Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes

MNDL-S, FFL
MNDL-S, MNDCL-S, FFL
MNSDB-DR, FFT

Introduction

The Landlord files two applications, the first of which they seek the following relief under the *Residential Tenancy Act* (the "*Act*"):

- a monetary order pursuant to ss. 67 and 38 to pay for repairs caused by the tenant during the tenancy by claiming against the deposit;
- return of the filing fee pursuant to s. 72.

In their second application, the Landlord seeks the following relief under the *Act*:

- a monetary order pursuant to ss. 67 and 38 to pay for repairs caused by the tenant during the tenancy by claiming against the deposit;
- a monetary order pursuant to ss. 67 and 38 compensating for loss or other money owed by claiming against the deposit; and
- return of the filing fee pursuant to s. 72.

The Tenants file their own application seeking the following relief under the *Act*:

- an order pursuant to s. 38 for double the return of the security deposit and/or the pet damage deposit; and
- return of the filing fee pursuant to s. 72.

The Tenants' application was filed as a direct request but was scheduled for a participatory hearing due to the Landlord's applications.

W.K. attended as the Landlord's agent. S.K. attended as the Tenant.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

Service of the Applications and Evidence

Landlord's Application Materials

The Landlord's agent advised that the first application was not served on the Tenant as it did not comprise the Landlord's total claim, which was amended in the form of the second application. The agent further advises that the Landlord's second application and evidence was served on the Tenant, which the Tenant acknowledges receiving without objection.

I find that the first application was not served such that it is dismissed.

I accept that the second application was an attempt to revise the Landlord's claim, which could have been done by way of amendment but was not due to the Landlord's unfamiliarity with the Residential Tenancy Branch process. In any event, the second application replicates the claims set out in the first application such that I find that the first application, including the claim for return of the filing fee, is dismissed without leave to reapply.

Given the Tenant acknowledges receipt of the Landlord's second application and evidence, I find under s. 71(2) of the *Act* that these sufficiently served on the Tenant.

Tenants' Application Materials

The Tenant advises that he served the Landlord with two registered mail packages: one sent in July 2023 and the second sent on December 15, 2023. The Tenant advises that the first registered mail package contained the application and some of the evidence submitted to the Residential Tenancy Branch and that the second registered mail package contained additional evidence.

The Landlord's agent acknowledges receipt of the Tenants' application but denies receipt of any evidence. The Tenant emphasized that the packages contained the evidence.

The Tenants have not provided proof of service for their application materials. During the hearing, the Tenant read out a tracking number for the package he says was sent in December 2023, though review of that shows that it does not correspond with a valid tracking number that can be reviewed online with Canada Post.

It bears consideration that the Tenants must demonstrate service of their application materials. In this instance, I find under s. 71(2) of the *Act* that the application was served given the Landlord's agent acknowledged its receipt. However, I am not satisfied that the Tenants have demonstrated service of their evidence. Given that I cannot find the evidence was served, I shall not consider it as it would be procedurally unfair to consider evidence for which the Landlord did not have notice.

Preliminary Issue – Parties Named in the Applications

The Landlord's evidence contains a copy of the tenancy agreement, which lists M.K. as the Landlord and S.K. and R.M. as co-tenants. I note that tenancy agreements should use the correct legal spelling for the names of the parties to the agreement and that applications should generally follow the spelling of the parties as listed in the tenancy agreement.

In this instance, the Landlord lists S.K. as the sole respondent in its application. The Tenants list S.K. and R.M. as applicants and list M.K. and A.C. as respondents. A.C. is not listed as a landlord under the tenancy agreement, though the Landlord's evidence suggests A.C. acts as the Landlord's agent. To be clear, if an order is granted on either application, it can only be granted against the respondents listed.

Though, I have not been asked to amend either application, I find that it is appropriate to remove A.C. as respondent. A.C. is not a party to the tenancy agreement and it would be inappropriate to potentially order her to pay funds to the Tenants when she is not privy to the contract.

I do not, however, add R.M. as a respondent on the Landlord's application. Co-tenants are jointly and severally liable for claims brought by their landlord, which in this case means the Landlord can seek compensation from S.K. alone if they chose to do so. Further, R.M., was not given notice of the Landlord's application as they were not a respondent such that it would be improper to add them as a party because doing so would deprive them their right to such notice.

If an order is granted on either application, it will follow the parties named in that application except for A.C., who is not a party to the tenancy agreement and has been removed as a respondent from the Tenants' application.

Issues to be Decided

1) Is the Landlord entitled to compensation for damage to the rental unit caused by the Tenant, their pet, or their guest?
2) Is the Landlord entitled to compensation for loss or other money owed by the Tenant?
3) Is the Landlord entitled to retain the deposits in partial satisfaction of their monetary claims or should the deposits be returned to the Tenants?
4) Is either side entitled to the return of their filing fee?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

General Background

The parties confirm the following details with respect to the tenancy:

- The tenants moved into the rental unit on June 1, 2020.
- The tenants moved out of the rental unit on May 31, 2023.
- At the end of the tenancy, rent of $1,928.50 was due on the first day of each month.
- A security deposit of $950.00 and a pet damage deposit of $300.00 was paid by the tenants.

I have been provided with a copy of the tenancy agreement by the Landlord.

Legislation Relevant to the Monetary Claims

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the 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.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

1) Is the Landlord entitled to compensation for damage to the rental unit caused by the Tenant, their pet, or their guest?

In their application, the Landlord claims $1,600.00 for this claim and describes their claim as follows:

1. Bathroom restoration - Drywall Patch - Tape & Mud - Repainting – Replace Baseboard - Remove Mold & Cleaning 2. Livingroom Restoration -Remove Mold & Cleaning -Replace Baseboard -Replace Laminated Woods (2 pieces)

The Landlord has provided a monetary order worksheet that particularizes the monetary claim as follows:

Bathroom Restoration	$1,050.00
Living Room Restoration	$262.50

Section 37(2) of the *Act* imposes an obligation on tenants at the end of the tenancy to leave the rental unit in a reasonably clean and undamaged state, except for reasonable wear and tear, and to give the landlord all keys in their possession giving access to the rental unit or the residential property. Policy Guideline 1 defines reasonable wear and tear as the “natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion.”

At the hearing, the Landlord’s agent explained that there was water damage to the bathroom and adjacent living room at the rental unit and argued the tenants was responsible. I have been provided with photographs of the rental unit by the Landlord, which shows an area of drywall beside the shower surround has been damaged and baseboard that appear to be damaged by water in the bathroom and the living room.

As explained to me by the Landlord's agent, the damaged drywall in the photograph is opposite the shower head. The agent argued the tenants failed to use the shower curtain properly, which caused the water damage. I am further told by the agent that the tenants did not report a water leak to them and only discovered the water damage in April 2023 after the tenants gave notice they would be vacating.

The Tenant says that the damage was not caused by him or his co-tenant and that they used the shower curtain properly. The Tenant argued that the waterproofing for the shower had failed and that this caused the water damage. The Tenant further says that he reported some water damage to the Landlord in April 2022 but that the Landlord did not respond.

I enquired with the Landlord's agent with respect to the age of the residential property and whether the tub surround was original to the residential property. I was told by him that the residential property is approximately 15 years old and that the tub surround had not been replaced by the Landlord. The agent emphasized, however, that there was no indication that the tub surround had failed and that there was no water damage to the bathroom when the tenancy began.

I make note that waterproofing membranes for tub surrounds do have a useful life. In this instance, the surround is tiled, which will invariably mean some waterproofing method was utilized on the substrate surface beneath the tiles. Policy Guideline #40 provides guidance on the useful life of building elements, which suggests that the expected useful life of a waterproofing membrane is 15 years and sealer being 5 years.

The Landlord's agent requested the opportunity to provide additional evidence after the hearing from the repair person to indicate their opinion on the cause of the water damage. I denied the agent's request both because the Landlord had more than sufficient time to organize its case and because the Landlord cannot, in my view, backstop their evidence after having had the benefit of hearing the arguments made at the hearing.

On my view of the evidence before me, there is insufficient proof to show the tenants are responsible for causing the water damage. It is just as likely that the damage was caused following the failure of the waterproofing membrane beneath the tiles as it was due to the neglect of the tenants themselves. Indeed, the guidance provided with Policy Guideline #40 would at least suggest the waterproofing membrane was at or past the end of its useful life and likely to fail.

I have also considered whether the tenants are responsible for the extensive nature of the damage by failing to report the same to the Landlord. I find that they are not. I accept that it is likely they reported the issue to the Landlord earlier than was mentioned by the agent at the hearing. Given the nature of the damage and its location, I do not accept that they would have merely ignored the issue while the damage got progressively worse.

I find that the Landlord has failed to demonstrate the tenants were in breach of s. 37(2) of the *Act*. As such, I dismiss this portion of their application without leave to reapply.

2) *Is the Landlord entitled to compensation for loss or other money owed by the Tenant?*

In their application, the Landlord claims $193.33 for this claim and describes their claim as follows:

> 2 days of vacancy due to repair (current rental price: $2900/month which is $96.67/day)

At the hearing, the Landlord's agent explained that the bathroom and living room repairs took 2 days to complete in late June 2023 such that the tenants should be responsible for paying the Landlord lost rental income for the rental unit during those 2 days. I enquired with the agent when the rental unit was re-rented. The agent advised the new tenant moved in on July 15, 2023.

First, this claim must fail given my findings above that the tenants did not cause the underlying damage. Second, this was a monthly periodic tenancy which ended in accordance with s. 45 of the *Act* and the Landlord did not have a new tenant for the rental unit for June 2023. In other words, the Landlord did not suffer lost rental income when the repairs were completed in late June 2023.

I also dismiss this portion of the Landlord's application without leave to reapply.

3) *Is the Landlord entitled to retain the deposits in partial satisfaction of their monetary claims or should the deposits be returned to the Tenants?*

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the

Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38. Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit.

I have reviewed the condition inspection report provided to me by the Landlord. I find that it was properly prepared in accordance with ss. 23 and 35 of the *Act*. I am further advised and accept that the tenants were provided a copy of the move-in and move-out condition inspection reports in accordance with ss. 23(5) and 35(5) of the *Act*. I find that neither party's right to the deposits has been extinguished by either ss. 24 or 36 of the *Act*.

The parties confirm that neither deposit has been returned, either in whole or in part, to the tenants.

The Tenant advises that they provided their forwarding address to the Landlord by way of mail sent on June 7, 2023. The Landlord's agent acknowledges the forwarding address was received by the Landlord on June 18, 2023. I find that the Landlord received the tenant's forwarding address on June 18, 2023.

Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Landlord filed their second application on June 30, 2023.

Dealing first with the security deposit, I accept that the Landlord properly retained the security deposit pending the outcome of this hearing and claimed within the 15-day time limit imposed by s. 38(1) of the *Act*. I find that the doubling provision under s. 38(6) of the *Act* does not apply to the security deposit.

With respect to the pet damage deposit, the definition of "pet damage deposit" set out in s. 1 of the *Act* states that it is "held as security for damage caused by a pet…" (emphasis added). In other words, a landlord may only claim against a pet damage deposit for damage caused by the pet. In this instance, there is no contention that the water damage was somehow caused by the tenants' pet, rather it was alleged to have been caused by the tenants themselves.

Given the nature of the damage here, the Landlord had no right to retain the pet damage deposit pending the outcome of its application since the damage did not relate to damage alleged to have been caused by the tenants' pet. Since the pet damage

deposit had not been returned within 15 days of June 18, 2023, I find that s. 38(6) of the *Act* applies with respect to the pet damage deposit.

Taking the above into account, I order that the Landlord return the security deposit, double the pet damage deposit, and the interest owed on the deposits, which totals $1,574.25 ($950.00 + $600.00 + $24.25).

4) *Is either side entitled to the return of their filing fee?*

I find that the Landlord was unsuccessful on their application. Their claim for their filing fee is dismissed without leave to reapply.

I find that the Tenants were largely successful and are entitled to their filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenants $100.00 filing fee.

Conclusion

I dismiss the Landlord's monetary claims, in their entirety, without leave to reapply.

I further dismiss the Landlord's claim for their filing fee, without leave to reapply.

I grant the Tenants an order for the return of the security deposit, double their pet damage deposit, and interest on the deposits, which totals $1,574.25.

I also grant the Tenants their filing fee of $100.00, which shall be paid by the Landlord.

In total, I order that the Landlord pay **$1,674.25** to the Tenants ($1,574.25 + $100.00).

It is the Tenants' obligation to serve the monetary order on the Landlord. Should the Landlord fail to comply with the monetary order, the Tenants may enforce it at the BC Provincial 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: January 03, 2024

Residential Tenancy Branch