Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlords applied for:

- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- authorization to obtain a return of double her security deposit pursuant to section 38; and
- authorization to recover her filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The landlords' agent (the landlords' daughter) confirmed that the landlords received the tenant's January 3, 2012 notice to end her tenancy by January 30, 2012, by email. The parties confirmed that the tenant vacated the premises by January 30, 2012.

The landlords' agent (the landlord) confirmed that the landlords received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on April 20, 2012. The tenant confirmed that she received copies of both the landlords' original dispute resolution hearing package seeking a monetary award of $745.37 and their amended dispute resolution hearing package seeking a monetary award of $895.85 by registered mail sent by the landlords on March 9, 2012 and April 12, 2012. I am satisfied that the parties served one another with their dispute resolution hearing packages in accordance with the *Act*.

Issues(s) to be Decided

Which of the parties are entitled to the tenant's security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*? Are the landlords entitled to a monetary award for damage or losses arising out of this tenancy? Are either of the parties entitled to recover their filing fees from one another?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, miscellaneous letters, receipts and invoices and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the claims and my findings around each are set out below.

This tenancy commenced on December 2, 2009, initially as a one-year fixed term tenancy. When the first term expired, the tenancy continued as a periodic tenancy. Monthly rent by the end of the tenancy was set at $1,800.00, payable in advance on the first of each month. The landlords continue to hold the tenant's $900.00 security deposit paid on December 2, 2009.

Although the landlord said that the landlords conducted a "visual" joint move-in condition inspection, she confirmed that they produced no move-in condition inspection report. The landlords also "walked through" the rental unit at the end of the tenancy on the evening of January 30, 2012, but issued no joint move-out condition inspection report. The landlord maintained that it was difficult to determine the condition of the premises that night because the rental unit was poorly lit. The landlord testified that the landlords asked the tenant who moved into the rental unit immediately after the tenant vacated this rental unit to inspect the rental unit and let them know if anything was damaged or needed repair. The landlords entered into written evidence a lengthy list of items noted in a February 1, 2012 email that the new tenants maintained were damaged when the new tenants moved into the rental unit that day.

The tenant applied for a monetary award of $1,800.00, double her security deposit, as she maintained that the landlords had not returned her security deposit in full in compliance with section 38 of the *Act*. She also sought recovery of her filing fee.

In support of the landlords' revised application for a monetary award of $895.85, the landlords submitted an April 11, 2012 Monetary Order Worksheet which included the following items:

Item	Amount
Oven Repair	$100.74
Light Bulbs, Cleaning Supplies	14.63
New Fob Key Remote	80.00
Strata Fine	250.00
Carpet Stains	116.48
Painting and Filling to Repair Holes in Wall	224.00
Repair of Washing Machine	110.00
Total Monetary Award Requested	**$895.85**

The landlords also requested recovery of their filing fee for their application from the tenant. The landlords supplied receipts and invoices to support this application. They also provided photographs taken at the end of this tenancy.

Analysis – Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant."

In this case, the evidence is that on January 31, 2012 the tenant provided her forwarding address by email to the landlord's agent in this hearing. Although email is an unreliable way to communicate with a landlord, the tenant submitted undisputed written evidence that the landlord's agent received the tenant's forwarding address by at least February 20, 2012. In a February 20, 2012 email, the landlord's agent communicated about the tenant's security deposit, noting in the "Subject" of the email that the February 20, 2012 email was "Re; Forwarding Address." At the bottom of this email was a copy of the tenant's January 31, 2012 email containing the tenant's forwarding address.

Based on this evidence, I am satisfied that the landlords' agent who had been looking after communication with the tenant after the end of the tenancy was provided the tenant's forwarding address by at least February 20, 2012. Therefore I find that the 15-day period whereby the landlords were required to either return the tenant's security deposit in full or apply for dispute resolution commenced on February 20, 2012. Their March 8, 2012 application for dispute resolution occurred beyond the 15-day time period for doing so.

I find that the landlords have not returned the security deposit in full within 15 days of receipt of the tenant's forwarding address nor did they apply for dispute resolution within that time frame. As such, the tenant is therefore entitled to a monetary order amounting to double the deposit with interest calculated on the original amount only. No interest is applicable over this period.

Having been successful in this application, I find further that the tenant is entitled to recover the $50.00 filing fee paid for her application.

I dismiss the landlord's application to retain the security deposit without leave to reapply.

Analysis – Landlords' Application for a Monetary Award

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlords to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

At the commencement of the hearing, I advised the tenant that she was incorrect in the assertion she made in her written evidence that the landlords were unable to claim for damage arising out of this tenancy if they failed to take action within the 15-day time period for seeking authorization to retain the tenant's security deposit. I noted that the *Act* allows a party to make a claim for damage or loss up to two years after the end of a tenancy.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy. Section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***36*** *(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...*

Similar provisions are in place if a landlord does not conduct a joint move-in condition inspection or provide a copy of the move-in condition inspection report to the tenant.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint condition inspections and inspection reports are very helpful. In this case, there is undisputed evidence that the landlord did not produce condition inspection reports for either the move-in or move-out condition inspections. Rather, the landlords have relied on an inspection conducted by the new tenant who occupied the rental unit the day after the tenant vacated the premises to itemize the deficiencies in the previous tenancy at which photographs were taken to demonstrate the condition of the premises.

Despite the provisions in the *Act* regarding move-in and move-out condition inspections and inspection reports, a landlord can still make a separate application for damage or losses arising out of a tenancy. Section 37(2) of the *Act* requires a tenant to "leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear." The tenant maintained that some of the items in the landlord's claim were left in the same condition as when she moved into the rental in 2009. Without move-in or move-out condition inspection reports, it is difficult to assess the extent to which the condition

of the rental unit at the end of the tenancy reflected damage arising out of this tenancy and the condition of the premises when the tenancy commenced.

The tenant testified that the oven worked fine throughout her tenancy. However, she realized when she was preparing to use the self-cleaning feature of the oven that the self-cleaning feature was inoperative. She said that since there are explicit instructions on why other forms of cleaning the oven should not be undertaken for this appliance, she was unable to clean the oven at the end of her tenancy. She testified that she did not know if this feature was working when she commenced her tenancy as she never tried to clean the oven until she was preparing to vacate the premises.

The landlord testified that there were 24 holes in the wall by the end of this tenancy and that many of these were created during this tenancy to hang photographs and artwork. The tenant maintained that she hung all of her artwork using existing holes and did not create any new ones during her tenancy

The tenant testified that the key fob given to her by the landlord was broken when she received it, although it worked. She said that during the course of the tenancy she bought a new key fob, but part of the plastic on that fob broke during the course of her tenancy. She said that the key fob still worked at the end of her tenancy.

I am not satisfied that the landlord has met the burden of proof required to demonstrate that the damage to the rental unit arose during this tenancy and that it exceeded that which would be expected as a result of normal wear and tear. The landlords' claims for such items as broken appliances, stained carpet and damaged walls all rely on an acceptance of the landlords' assertion that these items were free of damage at the beginning of the tenancy. The tenant disputed the landlords' claim that these items were free of damage at the commencement of the tenancy. I dismiss the landlord's claims for a monetary award without leave to reapply with the following exceptions.

I allow the landlord's claim of $14.63 for the purchase of light bulbs and cleaning supplies at the end of this tenancy, as I accept that these likely resulted from this tenancy.

I find that the tenant did not leave the rental unit in reasonably clean and undamaged condition at the end of this tenancy and, as such, I allow the landlord a monetary award of $80.00, an amount which is intended to compensate the landlord for 4 hours of general cleaning and repair at an hourly rate of $20.00 per hour.

I have also given careful consideration to the landlord's claim for recovery of a $250.00 strata fine imposed by the strata corporation against the landlord for the tenant's action in leaving a couch in a location of the strata building where this was not allowed. I have no doubt that the landlord incurred this cost or that the tenant's actions resulted in this expense. However, section 7(2) of the *Act* imposes a responsibility on the landlord to take reasonable measures to mitigate the tenant's losses. In this case, the tenant offered an explanation for the circumstances surrounding leaving her couch in a recycling section of the strata property for a $10.00 payment, which she claimed to have made as requested to the building manager. She said that had she been notified of the strata corporation's action prior to the expiry of the 7-day period for challenging that decision, she could have clarified this situation and likely had the fine set aside. She gave undisputed evidence that the landlords did not contact her about this matter until after the 7-day appeal period had expired. Had they contacted her, she maintained that the fine would not have been applied.

The landlord entered into written evidence a copy of an email from the concierge at the strata containing the rental unit in which the concierge alleged that he spoke with the tenant to let the tenant know that a fine would be applied if she left the couch where she had and she did not object to the fine being applied. The tenant denied having agreed to the levying of a fine against her for her failure to move the couch in question.

Although I find an element of validity to the tenant's claim that the landlord did not take proper action to mitigate her exposure to the $250.00 strata fine, there is no certainty that the strata corporation would have agreed to waive the fine on the basis of her explanation. Under these circumstances, I find that the tenant remains responsible for one-half of the strata fine imposed by the strata and paid by the landlord. I issue a monetary award in the amount of $125.00 in the landlord's favour for this item.

I dismiss the remainder of the landlords' application without leave to reapply. As the landlords were only partially successful in their application, I allow them to recover $25.00 of their filing fee from the tenant.

Conclusion

I issue a monetary Order in the tenants' favour under the following terms which allows the tenant to recover double her security deposit and her filing fee for her application less the awards noted in the landlords' favour:

Item	Amount
Return of Tenant's Security Deposit	$900.00
Monetary Award of $900.00 for Landlords' Failure to Comply with s. 38 of the *Act*	900.00
Light Bulbs, Cleaning Supplies	-14.63
Cleaning	-80.00
Strata Fine	-125.00
Less One-Half of Landlords' Filing Fee	-25.00
Tenant's Filing Fee	50.00
Total Monetary Order	**$1,605.37**

The tenant is provided with these Orders in the above terms and the landlord(s) must be served with a copy of these Orders as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that 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: May 16, 2012

Residential Tenancy Branch