Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Introduction

This hearing was convened under the *Residential Tenancy Act* (The ***Act***) in response to cross applications from the parties. The Landlord filed their application on June 6, 2023, and seeks:

- A Monetary Order for damage to the Rental Unit or common areas.
- Authorization to retain all or a portion of the Tenant's security deposit in partial satisfaction of the Monetary Order requested.
- Authorization to recover the filing fee for this application from the Tenant.

The Tenant filed their application on June 21, 2023, and seeks the return of their security deposit.

Preliminary Matters and Service of Records

On December 18, 2023, the parties attended arbitration before arbitrator NM. Arbitrator NM adjourned the matter due to service issues and ordered the parties to exchange their evidence. In their December 20, 2023, decision, arbitrator NM stated that "the parties also confirmed their understanding that they must not refuse to accept evidence from the other party…"

The hearing was adjourned to March 4, 2024, to be heard by the same arbitrator. On February 22, 2024, the parties were contacted by the Residential Tenancy Branch (the **Branch**) and were informed that the matter must be heard *de novo* by a new arbitrator on March 4, 2024. Branch's records show that the parties were informed that the hearing will be heard from the beginning.

On March 4, 2024, the parties attended the hearing and once again raised issues regarding service. The Tenant testified that they were not served with the Landlord's evidence. The Landlord testified that during the previous hearing, the Tenant provided their new residential address to the Landlord, along with their email address. The Landlord testified that they sent the Tenant a registered package containing all their records on December 30, 2024. They provided the associated tracking number, which I have copied on the cover page of my decision.

The Tenant confirmed their address and testified that they have trouble receiving their mail, as they share their mailbox with their new landlord. They did not explain how

sharing their mailbox is a barrier to receiving mail. But in any event, the Tenant acknowledged that the Landlord contacted them on January 4, 2024, and let them know that their records are sitting at the local Canada Post office waiting to be picked up by the Tenant. The Tenant also testified that they never informed the Landlord that they have issues receiving mail at their new residential address.

The Tenant testified that they made zero attempts to pick up the Landlord's records from the local post office over the one-month period in which the package was sitting at the post office.

I also find it notable that the Branch's records indicate that the Tenant contacted the Branch shortly prior to the hearing. An information officer at the Branch recorded the following notes after their conversation with the Tenant: "asked if [Tenant] wished to receive [Landlord's] evidence via email. [Tenant] refused because the hearing was happening in 1 hour and [Tenant] would not have time to view it and respond to it."

While I understand why the Tenant refused the Branch's offer at that time, I find the Tenant was fully aware of their option to request courtesy copies from the Branch. However, more importantly, based on their testimony during the hearing, I find that the Tenant was fully aware that the Landlord's records were waiting for them at their local post office, and they decided to avoid service.

I find the Tenant is deemed served with the Landlord's records, in accordance with section 90 of the *Act*, on January 4, 2024, by registered mail in accordance with sections 88 and 89(1) of the *Act*, the fifth day after the Landlord's registered mailing. On October 4, 2023, a Branch information officer emailed the Tenant courtesy copies of the Landlord's Proceeding Package. On December 21, 2023, the Branch again emailed the Tenant with a copy of the Proceeding Package. The Tenant attended the hearing as scheduled and so for absolute clarity, pursuant to section 71(2)(b) of the *Act*, I find the Tenant was sufficiently served with the Proceeding Package on the above dates.

The Landlord acknowledged service of the Tenant's application and the bulk of the Tenant's documentary evidence, which was mailed to the Landlord on June 23, 2023. The associated tracking number is copied on the cover page of my decision.

The Landlord testified that they were not served with several documents that were served to the Branch in November 2023 and beyond. I reviewed those documents during the hearing and informed the parties that they are irrelevant documents regarding the parties' dispute with the RCMP. I will not consider these documents in my decision, both because they are irrelevant and because they were not served to the Landlord. The Tenant acknowledged that they have not served the November 2023 records to the Landlord. I have considered the balance of the Tenant's records in making my decision as I find the Tenant served those records to the Landlord in accordance with sections 88 and 89 of the *Act*.

Background Facts and Evidence

The parties agreed that this tenancy began on February 1, 2023, and that it ended on May 31, 2023, with a monthly rent of $1,100.00, due on the first day of every month. The parties agreed that the Tenant paid a $550.00 security deposit to the Landlord on May 31, 2023.

The parties agreed that there is no start of tenancy condition inspection report, but they did complete what the parties referred to as a “walkthrough”.

The Landlord testified that their advertisement included pictures of the Rental Unit, and a note that the Rental Unit is a drug-free environment. The parties agreed that the Rental Unit was rented to the Tenant furnished. The Landlord submitted a copy of the advertisement, which they say included several pictures. The Landlord only submitted the first page of the advertisement, which includes one picture, which also states that the there is to be “no drugs or vaping”.

The parties did not complete an end of tenancy condition inspection report.

The Landlord acknowledged receipt of the Tenant’s forwarding address on May 31, 2023. The Tenant sent the Landlord their updated address on November 17, 2023, which the Landlord acknowledged they received on November 20, 2023.

The Landlord submitted a monetary order worksheet which includes the following line items being sought from the Tenant:

No.	Receipt/Estimate From	For	Amount
1	HD	Cabinet	$122.08
2	MLWM	Mattress	$498.40
3	TB	Sofa	$821.24
4	SW and CP	Paint ($111.34, $63.82, $50.87)	$226.03
5	BBP	Painter	$1,044.75
6	Unknown	Postage	$13.59
7	RTB	Filing fee	$100.00
8	SN	Notary fee	$75.00
9	J	J. Handyman	$75.00
10	PC and RC	Cleaning ($821.24, 234.08, 342.72)	$1,398.04

I will provide details about the parties’ testimonies regarding the above items in my analysis section below.

The Tenant filed their application to seek the return of double their security deposit.

Analysis

When two parties to a dispute provide equally possible accounts of events or circumstances related to a dispute, the party making the claim has the responsibility to provide evidence over and above their testimony to prove their claim.

The standard of proof in this tribunal is balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

- *Security Deposit*

Section 23(1) of the *Act* establishes that at the start of a tenancy, a landlord and a tenant must inspect the condition of the rental unit together and the landlord must complete a condition inspection report with both the landlord and the tenant signing the report.

Section 24(2) of the *Act* states that the right of a landlord to claim against a security deposit for damage to residential property is extinguished if the landlord does not provide the Tenant two opportunities for inspection and if the landlord does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

There is no dispute that the Landlord did not complete a condition inspection report in accordance with section 23(4) of the *Act* and the *Residential Tenancy Regulation* at the start of the tenancy. Thus, per section 24(2)(c) of the *Act*, the Landlord extinguished their right to claim against the security deposit for damages to the Rental Unit and had no right to retain the Tenant's security deposit.

Section 38 of the *Act* states that within 15 days of either the tenancy ending or the date that the landlord receives the tenant's forwarding address in writing, whichever is later, a landlord must repay a security deposit to the tenant or make an application for dispute resolution to claim against it. In this case, the parties agreed that the tenancy ended on May 31, 2023. The Landlord acknowledged receipt of the Tenant's forwarding address on May 31, 2023, and their updated forwarding address on November 20, 2023. Even if I find that the May 31, 2023, forwarding address was not the Tenant's actual forwarding address, by November 20, 2023, the Landlord had the Tenant's forwarding address in writing. To date they have not returned the Tenant's security deposit.

The Landlord applied for dispute resolution on June 6, 2023, within 15 days of May 31, 2023, and well before November 20, 2023, but as I have already found, the Landlord had extinguished their right to retain the Tenant's security deposit to file a claim against it.

In accordance with section 38(6)(b) of the *Act*, as the Landlord extinguished their right to claim against the security deposit and did not return the full amount of the security

deposit within the timeframe of section 38(1) of the *Act*, the Landlord must pay the Tenant double the amount of the security deposit they retained.

Branch's Policy Guideline 17 provides information regarding the handling of security deposits at the end of a tenancy:

> A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
>
> a. to obtain the tenant's consent to deduct from the deposit any monies owing for other than damage to the rental unit;
> b. to file a claim against the deposit for any monies owing for other than damage to the rental unit;
> c. to deduct from the deposit an arbitrator's order outstanding at the end of the tenancy; and
> **d. to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.**

Therefore, the lawful procedure per the *Act* was to return the Tenant's security deposit within the 15-day period and to then file a claim with the Branch for compensation. The Landlord withheld the Tenant's security deposit, unlawfully.

Under these circumstances and in accordance with section 38(6)(b) of the *Act*, I find the **Tenant is entitled to a monetary award of $1,113.10** (double the security deposit of $550.00, plus interest calculated on $550.00, from February 1, 2023, to March 20, 2024).

- *Landlords' claims and application*

Section 7 of the *Act* states that if a party does not comply with the *Act*, the *Regulations* or the tenancy agreement, the non-complying party must compensate the other party for damage or loss that results and that the party who claims compensation must minimize the losses.

Section 67 of the *Act* allows a monetary order to be awarded for damage or loss when a party does not comply with the *Act*. The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. The Residential Tenancy Branch Policy Guideline 16 outlines the criteria to be applied when determining whether compensation for a breach of the *Act* or the tenancy agreement is due. It states that the applicant must prove that (1) the respondent failed to comply with the *Act* or the tenancy agreement; (2) the applicant suffered a loss resulting from the respondent's noncompliance; (3) the applicant proves the amount of the loss; and (4) that they reasonably minimized the losses suffered.

Section 32 of the *Act* states that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 37 of the *Act* states that when a tenant vacates a Rental Unit, the tenant must leave the Rental Unit reasonably clean, and undamaged, except for reasonable wear and tear, and 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.

i. *The cabinet* - $122.08

The Landlord testified that at the start of the tenancy there was a cabinet inside a closet in the Rental Unit, which the Tenant placed outside causing it to be damaged.

The Tenant testified that this cabinet was never attached to any walls and the Tenant never wanted the cabinet. They testified that they informed the Landlord to take the cabinet away, along with another box with the Landlord's possessions inside. The Tenant testified that in March 2023, the Landlord took their box of possessions away, but not the cabinet. The Tenant testified that they placed the cabinet outside the Rental Unit.

The Landlord testified that they were never asked to take the cabinet away, but the Tenant did not want the cabinet and was not allowing the Landlord to attach it to one of the walls of the Rental Unit inside a closet. The Landlord testified that when they went to the Rental Unit to collect their box of possessions, they saw the cabinet sitting outside the Rental Unit. The Landlord testified that they informed the Tenant to put it back in the Rental Unit, but in the interim, they placed the cabinet under the eaves of the property.

The landlord testified that the cabinet has been damaged by water and they were forced to purchase a new cabinet.

With respect to the four-part test outlined above, I find the Landlord failed to mitigate their damages, if any. Irrespective of whether the Tenant had the right to place the cabinet outside the Rental Unit, the Landlord had the opportunity to either fully cover the cabinet or take it inside their own residence for safe keeping. The Landlord made zero attempt to mitigate the issue (even if it can be classified as a damage associated with the Tenant, which I am doubtful). I dismiss this portion of the Landlord's claim because the Landlord failed to mitigate their damage.

ii. *The Mattress and the sofa* - $498.40 and $821.24 respectively.
iii. *Paint cost and painter fees* - $226.03 and $1,044.75 respectively.
iv. *Cleaning fees - $1,398.04*
v. *Handyman fee - $75.00*

The Landlord testified that at the start of the tenancy agreement they made it clear to the Tenant that there is to be no smoking in the Rental Unit, and this was also mentioned on the advertisement in which the Tenant replied to.

The Landlord testified that the Tenant smoked inside the Rental Unit and caused damage. The Tenant's advocate argued that the parties' tenancy agreement did not include a no-smoking clause and placed heavy emphasis on this fact throughout the hearing. I have reviewed the parties' standard RTB-1 tenancy agreement, which does not include a no-smoking clause. The Landlord did not refer me to any relevant addendums or provisions in the agreement.

Whether the tenancy agreement includes a clause or not, if the Landlord established damages to the Rental Unit caused by the Tenant smoking, contrary to sections 32 and 37 of the *Act*, compensation would follow (subject to the Landlord proving they mitigated their damages). A tenant cannot argue that their actions, even if contrary to the *Act*, should receive a pass, because the Landlord did not specifically forbid them in the written tenancy agreement. Such a finding would be irrational. Further, section 67 of the *Act* establishes that the claimant must establish that the respondent contravened either the *Act*, the *Regulation*, or the tenancy agreement, not all of the foregoing.

The Tenant testified that they never smoked inside the Rental Unit and that they are not a smoker. They testified that at the start of the tenancy there was never any discussion regarding smoking.

The Landlord testified that they never personally witnessed the Tenant smoke inside the Rental Unit, but their daughter witnessed the Tenant walk into the Rental Unit with a cigarette in their hand.

The Landlord testified that they saw a cigarette butt under the Rental Unit's sofa after the tenancy ended and they witnessed cigarette butts in the driveway of the Rental Unit, where the Tenant parked their car, when the tenancy was ongoing.

The Landlord's daughter, BT, attended the hearing and provided affirmed testimony. BT testified that on one occasion they witnessed the Tenant smoking beside trees near the Rental Unit with a third-party, and on another occasion, they witnessed the Tenant smoking by a local pub. BT could not recall dates.

The Tenant called two witnesses, JR, and PM, who both provided affirmed testimonies regarding the Tenant's smoking habits. JR testified that they have known the Tenant for 50 years and they have never seen the Tenant smoke or known the Tenant to be a smoker. They testified that they have never entered the Rental Unit.

The Landlord provided testimony regarding an instance in April 2023, where they, along with their daughter BT, inspected the Rental Unit (the **Inspection**), because the Landlord could smell cigarette smoke. The Landlord testified that the Inspection was

preceded by a “warning letter”, dated March 14, 2023. The Tenant agreed that they may have received the “warning letter”.

The Landlord submitted a hand-written record titled “WARNING Letter and 24 hr notice march 11/23 [*sic*]” (the **Warning Letter**). The Warning Letter is three pages in length. In the Warning Letter, the Landlord is discussing various grievances. At the bottom of page one, I can see the following reference to smoking: “Also there is to be no smoking or no vaping or drugs in unit.” I read the letter to the Tenant during the hearing and they testified that they may have received it.

The Tenant testified that the Landlord inspected the Rental Unit “many times” and they do not recall a specific inspection in April 2023, but they do recall the Landlord and their daughter attending the Rental Unit. The Landlord testified that during the Inspection, the Tenant was present alongside PM.

The Landlord testified that during the Inspection, the Tenant informed them that the smell they are smelling is bacon smell, not cigarette smell. They testified that they could smell cigarette smoke in the bathroom of the Rental Unit. The Landlord testified that they believe the Tenant was attempting to mask the cigarette smell with bacon.

PM testified that they have known the Tenant for four years and they have never witnessed the Tenant smoke. PM testified that when the Tenant vacated the Rental Unit, the Rental Unit was spotless. The Landlord asked PM if they recall the Landlord asking the Tenant and PM on the day of the Inspection about smoking and PM testified that they do not.

The Landlord submitted a statement from an individual they testified was the Tenant’s former landlord. Rules of evidence are not strictly enforced at this tribunal (per section 75 of the *Act*, which states that the director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be necessary and appropriate, and relevant to the dispute resolution proceeding). While hearsay, the three-page statement is detailed. The author has signed the statement and they have included their contact information. In the letter, the author states that after the Tenant vacated the Rental Unit, the rental unit “reeked” of cigarette smell and during the tenancy they suspected the Tenant to be smoking inside the unit.

The Landlord testified that no smoker had ever occupied the Rental Unit prior to the Tenant.

The Landlord testified that after the tenancy ended, they contacted a cleaning company called PC for an estimate to find a solution to the smell. A copy of the estimate was submitted as evidence, dated June 1, 2023, which states that a representative of the company attended the Rental Unit. The estimate further states that “when we entered

the property, it was very strong smell of tobacco smoke, and we will give it 7 out of 10." The cleaning company estimated that the cost of remediation would be $3,573.36.

The Landlord testified that the above estimate would be for running "Hydroxyl" machines and for cleaning the Rental Unit. The estimate shows that the hydroxyl machine referred to by the Landlord is an odor counteractant. The Landlord testified that even with the machine, the sources of the smell had to be removed (which in this case the Landlord testified were the Rental Unit's sofa and mattress). The estimate further shows that the PC intended to surface clean the entire Rental Unit with a chemical.

The Landlord testified that to lower the cost, they contacted another cleaning company to complete the surface cleaning process and only used PC for the running of the odor counteractant machine. The Landlord testified that they paid $821.24 to PC.

The Landlord testified that PC mandated a cleaning solution named "Blastout" be applied to all surfaces of the Rental Unit, which is why PC's estimate was so high as it included both the cost of bringing their machines and the cost of cleaning. They testified that they paid $234.08 to a cleaning company named RC to partially complete the necessary cleaning work prior to the arrival of PC's machines. After PC removed their machines, they testified, RC returned to complete the cleaning work. They testified that they paid $342.72 to RC for the second round of cleaning as RC was unable to complete the work the first time. The Landlord submitted all invoices. RC's invoices are detailed and reference the chemical "Blastout". These invoices state that ceilings were wiped, and all fabrics were steam cleaned to remove "smoke smell".

The Landlord testified that they placed the Rental Unit's sofa in fresh air to rid it of cigarette smell, but after that attempt failed, they replaced the sofa. An invoice in the amount of $895.94 was submitted. They also submitted an invoice in the amount of $498.40 for a mattress. They testified that the replaced sofa was four years old, but they did not testify how old the mattress was.

The Landlord is also seeking the cost of repainting the Rental Unit, which they say was only necessitated by the Tenant's smoking. The Landlord submitted several invoices for the purchased paint and a $1,044.75 invoice for a painter's labour. The $75.00 handyman fee, the Landlord explained, was for the re-installation of the Rental Unit's baseboards after painting.

While the Landlord provided a confusing testimony at times, I found them to be more credible and forthcoming than the Tenant, who was at times evasive. Both parties called witnesses who provided opposing testimonies. However, the Landlord backed their oral testimony with an estimate from a third-party cleaning company that sent an agent to inspect the Rental Unit in person. Their estimate, which is dated June 1, 2023, states that the Rental Unit suffered from "strong smell of smoke". Based on this, the parties' testimonies, and the former landlord's statement, I find that it is more likely than not that the Tenant did smoke inside the Rental Unit during the tenancy.

I find strong cigarette smell to be a damage contemplated by section 32 of the *Act*. I rely on the Landlord's third-party estimate in making my finding that the Rental Unit did suffer from heavy smoke damage at the end of the tenancy. I find that it is more likely than not that the Rental Unit was not delivered to the Tenant in the damaged state that it was left after the tenancy.

Pursuant to section 67 of the *Act*, I award the Landlord the $1,398.04 sought across three invoices (cost of machines and the two cleaning invoices). I decline to award any further invoices. The Landlord testified that they had to rid the Rental Unit of the old paint and its furniture. I can find no such demand from PC on their estimate. It is not clear to me whether these actions were necessary after completing the remediation work. Beyond the Landlord's self-serving testimony, I have no way of making that determination and I decline to award any amount for brand new furniture and paint. In addition, the Landlord did not testify to the age of the mattress and the paint in the Rental Unit.

The standard under the act is reasonableness, not perfection. If the cleaning work and deodorization efforts brought smell levels to a reasonable level, further costs should not be borne by the Tenant.

vi. Postage and filing fee - $13.59 and $100.00 respectively.

The Landlord was partially successful with their application. Pursuant to section 72 of the *Act*, **I award the Landlord their $100.00 filing fee**. The Tenant did not pay a filing fee. Their filing fee was waived by the Branch at the time of filing.

Postage fees are not a recoverable cost under the *Act*.

vii. Notary fee - $75.00

I decline to award this amount to the Landlord. It is unnecessary to notarize documents for this tribunal. In any event, legal and administerial fees are not recoverable under the *Act*.

Conclusion

The Tenant's application is granted. I award the Tenant **$1,113.10** pursuant to section 38 of the *Act* (double the security deposit of $550.00, plus interest calculated on $550.00, from February 1, 2023, to March 20, 2024). The Tenant's filing fee was waived, and they did not pay a filing fee. I make no filing fee awards in favour of the Tenant as a result.

The Landlord's application is partially granted. Pursuant to section 67 of the Act, I award the Landlord **$1,398.04** for the cost of deodorization.

I award the Landlord their **$100.00 filing fee** pursuant to section 72 of the *Act*.

After setting off the above amount, I issue the Landlord a Monetary Order in the amount of **$384.94**, to be served to the Tenant prior to its enforcement.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the *Act*.

Dated: March 20, 2024

Residential Tenancy Branch