Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF, MND, MNDC, FF

Introduction

This hearing dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* (the *Act*). The landlords identified only the male tenant as a Respondent in their application as they noted that he was the only individual listed as a tenant on the Residential Tenancy Agreement (the Agreement) for this tenancy. 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; and
- authorization to recover their filing fee for this application from the male tenant (the tenant) pursuant to section 72.

The tenants applied for:

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

The male tenant (the tenant) explained that the female tenant is his wife and was only excluded from the Agreement because the female landlord asked for the female tenant's identification at the time of the signing of the Agreement. At that time, the female tenant was at work and her identification was unavailable to the male tenant. The female landlord disputed this testimony. Since the male tenant is the only person listed as tenant on the Agreement, any order associated with this decision is to be directed do him as the sole tenant.

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 landlord confirmed that they received a copy of the tenants' dispute resolution hearing package by registered mail on or about May 16, 2013, after they returned from being away from their home. The tenant confirmed that a representative appointed by the landlords handed him a copy of the landlords' dispute resolution hearing package at

6:00 p.m. on May 26, 2013. I am satisfied that the parties served one another with their dispute resolution hearing packages in accordance with the *Act*.

The tenant confirmed that he received three separate written evidence packages from the landlords. The first of these was included with the landlords' dispute resolution hearing package delivered on May 26, 2013; the other two were sent by registered mail. I find that the landlords have served their written evidence in accordance with the *Act*.

The landlords gave undisputed sworn testimony that they have not receiving any written evidence from the tenants. The tenant testified that one of his friends has been attempting to serve the landlords with the written evidence package the tenants provided to the Residential Tenancy Branch (RTB). He said that he did not believe that the tenants' written evidence has been successfully served to the landlords. Since the tenants' written evidence has not been served to the landlords, I advised the parties that I could not consider that evidence in rendering my decisions on these applications.

Issues(s) to be Decided

Are the landlords entitled to a monetary award for losses or damage arising out of this tenancy? Are the tenants entitled to a monetary award for the return of a portion of their security deposit? Are the tenants entitled to a monetary award equivalent to the amount of their security deposit as a result of the landlords' failure to comply with the provisions of section 38 of the *Act*? Are either of the parties entitled to recover their filing fees?

Background and Evidence

This tenancy began on September 26, 2012, when the landlords allowed the tenant(s) to move into the rental unit a few days before the scheduled October 1, 2012 start to this tenancy. Monthly rent for this periodic tenancy was set at $1,700.00, payable in advance on the first of each month. According to the Agreement, the landlords were responsible for providing water to the tenants; the tenants were responsible for the remainder of the utility costs. The tenant paid an $850.00 security deposit on October 1, 2012 and a $500.00 pet damage deposit on November 1, 2012.

The parties agreed that they participated in a joint move-in condition inspection on September 26, 2012. The female landlord testified that she prepared a joint move-in condition inspection report, but the tenant said that he never received a copy of that report. The female landlord said that she provided it to him and also entered a copy of that report into her written evidence. Neither the RTB nor the tenant had received a copy of the landlords' joint move-in condition inspection report in the landlords' written evidence package. As such, I advised the landlords that I could not consider the content of the report they claimed to have at their disposal at the hearing. The female

landlord testified that she advised the tenant on April 1, 2013 when the tenancy was ending that it would take her a few hours to complete her move-out condition inspection and that there was no need for him to wait for this to be completed. Although the female landlord conducted her own move-out condition inspection without the tenant(s), she did not prepare a move-out condition inspection report.

The tenant testified that he sent the landlords a text message on or after March 2, 2013, advising them that the tenants would be vacating the rental premises by March 31, 2013. He said that almost all communication with the landlords during this tenancy was by way of text messages. The female landlord (the landlord) confirmed that the landlords received the tenant's text message, but did not receive any written notice to end this tenancy. The tenants vacated the rental unit on April 1, 2013.

The parties agreed that the landlord handed the tenant the $500.00 return of the pet damage deposit on April 4, 2013. The parties also agreed that the landlord also handed the tenant a $520.00 return of the tenant's security deposit on April 15, 2013. This payment was intended to return all but $330.00 of the security deposit for this tenancy, which the landlords arbitrarily withheld to pay for the cleaning of the rental unit.

The tenants' application for a monetary award of $1,700.00 sought a return of double their security deposit. They maintained that the landlords had not followed the provisions of section 38 of the *Act* by failing to return all of their security deposit in a timely fashion. In response, the landlord testified that the landlords never received the tenant's forwarding address in writing until they received the tenants' dispute resolution hearing package. The tenant disputed this claim, stating that he sent the landlords his forwarding address in a text message on or about April 3, 2013. The landlord said that she has no record of receiving any such text message from the tenant.

The landlords' application for a monetary award of $2,025.00 included requests for the following:

Item	**Amount**
Loss of Rent April 2013	$1,700.00
Additional Water Bills due to Extra Tenant in the Rental Unit	175.00
Cleanup and Removal of Garbage from the Rental Unit	150.00
Total of Above Items	**$2,025.00**

The landlord testified that the landlords advertised the availability of the rental unit on a popular rental website shortly after the landlords received the tenant's text message advising them that they would be ending their tenancy by March 31, 2013. She said that they had in fact been successful in locating a tenant who was planning to move into the rental unit as of April 1, 2013. However, this individual was unwilling to honour this commitment when he was dissatisfied with the condition of the rental unit. The landlord said that a lot of material had to be removed from the rental property and considerable cleaning was required. The landlords entered into written evidence a copy of a $330.00 receipt from a cleaning company dated April 14, 2013. They also entered into evidence photographs of wood, tires and debris that remained at the rental premises until at least May 17, 2013, the date of these photographs. The landlord said that the landlords did not choose to pursue re-renting the premises after the tenant located for April 1, 2013 refused to take occupancy of the rental unit.

The tenant testified that there was considerable debris on the premises when he and his family moved into the rental unit. He said that he was told that a previous owner or tenant would be coming to pick up an old barbeque, tires and wood that remained on the premises when the tenants took occupancy on September 26, 2012. Although the barbeque was removed shortly thereafter, he said that everything else remained during the course of his tenancy. He testified that the premises were left in the same shape as when he moved into this home and that he removed everything that was his, but left those items that were there when his tenancy began. He testified that he took a pickup truck of garbage to the waste disposal site at the end of his tenancy. He gave undisputed testimony that he and his wife spent 12 hours cleaning the premises at the end of this tenancy and that no damage arose during the course of this tenancy. The landlord confirmed that there was no damage to the premises during the tenancy.

Analysis- Tenants' Application

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 security and pet damage deposits or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposits. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposits, and the landlord must return the tenant's pet damage and security deposits plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the deposits (section 38(6) of the *Act*). With respect to the return of the deposits, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address in writing. 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 landlords did return all of the tenant's pet damage deposit within 15 days of the end of this tenancy. The landlords also returned $520.00 of the security deposit for this tenancy within 15 days. However, the landlords have retained $330.00 from the security deposit without legal authorization to do so.

At issue is whether the landlords were provided with a forwarding address in writing by the tenants. I am not satisfied that the tenant's alleged provision of the tenant's forwarding address to the landlords by way of a text message satisfies the requirement under the *Act* to provide the forwarding address in writing. The landlord testified that she did not receive this text message and has been unable to retrieve records as her text messages have been deleted for that period. The tenant did not dispute the landlord's claim that the landlord handed the $500.00 pet damage deposit and $520.00 of the security deposit to the tenant on separate occasions. Without evidence that the landlord received the tenant's forwarding address in writing, I find that the landlords' obligation to return all of the security deposit within 15 days as set out in section 38 of the *Act* had not yet been triggered when the tenant applied for dispute resolution.

I find that the tenants are entitled to a return of the remaining portion of their security deposit, $330.00, plus applicable interest, as the landlords had no authorization to retain that portion of the security deposit. However, I dismiss the tenants' application to obtain a monetary award equivalent to the value of the original security deposit as I am not satisfied that the landlords have contravened section 38 of the *Act*. I make this finding as I am not convinced that the 15-day time frame for returning all of the tenant's security deposit had been activated due to the tenant's failure to provide the forwarding address to the landlords in writing. I issue a monetary award in the tenant's favour in the amount of $330.00. No interest is payable over this period.

As the tenants have been successful, in their application, I allow them to recover their $50.00 filing fee from the landlords.

Analysis – Landlords' Application

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. Section 45(1) of the *Act* requires a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for April 2013, the tenant would have needed to provide his notice to end this

tenancy before March 1, 2013. Section 52 of the *Act* also requires that a tenant provide this notice in writing.

I find that the tenant did not comply with the provisions of section 45(1) of the *Act* by failing to provide notice to end this tenancy until after March 1, 2013. I also find that the tenant did not meet the requirement under section 52 of the *Act* that a notice to end tenancy must be in writing; a text message does not meet this requirement.

There is undisputed evidence that the tenant did not pay any rent for April 2013. For the reasons outlined above, I find that the tenant was responsible for rental losses that the landlords incurred for April 2013. However, section 7(2) of the *Act* also places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

In this case, although the landlords did not produce copies of on-line advertisements on a rental website, the landlord did give undisputed sworn testimony that she placed an ad on a website and had a prospective tenant in place to take occupancy for April 2013. While I accept the landlord's undisputed testimony that they advertised and identified a prospective tenant to minimize the tenant's losses of rent for April 2013, this process did not lead to an actual mitigation of the tenant's losses.

I am not satisfied that the landlords have demonstrated to the extent required that the tenant was responsible for the circumstances that led to the prospective tenant's refusal to take occupancy of the rental unit in April 2013. The tenant gave strong and specific testimony that he left the rental premises in a condition similar to that which he encountered when his tenancy commenced. The landlord disputed this account of the conditions before and after this tenancy.

When disputes arise as to the condition of rental premises before and after a tenancy, it is very helpful to use the joint move-in and joint move-out condition inspection reports as a guide. As noted at the hearing, landlords are required to schedule and conduct these inspections and to send a copy of the inspection reports to the tenants. 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. For example, section 36(1) of the *Act* reads in part as follows:

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...

In this case, there is evidence that the landlord specifically asked the tenant to refrain from participating in the landlord's move-out condition inspection, even though the tenant was at the rental unit when she started her inspection. In addition, the landlord produced no report of her own inspection so did not provide a copy to the tenant or to the RTB for the purposes of this hearing. Although she said that she provided a copy of the joint move-in condition inspection report to the tenant shortly after the move-in inspection and to the tenant and the RTB for this hearing, the tenant denied receiving a copy of this report. The RTB has no record of receiving a copy of this report in the landlords' written evidence. When asked about this, the landlord said that she must have overlooked forwarding this as part of the landlords' evidence package.

Without copies of any of the above reports, the landlord had little documentation or evidence to dispute the tenant's claim that tires, wood and debris were left on the rental unit before his tenancy began. Lending further credence to the tenant's account is the failure of the landlords to remove the tires and debris from the rental premises until at least May 17, 2013, the date of the landlords' photographs. Given that a prospective tenant had refused to move into the rental premises because of the conditions that were present by April 1, 2013, it would appear that the landlords did little to clean up the yard over the following 6 ½ weeks. Based on the April 14, 2013 date of the receipt for cleaning, it would also seem that the landlords may have delayed attending to the cleaning that they maintained was necessary at the end of this tenancy. All of these factors indicate to me that the landlords have not undertaken adequate measures to mitigate the tenant's exposure to the landlords' loss of rent for April 2013. Even if the tenant was responsible for at least some of the cleaning and removal of debris from the premises, I do not find that the landlords demonstrated adequate attendance to these shortcomings during a time frame that was designed to mitigate the tenant's losses. Rather, it seems that the landlords took their time in cleaning up this property, leaving

many of the most objectionable items in the yard for at least 6 ½ weeks after the tenancy ended. The landlord's admission that the landlords have discontinued efforts to re-rent the premises as a result of a "personal decision" also calls into question the extent to which the landlords have actually suffered a loss in rent for April 2013, when they have subsequently decided to discontinue renting the premises to tenants.

For the reasons outlined above, I am not satisfied that the landlords have properly discharged their duty under section 7(2) of the *Act* to minimize the tenant's exposure to the landlords' rental losses for April 2013. Consequently, I dismiss the landlords' claim for loss for April 2013, without leave to reapply.

I now turn to the landlords' application for compensation for an increase in their water bill as a result of an extra tenant residing on the rental premises. The tenant testified that the landlords were very clearly aware that his wife was planning to reside in this rental unit with him as part of his family. The landlord was unable to identify any provision in the Agreement that called for an additional charge to the tenants for water if extra people resided in the rental unit. The Agreement only specified that water was included in the services provided by the landlords for this tenancy. In the absence of any provision in the Agreement to impose an additional retroactive charge for water for this tenancy, I dismiss the landlords' application for a monetary award for an additional water charge without leave to reapply. In coming to this determination, I remark that I find this portion of the landlords' claim particularly baseless and unfounded. The landlords provided virtually no evidence to provide them with the outcome they were seeking in this regard.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator 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.

For many of the same reasons outlined above with respect to the provisions of the security deposit sections of the *Act*, I dismiss the landlords' claim for a monetary award for the cleanup and removal of garbage from the rental unit without leave to reapply. In coming to this determination, I find on a balance of probabilities that much if not all of

the cleanup and removal of debris and garbage may very well have been necessary as a result of actions taken by previous occupants of the rental premises prior to the commencement of this tenancy. The landlords' failure to provide signed joint move-in and move-out condition inspection reports makes it very difficult to evaluate the extent of the cleanup that arose as a result of this tenancy as opposed to previous occupants of the premises. The fact that 6 ½ weeks after the end of this tenancy the landlords had still not removed tires and wood and much of the outside mess on these premises lends credibility to the tenant's claim that the landlords were quite prepared to leave the premises as is and not remove material and junk left behind from previous tenancies.

As the landlords have been unsuccessful in their application, they bear the cost of their filing fees.

Conclusion

I issue a monetary Order in favour of the male tenant, the listed tenant on the Agreement, under the following terms. This Order allows the male tenant to obtain a return of the remaining portion of the security deposit for this tenancy and the filing fee for this application:

Item	**Amount**
Return of Remaining Portion of the Security Deposit for this Tenancy	$330.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$380.00**

The male tenant is provided with these Orders in the above terms and the landlord(s) must be served with this Order 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.

I dismiss the landlords' application without leave to reapply.

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: July 17, 2013

Residential Tenancy Branch