH left the hearing from 1:51 to 1:53 p.m., claiming that his call "dropped." The tenant confirmed that she wanted to proceed with this hearing, in the absence of tenant JH. This hearing ended at 2:22 p.m.

The landlord's agent and the two tenants confirmed their names and spelling. The landlord's agent and the tenant provided their email addresses for me to send this decision to them after the hearing.

The landlord's agent confirmed that she had permission to represent the landlord named in this application. She said that the landlord owns the rental unit and provided the rental unit address.

The tenant identified herself as the primary speaker on behalf of both tenants at this hearing.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure ("Rules")* does not permit recording of this hearing by any party. At the outset of this hearing, the landlord's agent and the two tenants all separately affirmed, under oath, that they would not record this hearing.

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

The tenant confirmed receipt of the landlord's application for dispute resolution hearing package and the landlord's agent confirmed receipt of the tenants' evidence. In accordance with sections 88, 89 and 90 of the *Act*, I find that both tenants were duly served with the landlord's application and the landlord was duly served with the tenants' evidence.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's application to correct tenant JH's name, as his first name and surname were inverted in this application. The landlord's agent and tenant JH both consented to this amendment during this hearing.

Issues to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit and for compensation under the *Act, Regulation* or tenancy agreement?

Is the landlord entitled to retain the tenants' 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 June 1, 2021 and ended on September 15, 2021. A written tenancy agreement was signed by both parties. Monthly rent in the amount of $3,990.00 was payable on the first day of each month. A security deposit of $1,995.00 and a pet damage deposit of $1,995.00 were paid by the tenants and the landlord continues to retain both deposits in full. Move-in and move-out condition inspection reports were completed for this tenancy. The move-out condition inspection report was completed without the tenants present. The tenants provided a forwarding address to the landlord on October 4, 2021, by way of text message. The landlord did not have written permission to keep any amount from the tenants' deposits. The landlord's application to retain the tenants' deposits was filed on October 15, 2021.

The landlord seeks a monetary order of $3,345.62, to retain the tenants' deposits of $3,990.00, and to recover the $100.00 application filing fee. The tenants dispute the landlord's application.

The landlord's agent testified regarding the following facts. The tenants signed a tenancy agreement in June 2021. The tenants viewed the property in person a few weeks prior to starting their tenancy. There was negotiation about furnishing the rental unit since it was advertised as furnished. However, the tenants asked for items to be removed from the rental unit by the landlord. The landlord gave early possession of the rental unit to the tenants on May 28, 2021, when they handed the keys to them. On May 26, 2021, the landlord had professional cleaners attend the rental unit. On May 27, 2021, the landlord had professionals clean the carpets at the rental unit. The tenants messaged the landlord after they moved in, claiming that the rental unit was filthy and not clean. The landlord felt that she met the standard under the *Act* but agreed to have cleaners come back again for a second time, in order to minimize any issues with the tenants since it was the start of their tenancy. The landlord had a company come in to service the hot tub and pool at the rental unit and provide information to the tenants. The landlord paid $1,800.00 for new filters and chemicals for the pool. Around mid to the end of August 2021, the tenants said that they were frustrated, and they were moving out, since tenant JH was already spending time out of town. The tenants

offered to help the landlord find new tenants for the rental unit. The tenants wanted control of the showings because of covid. The landlord found new tenants through their own screening.

The landlord stated the following facts. The tenants moved out on September 11 and a move-out inspection was done in the tenants' absence. The landlord provided two opportunities for the move-out inspection and served notices to the tenants, one using the RTB form, but the tenants did not attend. The tenants caused damages to the rental unit, including removing a wall clock, where the numbers were separately mounted in the wall. The tenants took down the clock and the wallpaper was torn. The landlord submitted photos of before and after the wall clock was removed and the landlord incurred costs for repairing the walls. The landlord overlooked wear and tear in the rental unit and did not charge the tenants for it. The tenants removed a doorbell, put their own camera, and then took it off when they moved out. They left the wires hanging out in the doorbell area and did not replace it. The tenants did not complete carpet cleaning at the rental unit, even though they had a dog. The tenancy agreement addendum says that the tenants could pay half a month's rent for a replacement fee, to find new tenants. Although the tenants helped the landlord find new tenants, the landlord still had to complete its own procedures and screening. The landlord completed repairs and provided an invoice for the wallpaper and the doorbell. The landlord is seeking the placement fee, repairs costs, and recovery of the $100 filing fee.

The tenant testified regarding the following facts. The tenants want double the return of their security and pet damage deposits because they never received the move-out condition inspection report from the landlord until May 2022, when the landlord provided this application evidence. The tenants agreed that the landlord could conduct the move-out condition inspection without them present because they were moving out of town and they did not want to attend, so they told the landlord. The tenants were expecting to receive some of their deposits back from the landlord. The rental unit was "very filthy" and there was a cigarette smoke smell when the tenants moved into the rental unit. The tenants broke the lease because it was not safe for them to be at the rental unit. The shelf unit in the garage fell and almost hit tenant JH. The electrical outlet caused smoke and fire burnt under the stairs. The tenants helped the landlord find new tenants by completing showings, so they agreed they were "off the hook" for the lease fee. The tenants found someone for the rental unit and helped the landlord put up pictures and show the unit. The tenants agree that they removed the big wall clock from the wall at the rental unit but there was only a small tear in the wallpaper. They removed it because the clock was not functioning. The landlord's $1300 fee for the repairs is unreasonable because it was just sticker wallpaper that was used, so it is

minor wear and tear. There were lots of scuffs and tears in the walls while the tenants were living there, which they fixed. Almost every art piece in the rental unit was covering damages, including the rug. The tenants had a dog that was senior and 14 pounds at the rental unit. The carpets were not cleaned by the tenants. The tenants brought their furnishings from out of town to put in the rental unit, which was expensive, and they wanted a furnished place where they could stay for at least one to two years. The tenants agree to pay $50.00 for the doorbell cost to the landlord during this hearing.

Tenant JH testified regarding the following facts. He replaced the filter in the pool after watching a video, not the person that the landlord sent, so the landlord should get her money back. The hot tub and pool were not functioning in the first couple months of the tenancy. The tenants took off the wall clock for safety. The shelving fell off the wall in the garage and there were paint buckets there, which almost hit him and caused injuries. The tenants were concerned about their safety in the house and the landlord's property management company did not show any concern. The tenants were told to take the doorbell off by the company. The company was supposed to reinstall a new doorbell for the new tenants. The tenants were told to take their doorbell with them when they left.

Analysis

Wall Repairs, Painting, Doorbell

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 tenants 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.

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.

I accept the affirmed testimony of the landlord's agent that the landlord incurred costs totalling $1,350.62, for labour and materials to repair and paint the wall and install a new doorbell at the rental unit. The landlord provided an invoice for the above cost.

I accept the affirmed testimony of both parties that the tenants removed the existing doorbell at the rental unit, installed a new doorbell with a camera, and took the new doorbell and camera with them, leaving the area empty with wires hanging. The tenants agreed to pay $50.00 for the above cost during this hearing, but I find that this is insufficient, given the landlord's total invoice cost, as noted above.

I accept the affirmed testimony of both parties that the tenants removed a clock from the wall at the rental unit, causing damages to the wall, which were not repaired by the tenants before they moved out.

For the above reasons, I find that the landlord provided sufficient documentary and testimonial evidence to support a claim of $1,350.62, to repair and paint the wall and install a new doorbell at the rental unit. I find that the landlord is entitled to $1,350.62 from the tenants.

Placement Fee

Subsection 45(2) of the Act sets out how tenants may end a fixed term tenancy:

> *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*
>
> > *(a) is not earlier than one month after the date the landlord receives the notice,*
> >
> > *(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*
> >
> > *(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

The above provision states that tenants cannot give notice to end the tenancy before the end of the fixed term. If they do, they may have to pay for monetary losses to the landlord.

In this case, the tenants ended the tenancy prior to the end of the fixed term on May 31, 2022. The landlord provided a copy of the signed, written tenancy agreement and

addendum for this hearing. The tenants did not dispute the above information during this hearing.

I find that the tenants breached the fixed term tenancy agreement. As such, the landlord may be entitled to compensation for losses she incurred as a result of the tenants' failure to comply with the terms of the tenancy agreement and the *Act*.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

The parties' signed written tenancy agreement addendum states the following at paragraph 5, page 1:

> *5. Ending the Tenancy*
> *The tenant is required to give written notice to the landlord either delivered to the office, or by sending it registered mail. Should the tenancy agreement be terminated by the tenant for any reason prior to the agreed length of stay (see page 2 of tenancy agreement for length of tenancy), the tenant understands that they are liable to pay liquidated damages including but not limited: rent during vacancy, a "placement fee" to find a new tenant which is equivalent to 75% month's rent and any additional costs to re-rent the property.*

I find that the landlord incurred a placement fee cost of $1,995.00, which is half a month's rent, and less than the 75% monthly rent cost noted above in the addendum. I find that the tenants agreed to pay the placement fee if they breached the fixed term tenancy agreement, since they signed the tenancy agreement and signed and initialled each page of the addendum.

I accept the affirmed testimony of the landlord's agent, that she was required to show the rental unit, screen applicants, and find a new tenant to occupy the rental unit after the tenants moved out. Although the tenants claimed that helped the landlord find and show the rental unit to new tenants, I find that the landlord did not waive the placement fee for the tenants, and she is not obligated to do so. I find that it is the landlord's prerogative to find, screen, and select a new tenant, based on her own needs and requirements, as she sees fit. I find that the landlord accommodated the tenants' showing schedule and health requirements because of the covid-19 pandemic.

For the above reasons, I find that the landlord provided sufficient documentary and testimonial evidence to support a claim of $1,995.00, for a placement fee. I find that the landlord is entitled to $1,995.00 from the tenants.

As the landlord was successful in this application, I find that she is entitled to recover the $100.00 filing fee from the tenants.

Tenants' Deposits

During this hearing, I informed the tenants that they may be unsuccessful and they may not receive double the value or the regular amount of their deposits returned to them from the landlord. I notified them that service of a forwarding address by text message was not approved under the *Act* and that the right to the return of their deposits may be extinguished because they failed to participate in the move-out condition inspection with the landlord. The tenants both confirmed their understanding of same and stated that they wanted to proceed with this hearing, they wanted me to make a decision, and they did not want to settle this application with the landlord. The tenants both stated that they were entitled to the return of double the value of their deposits because the landlord did not give them a copy of the move-out condition inspection report in a timely manner.

The landlord continues to hold the tenants' security and pet damage deposits, totalling $3,990.00. Over the period of this tenancy, no interest is payable on the deposits.

Section 38 of the *Act* requires the landlord to either return the tenants' deposits or file for dispute resolution for authorization to retain the deposits, within 15 days after the later of the end of a tenancy and the tenants' 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 deposits. However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the deposits to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

This tenancy ended on September 15, 2021. The landlord did not have any written permission to keep any amount from the tenants' deposits. The landlord did not return the deposits to the tenants.

The landlord filed this application for dispute resolution to claim against the deposits on October 15, 2021. This is within 15 days of the forwarding address being provided to the landlord by the tenants on October 4, 2021. However, text message is not an approved method of service for a written forwarding address, as per section 88 of the *Act.* Therefore, I find that the tenants did not provide a proper written forwarding address to the landlord, as required by section 38 of the *Act*, to trigger the doubling provision.

Sections 35 and 36 of the *Act* state the following:

> *Condition inspection: end of tenancy*
> *35(1) 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.*
> *(2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.*
> *(3) The landlord must complete a condition inspection report in accordance with the regulations.*
> *(4) 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.*
> *(5) 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.*
>
> *Consequences for tenant and landlord if report requirements not met*
> *36(1) 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.*
> *(2) 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.*

Residential Tenancy Policy Guideline 17 states that if both parties' rights to the deposits are extinguished, the party who breached first, bears the loss.

I accept the undisputed affirmed testimony of the landlord's agent that she provided two opportunities to the tenants, one using the approved RTB form, to conduct a move-out inspection. The tenants did not dispute the above information during this hearing. The landlord provided a copy of the RTB form with its application evidence.

I accept both parties' affirmed testimony that the tenants did not participate in the move-out condition inspection or sign the move-out condition inspection report. The tenants testified that they were moving and chose not to attend the move-out condition inspection, of their own accord.

I accept both parties' affirmed testimony that the landlord's agent conducted the move-out condition inspection alone, she signed the report, the tenants were not present, and the tenants did not sign the report.

Therefore, I find that the tenants breached section 36(1)(a) and (b) of the *Act* above, by failing to attend the move-out condition inspection after being provided two opportunities to do so, one using the approved RTB form. Accordingly, I find that the landlord is entitled to retain the tenants' entire security and pet damage deposits, totalling $3,990.00, as the right of the tenants to the return of their deposits is extinguished. For the above reasons, I find that the tenants are not entitled to the regular return or double the value of their deposits from the landlord.

The tenants testified that they did not receive a copy of the move-out condition inspection report until May 2022, with the landlord's application evidence for this hearing. The landlord's agent stated that she emailed and mailed a copy of the move-out condition inspection report to the tenants on Friday of the same week of October 4, 2021, when she received the tenants' forwarding address. The tenants claimed that they did not receive the landlord's mail or email from October 2021.

I find that the tenants breached first, by failing to attend the move-out condition inspection, as required by section 36(1)(a) and (b) of the *Act*. If the landlord was late in providing a copy of the move-out condition inspection report to the tenants, as required by section 36(2)(c) of the *Act*, the landlord would have breached second after the tenants failed to attend the move-out condition inspection first.

The landlord reduced its original monetary claim from $4,095.00 to $3,445.62, inclusive of the filing fee, at this hearing. I granted the landlords' application for $3,445.62 total, including the filing fee, as noted above. However, I find that the landlord is entitled to retain both the tenants' deposits in their entirety, totalling $3,990.00, since the tenants' right to their return is extinguished, as noted above.

Conclusion

The landlord's application is granted.

I order the landlord to retain the tenants' entire security and pet damage deposits totalling $3,990.00.

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 09, 2022

Residential Tenancy Branch