



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act"), for a monetary order of \$1,000.00 for damage or compensation under the Act; for a monetary order of \$1,899.00 for the return of the security deposit; and to recover their \$100.00 Application filing fee.

The Tenant, V.S., the Landlord, M.J., and a translator for the Landlord, P.K. ("Translator"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it. During the hearing, the Tenant and the Landlord were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary and Procedural Matters

The Tenants provided the Parties' email addresses in the Application, and the Parties confirmed these in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in

the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

Issue(s) to be Decided

- Are the Tenants entitled to a Monetary Order, and if so, in what amount?
- Are the Tenants entitled to recover their \$100.00 Application filing fee?

Background and Evidence

The Parties agreed that the fixed term tenancy began on June 1, 2021, and ran to May 31, 2022, with a monthly rent of \$3,100.00, due on the first day of each month. They agreed that the Tenants paid the Landlord a security deposit of \$1,550.00, and no pet damage deposit. The Parties agreed that the Landlord returned \$1,201.00 of the security deposit within 15 days of the end of the tenancy, and retained \$349.00 for damages. The Parties agreed that the Tenants vacated the residential property on May 31, 2022.

#1 MONETARY CLAIM FOR RENT OVERPAYMENT → \$1,000.00

The Tenant explained his first claim, as follows:

We moved in earlier than the date on the tenancy agreement; we agreed that we didn't pay for that, because it was paid for by the previous tenant - just the amount in the contract. But we paid \$1,000.00 more, because of the 10 days, or a third of the monthly payment.

I asked the Tenant why he paid the Landlord this amount, if the Parties had agreed at the start that he did not have to pay it. The Tenant said:

[The Landlord] was trying to convince me that I should pay them. I cannot answer . . . I cannot explain. She convinced me that I need to pay, but I figured out that I shouldn't have paid. I'm not sure of it from a legal point of view.

We agreed – it's a contract - so according to the contract, the rental starts on the first of June, but we moved in, in May – but it's not in the contract.

The Translator interpreted the Tenant's comments to the Landlord, and then she said that the Landlord responded, as follows:

She wants to express that she wants to explain it herself. At the first of the tenancy, they told me because they have to arrange for rent to another landlord that they cannot pay [for the ten days in May]. But at the end of the tenancy, they didn't want to pay their last month. I have to cover my mortgage. I said it's not fair, because you came ten days earlier and you don't want to pay the last month's rent. Finally, they agreed to pay that one [for \$1,000.00].

The Landlord directed me to her evidence labelled document "B" - specifically to an April 21st, 2022, conversation. She said: "And on page two you can see I agreed with the ten days; the best option would be to compensate me for the ten days. So, \$1,000.00 as a rent, instead of the \$3,100.00 for the last month."

The Tenant responded:

I'm not denying that it was my decision [to pay the \$1,000.00], but it's not according to the contract. So, it was in the very beginning, we should have paid in the beginning from the first day. But it was fine until the end of the tenancy. So, our monthly payments - and there were no issues - and then in the end we needed to pay for the first ten days, but it was not in the contract. I agree that I paid it, but I'm just saying it shouldn't be paid according to the contract.

The Landlord responded:

In the first pages of documents "A" and "B" it explains what happened about the ten days; it is clear. Basically, everything that occurred – communications between both Parties - she has expressed in all those pages in documents "A", "B", and "C" – just repeating everything verbatim. It's clearly listed and written out in those pages.

#2 RETURN OF THE SECURITY DEPOSIT → \$1,899.00

The Tenants requested the return of their security deposit in the amount of \$1,899.00. It is undisputed evidence that the Landlords returned \$1,201.00 of the Tenants' \$1,550.00 security deposit at the end of the tenancy. I asked the Tenant how he calculated this amount, and he said:

I was not paid in full, so I get that portion that wasn't paid in full, because it's illegal to withhold any amount. I want that back in full, and a penalty for not paying this amount.

The Translator said:

[The Landlord] wants to explain something regarding the security deposit and withholding the amount. They moved out and showed them the damages. [The Tenants] told me 'I don't know what happened. Because I wasn't in town'. I asked them to take picture of any damages they found and send me the pictures. They didn't send any.

I explained to them to send the pictures to compare them to the start. But because the Landlord was not in Canada at the start of the tenancy, a lot of communication was done by text messaging. She asked them to look around and take pictures of any damages they noted. They did send some.

At the end of the tenancy, she questioned them about the damages and asked for before and after pictures. See Document C – [she said:] 'I asked [the female Tenant] to send me the pictures. [These discussions are found] on pages six and seven. After that I asked them: we should estimate about that and a price for the repair. I emailed them two times. I sent it to them for signing that, but they didn't answer me. I wanted to return the security deposit before the 15 days. See document I, lines six and fifteen. They agreed at the first of the tenancy to let me list any damages and repair them, and return the deposit after that. I did it according to the Addendum.

Document I of the Landlord's evidence is entitled: "Addendum to the lease". Clause six of this Addendum states:

6. Within the lesser of 15 days and anytime period required by Act after the termination of this tenancy, the Landlords will deliver or mail the Security Deposit less any proper deductions or with further demand for payment to the tenant or at such other place as the Tenant may advise.

Clause 15 of the Addendum states:

15. During the Term of this Lease or after its termination, the Landlord may charge the Tenants or make deductions from the security deposit for any or all of the following:

1. repair of walls due to plugs, large nails or any unreasonable number of holes in the walls including the repainting of such damaged walls;

2. repainting required to repair the results of any other improper use or excessive damage by the Tenants;
3. unplugging toilets, sinks and drains;
4. replacing damaged or missing doors, windows, screens, mirrors or light fixtures;
5. repairing cuts, burns, or water damage to engineered hardwood, rugs, and other areas;
6. any other repairs or cleaning due to any damage beyond normal wear and tear caused or permitted by the Tenants or by any person whom the Tenants is responsible for;
7. the cost of extermination where the Tenants or the Tenants' guests have brought or allowed insects into the Premises or building;
8. repairs and replacement required where windows are left open which have caused plumbing to freeze, or rain or water damage to floors or walls;

The Translator continued:

She's relying on acting according to the Addendum to the lease, that the Tenants were understanding the process of how she would return the security deposit. Her main concern was for returning the security deposit before the 15 days.

She made two communications with the Tenants regarding the damages, but she never heard back. So, she wanted to quickly return the security deposit back to them. She was open to negotiation or communication, but the Tenants didn't communicate with her.

The Translator referred to the Landlord's document D, which she said says the Landlord states: "Send me a picture at the first of the tenancy. I would like to see any evidence they have, as I was open to the conversation with them."

I find that Document D consists of text messages of pictures regarding damages to the rental unit at the end of the tenancy. The damage described included:

- a dent in the bedroom wall;
- scraped paint in a window sill wall;
- a spot of discolouration in the living room curtain; and
- marks on the bedroom wall.

The Tenant said:

My general comment is that the reason for my Application was just the fact that they withheld an amount, because if the Landlord wants to discuss damages, they should file a case from their side. But as far as I understand, we shouldn't discuss the damages – it's illegal to withhold the amount without any reason.

I asked if there was any damage to the unit at the end of the tenancy, and the Tenant said:

No. There was one damage, but I fixed it. When I did the inspection, they said there were no damages. The damages is on the [condition inspection] report – they can't prove there are damages. We're not discussing damages; we're discussing withholding this amount.

The Landlord replied:

Because if you remember at the first of the tenancy, we discussed a lot about the Addendum. I asked you to record damages and you agreed with that. See document I, numbers six and fifteen. You knew to sign the dispute for damage deposit. The bottom line: there was lots of conversation regarding the security deposit and that in order to avoid dispute resolution process, she would have the ability to withhold those funds from the deposit and return the rest within the 15 days. She is acting in accordance with the Addendum to the lease.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Before the Parties testified, I let them know how I analyze evidence presented to me. I said that a party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this case, the Tenant must prove:

1. That the Landlords violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Tenants to incur damages or loss as a result of the violation;
3. The value of the loss; and,

4. That the Tenants did what was reasonable to minimize the damage or loss.
("Test")

#1 MONETARY CLAIM FOR RENT OVERPAYMENT → \$1,000.00

The Tenant asserts that his agreement with the Landlord about paying for the first ten days of the tenancy, which occurred prior to the start of the tenancy agreement, should be set aside, because it was not part of the tenancy agreement. However, I find that the Landlord's documentary evidence about the Parties' discussions that led to the \$1,000.00 payment indicates that this payment was made in connection with an agreement to not pay the last month's rent. The last month's rent was part of the tenancy agreement; I note that the Landlords are not pressuring the Tenants to reimburse them for that lost income. Further, the Tenant did not deny having used the Landlords' residential property for ten extra days.

I find that the Tenant has not established the first step of the Test - that the Landlords violated the Act, regulation, or tenancy agreement in this situation. Therefore, I **dismiss this claim** without leave to reapply, pursuant to section 62 of the Act.

#2 RETURN OF THE SECURITY DEPOSIT → \$1,899.00

Section 6 of the Act states that the rights, obligations, and prohibitions set out in the Act are enforceable between a landlord and tenant under a tenancy agreement. Section 6 (3) (a) states that a term in a tenancy agreement (including an addendum), is not enforceable if the term is inconsistent with this Act or the regulations. This means a landlord cannot insert a term in a tenancy agreement that does not comply with the Act.

In this case, I find that the Landlord tried to avoid dispute resolution, by inserting terms in the Addendum. These terms attempted to address how the Parties would deal with any damages that occur in the tenancy. However, the terms of the Addendum in this regard are inconsistent with what the Act states about dealing with the security deposit.

Section 38 of the Act states that a landlord must do one of two things at the end of the tenancy. Within 15 days of the later of the end of the tenancy and receiving the tenant's forwarding address in writing, the landlord must: **(i)** repay any security deposit and/or pet damage deposit; **or (ii)** apply for dispute resolution claiming against the security deposit and/or pet damage deposit. If the Landlord does not do one of these actions within this timeframe, the landlord is liable to pay double the security and/or pet damage deposit(s) pursuant to section 38(6) of the Act.

The Landlord failed to return \$349.00 of the Tenants' security deposit, and therefore, I find that section 38 (6) of the Act applies.

Section 38 (6) of the Act states that if a landlord does not comply with section 38 (1), then the landlord **(a)** may *not* claim against the security or any pet damage deposit, and **(b)** must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Policy Guideline #17, "Security Deposit and Set off" ("PG #17"), clarifies this section of the Act. PG #17 provides examples of how calculations are made in various situations. For example:

Example A:

A tenant paid \$400 as a security deposit. At the end of the tenancy, the landlord held back \$125 without the tenant's written permission and without an order from the Residential Tenancy Branch. The tenant applied for a monetary order and a hearing was held.

The arbitrator doubles the amount paid as a security deposit ($\$400 \times 2 = \800), then deducts the amount already returned to the tenant, to determine the amount of the monetary order. In this example, the amount of the monetary order is \$525.00 ($\$800 - \$275 = \525).

According to the Act and PG #17, I find I must deal with the security deposit in the case before me, as follows:

Security deposit =	\$1,550.00 X 2 =	\$3,100.00
Less amount returned		(1,201.00)
		<u>\$1,899.00</u>

Accordingly, I find the Tenants are correct in this claim, and I **award them \$1,899.00** from the Landlord, pursuant to sections 38 and 67 of the Act.

Given the Tenants' partial success in this Application, I grant the Tenants recovery of half of their \$100.00 Application filing fee or **\$50.00**, pursuant to sections 72 and 67 of the Act. The **Tenants are awarded a total of \$1,949.00** from the Landlord, pursuant to section 67 of the Act.

At the end of the hearing, the **Landlord requested guidance** on how to carry out her duties as a Landlord in a manner consistent with the Act, if she was found to be in error. She asked what she should have done differently in this situation. The most important point is that you cannot avoid the Act and dispute resolution, unless you can come to an agreement with the Tenant in that regard. However, if a term is overly onerous or unconscionable, it may be struck down by the Director, even if a tenant agrees with it.

In terms of the security deposit, the Landlord must return all of the security deposit within 15 days of the later of (i) the end of the tenancy and (ii) receiving the tenant's forwarding address in writing. The Landlord's other option is to apply for dispute resolution with the RTB within the 15 days for an order allowing the Landlord to retain some or all of the security deposit. If you have any questions about any tenancy matter, including my Decision, please don't hesitate to contact the RTB and speak with an information officer.

Conclusion

The Tenants are partially successful in their Application, as they provided sufficient evidence to establish monetary awards of **\$1,949.00** from the Landlord. This includes recovery of **half** of their **\$100.00** Application filing fee.

I grant the Tenants a **Monetary Order of \$1,949.00** from the Landlords. This Order must be served on the Landlords by the Tenants and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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 21, 2023

Residential Tenancy Branch