Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD FF
MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenants.

The Landlord filed seeking a Monetary Order to keep a portion of the security deposit and to recover the cost of the filing fee from the Tenants.

The Tenants filed seeking a Monetary Order for the return of double their security deposit and to recover the cost of the filing fee from the Landlord.

The parties appeared at the teleconference hearing, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Have the Tenants been sufficiently served notice of the Landlord's application pursuant to section 89 of the Act?
2. Have the Tenants breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
3. If so, has the Landlord met the burden of proof to retain a portion of the security deposit pursuant to sections 67 and 72 of the *Residential Tenancy Act*?
4. Has Landlord breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
5. If so, have the Tenants met the burden of proof to obtain a monetary order for the return of double their security deposit pursuant to sections 38 and 67 of the *Residential Tenancy Act*?

Background and Evidence

At the outset of the hearing the Tenants stated they were not served notice of the Landlord's application for dispute resolution.

The Landlord affirmed that he sent the hearing documents to each Tenant via registered mail on September 20, 2011 and provided the registered mail receipts in his evidence. He confirmed both packages were returned “unclaimed” and during the hearing he read the address that was written on each returned envelope confirming they were sent to the forwarding address provided by the Tenants.

The Landlord confirmed they had received the Tenants’ application and first submission of evidence in September 2011. The most recent evidence from the Tenants was personally served to the Landlord on Friday December 2, 2011, only four days before this hearing. I advised that I would not be considering this late evidence from the Tenants so the Landlord did not provide testimony in response to it.

The following facts are not in dispute:

- The parties entered into a written fixed term tenancy agreement that began on March 1, 2008 and switched to a month to month tenancy after February 28, 2009; and
- The Tenants were provided copies of the tenancy agreement and two addendums that were each two pages in length at the beginning of the tenancy; and
- Rent was payable on the last day of each month in the amount of $765.00; and
- On March 1, 2008 the Tenants paid $375.00 as the security deposit; and
- A move in inspection report form was completed and signed by one of the Tenants on February 23, 2008; and
- A move out inspection and report form were completed August 31, 2011, in the presence of the female Tenant who refused to sign the move out report;
- On July 31, 2011, the Tenants provided written notice to end the tenancy as of August 31, 2011; and
- The Tenants provided the Landlord with their forwarding address in writing on August 31, 2011; and
- The Tenants painted a feature wall in the master bedroom that was a dark green color; and
- The Tenants applied wallpaper to the bathroom wall.

The Landlord and Owner advised that all of their rental units are painted with the same neutral color scheme and they maintain their rental units to the same standards so no tenant would be given permission to paint or do maintenance.

The Landlord stated that during the walk through the female Tenant informed him that her husband had taken the lock to a locksmith to be rekeyed. He asked the Tenant if it was rekeyed to allow the master key to work. The Tenant said she did not know so he tried his master key and found out it did not work. They are seeking to recover the cost of $60.76 to have the lock rekeyed to allow the use of their master key for emergencies.

The Landlord advised that the rental unit was completely repainted and he provided an estimate for repainting the bedroom and bathroom and considering there is one wall in each room that the Tenants would be responsible for he estimated the cost to return the two walls back to the neutral color at $140.00 ($560.00 divided by 4). The work was performed by the Landlord which took him approximately ten hours as he had to strip the wall paper off, wash off the glue, and prime the dark green wall before painting. It took approximately one pint of primer and two five gallon cans of paint to paint the two rooms at approximately $250.00 for supplies. They are only seeking to recover $140.00 for the two walls.

The Tenants denied having the lock rekeyed and stated they did not change the lock. They did however have an extra key made for main entrance door. The female Tenant confirmed that she attended the move out inspection and when asked why she did not sign the form she stated that she had hit her head that day and was unwell so she did not want to sign anything.

The Tenants confirmed they painted the rental unit and argued that they had verbal permission from the Landlord's wife to do so. They claim the Landlord was out of town around the end of November 2010 when this permission was provided which is why it was provided from his wife and not him. They are of the opinion that because they had permission to paint the walls they are not responsible for changing them at the end of the tenancy. Both Tenants confirmed that this was the one and only time the Landlord's wife did any business as a landlord and the only time she gave them permission for anything to do with the rental unit.

The male Tenant stated that he called the Landlord on September 12, 2011 to request the return of their security deposit at which time the Landlord was trying to bully him into agreeing for them to keep the security deposit. The Tenants are seeking the return of double their security deposit plus interest, because they are of the opinion that the Landlord did not file his claim for dispute resolution within the required time frame of fifteen days, and they left the unit in better condition than it was at the start of the tenancy.

In closing, the Owner advised that his mother, the Landlord's wife, is a licensed realtor and that her license prevents her from doing any landlord business. Therefore she certainly would not risk losing her license by providing verbal permission to these Tenants. She is very contentious and has never been involved with the landlord operation. He offered to bring her into the hearing to testify if needed. He stated he took offense to the Tenants stating his father, the Landlord bullied them. His father was simply doing his job attempting to get the Tenants to agree to the deductions without having to come to dispute resolution.

The Landlord refuted the female Tenant's statement that she did not inform him about the lock. He advised that because the keys were returned to him he would have never questioned if the lock had been rekeyed as he had no reason to suspect such a thing. It was not until she told him that the lock had been taken out to a locksmith that he questioned if his master key would still work. As for the condition of the rental unit, the Landlord stated that the inspection report form is proof that the unit was not left in better shape at the end of the tenancy.

Analysis

Section 89 and 90 of the Act provide methods for service of hearing documents and if served via registered mail, the recipient is deemed to have received the documents five days after they were sent. Refusal to pick up registered mail does not negate service. Therefore, I find the Tenants were deemed served the Landlord's hearing documents and evidence on September 25, 2011.

The Tenants did not provide copies of their last submission of evidence in accordance with section 3.5(a) of the *Residential Tenancy Branch Rules of Procedure* which provides that all evidence must be received by the *Residential Tenancy Branch* and must be served on the respondent as soon as possible, and at least (5) days before the dispute resolution proceeding as those days are defined in the Definitions part of the *Rules of Procedure.*

Considering evidence that has not been received by the *Residential Tenancy Branch* or served on the other party in accordance with the *Residential Tenancy Branch Rules of Procedure* would create prejudice and constitute a breach of the principles of natural justice. Therefore as the applicant Tenants have not served their last submission of evidence in accordance with the *Residential Tenancy Branch Rules of Procedure* I find that pursuant to section 11.5 of the *Residential Tenancy Branch Rules of Procedure,* the Tenants' evidence that was served December 2, 2011, will not be considered in my decision. I did however consider the Tenants' testimony.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on a balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Landlord's application

Section 31 (2) of the Act provides that a tenant must not change locks or other means that give access to common areas of residential property unless the landlord consents to the change.

The tenancy agreement addendum titled "Conditions Of Tenancy" stipulates the following:

> *# 2 - The tenant shall not undertake any alterations to the premises without the express permission of the Landlord. Further, the tenant agrees to pay for any and all damages, repairs, alterations, redecorating, cleaning during occupation and pertaining to the premises expecting those repairs which are a responsibility of the Landlord under the Act.*
>
> *#16 – No lock or security device may be changed or altered and there will be a service charge of ten dollars ($10.00) to replace lost or stolen keys.*

I favor the evidence of the Landlord, who stated he would not have been alerted to the lock being changed had the female Tenant not told him plus the evidence provided by the Owner who confirmed the Landlord's wife is a licensed realtor who would not risk losing her license by conducting landlord business and they would not allow changes to the rental unit as they maintain them all at the same level, as supported by their tenancy agreement addendum. I favored the aforementioned over the evidence of the Tenants who state they had verbal permission which was not supported by documentary evidence.

I favored the evidence of the Landlord and Owner over the Tenants', in part, because the Landlord's evidence was forthright and credible. The Landlord readily acknowledged that they were not seeking compensation for damages for carpet cleaning and blind cleaning even though they were entitled to these costs. In my view the Landlord's willingness to not seek these other costs when they could easily have requested to keep all of the security deposit lends credibility to all of their evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Tenants' explanation of why they did not sign the move out inspection report and how they obtained permission to paint the unit to be improbable. Given that they knew the Landlord's wife did not conduct landlord's business, and their claim that this is the only time she provided them permission, it is highly suspect that they would seek verbal permission from her during an alleged absence of the Landlord. I find that the Owner's explanation that the Landlord's wife would not risk losing her real estate license by conducting landlord's business plausible given the circumstances presented to me during the hearing.

For all the aforementioned reasons, I find the Landlord has met the burden of proof to establish their claim and I hereby award them **$200.76** as claimed ($60.76 locksmith + $140.00 painting).

The Landlord has been successful with his application; therefore I award recovery of the **$50.00** filing fee.

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit plus interest as follows:

Locksmith & painting	$ 200.76
Filing Fee	50.00
SUBTOTAL	$ 250.76
LESS: Security Deposit $375.00 + Interest $4.70	-379.70
Offset amount due to the Tenants	**$ 128.94**

The offset amount of $128.94 is to be returned to the Tenants. A monetary order will be issued to the Tenants and may be served upon the Landlord if he fails to return the offset balance of the security deposit.

Tenants' application

The facts are that the tenancy ended August 31, 2011, the Tenants provided their forwarding address on August 31, 2011, and the Landlord filed his application for dispute resolution on September 15, 2011.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit. In this case the Landlords were required to return the Tenant's security deposit in full or file for dispute resolution no later than September 15, 2011. The Landlord filed his application September 15, 2011.

Based on the above, I find that the Landlord has not failed to comply with Section 38(1) of the *Act* and that the Landlord is not subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposit and the landlord must pay the tenant double the security deposit. Accordingly I dismiss the Tenants' claim.

As per the aforementioned I find that the Tenants have not succeeded with their application for return of double their security deposit; therefore I decline to award recovery of their filing fee.

Conclusion

The Tenants' decision will be accompanied by a Monetary Order in the amount of **$128.94.** This Order is legally binding and must be served upon the Landlord.

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: December 08, 2011.

Residential Tenancy Branch