



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MND, MNSD, FF

Introduction

This hearing was convened in response to cross applications.

On July 23, 2013 the Tenant filed an Application for Dispute Resolution, in which the Tenant applied for a return of the security deposit.

The Tenant stated that she served her Application for Dispute Resolution to the Landlord, via registered mail, on July 26, 2013. The Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings. The Landlord does not recall the exact date that she received these documents.

On September 25, 2013 the Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for damage; to keep all or part of the security deposit; and to recover the fee for filing this Application for Dispute Resolution.

The Landlord stated that he served his Application for Dispute Resolution and documents he wishes to rely upon as evidence to the Tenant, via registered mail, on September 27, 2013. The Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings. The Tenant does not recall the exact date that she received these documents.

Both parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit and should the security deposit retained by the Landlord or returned to the Tenant?

Background and Evidence

The Landlord and the Tenant agree that this tenancy began on February 01, 2013; that the Tenant paid a security deposit of \$225.00; that the Landlord did not complete a condition inspection report at the start of this tenancy; that the tenancy ended on June 30, 2013; that the Landlord did not complete a condition inspection report at the end of this tenancy; that the Tenant did not authorize the Landlord to retain the security deposit; and that the Landlord did not return any portion of the security deposit.

The Tenant stated that she provided the Landlord with her forwarding address, via text message, on June 30, 2013. The Landlord is not certain of how he first received the forwarding address for the Tenant, but he believes he may have received it on June 30, 2013, via text message. There is no dispute that he also received a forwarding address for the Tenant when he was served with the Tenant's Application for Dispute Resolution.

The Landlord is seeking compensation, in the amount of \$204.00, for repairing a tub surround. The Landlord stated that the surround was not broken at the start of the tenancy and that the soap tray was cracked at the end of the tenancy. The Landlord submitted a photograph of the broken soap tray.

The Tenant stated that the tub surround was cracked near the soap tray at the start of the tenancy.

The Witness for the Landlord stated that she is also a tenant in this residential complex; that she shared the lower portion of the residential complex with the Tenant; that there was one bathroom in the lower portion of the complex, which they shared; that she was living in the rental unit when the Tenant moved into the rental unit at the beginning of June or July; that she first noticed the soap tray was broken in August; and that she believes the Tenant broke the soap tray because she overheard the Tenant having sex in the shower sometime in August.

The Landlord initially stated that the Tenant was the only person who used this shower. After hearing the testimony of the Witness for the Landlord, the Landlord stated that the Witness did live in the lower portion of the residential complex for a period of time but insists that she never showered downstairs as she was not comfortable sharing the accommodations with the Tenant.

The Landlord stated that he believes the Tenant damaged the soap dish, in part, because she discouraged him from inspecting the surround at the end of the tenancy. He stated that she had the shower curtain pulled when the unit was inspected and that the Tenant asked him not to open the shower curtain because her cat was hiding behind the curtain. The Tenant stated that she did ask the Landlord not to open the curtain, but only because it was a favourite hiding spot for her cat and she did not want to distress the cat.

The Landlord is seeking compensation, in the amount of \$329.99, for replacing a sofa that was in the rental unit at the start of the tenancy. The Landlord stated that the sofa was used when it was given to him; that it was in "like new" condition; that it did not smell at the start of the tenancy; that it smelled strongly of urine at the end of the tenancy; that the sofa is a dark colour and no stains were visible; and that he has discarded the sofa.

The Tenant stated that she did not notice the sofa smelled during, or at the end, of the tenancy.

The Landlord is seeking compensation for replacing a mattress that was in the rental unit at the start of the tenancy. The Landlord stated that the mattress was used when it was given to him; that it was in "like new" condition; that it did not smell at the start of the tenancy; that it smelled strongly of urine at the end of the tenancy; and that he has discarded the mattress.

The Landlord submitted photographs of the mattress that the Landlord contends shows staining. I was unable to see stains in the photographs. The Landlord submitted a photograph of the box spring, on which I can see staining.

The Tenant stated that she did not notice the mattress smelled during, or at the end, of the tenancy. She stated that she did not notice the mattress or the box spring was stained.

The Landlord stated that the Tenant had sprayed Febreze in the unit at the end of the tenancy, which he contends was sprayed to mask the overwhelming odor in the unit. The Tenant stated that she sprayed the Febreze simply because she wanted the rental unit to smell fresh during the inspection.

The Tenant stated that when she moved into the rental unit at the start of the tenancy she did not notice an odor because the Landlord had been burning incense but she subsequently smelled an odor that would typically be associated to an enclosed space that did not get fresh air. The Landlord stated that the Tenant never complained of an odor and that he did burn incense simply because she wanted the rental unit to smell fresh when the Tenant moved into the unit.

Analysis

Section 38(1) of the *Residential Tenancy Act (Act)* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or make an application for dispute resolution claiming against the deposits.

The undisputed evidence is that this tenancy ended on June 30, 2013. As the Landlord does not dispute the Tenant's testimony that he received a forwarding address for the Tenant, via text message, on June 30, 2013, I find that the Landlord did receive her forwarding address on that date.

I also find that the Tenant mailed her forwarding address to the Landlord on July 26, 2013, when she served the Landlord with her Application for Dispute Resolution. Documents served by mail are deemed received five days after they are mailed and I therefore find that the Landlord is deemed to have received this forwarding address on July 31, 2013.

I find that the Landlord failed to comply with section 38(1) of the *Act*, as the Landlord has not repaid the security deposit and he did not file an Application for Dispute Resolution claiming against the deposit within fifteen days of receiving the forwarding address, in writing, for the Tenant.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(1) of the *Act*, I find that the Landlord must pay the Tenant double the security deposit.

When making a claim for damages under a tenancy agreement or the *Act*, the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that a damage or loss occurred; that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

I find that the Landlord submitted insufficient evidence to establish that the Tenant damaged the soap tray during this tenancy. In reaching this conclusion I was influenced, to some degree, by the Tenant's testimony that the tub surround was cracked near the soap tray at the start of the tenancy.

Damage of this nature is typically recorded on a condition inspection report. This prevents a landlord from claiming compensation for an item that was damaged prior to the start of the tenancy and it prevents a tenant from claiming damage existed prior to the start of the tenancy. The *Act* requires a landlord to complete a condition inspection report at the start of the tenancy. The Landlord's failure to complete a condition inspection report makes it significantly more difficult for the Landlord to establish that the rental unit was in good condition at the start of the tenancy.

I found the testimony of the Witness for the Landlord to be of limited value, as I did not find her to be a particularly credible witness. The Witness stated that she was living in the rental unit when the Tenant moved into the rental unit with her at the beginning of June or July, although both the Landlord and the Tenant agree that the Tenant moved

into the rental unit in February of 2013. The Witness stated that she overheard the Tenant having sex in the shower sometime in August, although both the Landlord and the Tenant agree that the Tenant moved out of the rental unit on June 30, 2013.

I found the testimony of the Witness for the Landlord and the testimony of the Landlord was contradictory. The Landlord stated that the Witness for the Landlord did not use the shower while the Tenant was living there and the Witness for the Landlord stated that she did share the shower with the Tenant. I am deeply concerned about the contradictory nature of this testimony, as it appears one, or perhaps both, of them is attempting to mislead. I note that the Landlord stated that the Witness for the Landlord did not use the shower after it was suggested that it was possible the Witness may have damaged the soap dish and he repeated that she did not use the shower even after the Witness for the Landlord testified that she shared the shower with the Tenant.

If the testimony of the Landlord is true and the Witness for the Landlord stopped using the shower in the rental unit while the Tenant was living there, than I find it unlikely that the Witness would have noticed the soap dish was broken. If the testimony of the Witness for the Landlord is true and the Witness for the Landlord did share this shower with the Tenant, I find it possible that the Witness for the Landlord could have damaged the soap dish and that her evidence is being fabricated to avoid liability.

In reaching this decision I have placed little weight on the undisputed testimony that the Tenant asked the Landlord not to open the shower curtain when the unit was jointly inspected at the end of the tenancy. While it is possible that the Tenant asked the Landlord not to open the curtain because she was concealing damage, as the Landlord suggests, it is also possible that she made the request simply because she did not wish to distress her cat, as the Tenant stated.

When considered in its entirety, I find the evidence is insufficient to establish that the Tenant damaged the soap dish and I dismiss the claim for repairing the damage.

I find that the Landlord submitted insufficient evidence to establish that the sofa and the mattress smelled at the end of the tenancy. In reaching this conclusion I was heavily influenced by the absence of evidence that corroborates the Landlord's testimony that the items smelled or that refutes the Tenant's testimony that the items did not smell. Although I recognize it is difficult to prove that an item has an odor, the burden of proving there was an odor rests with the Landlord. In the absence of some corroborating evidence, such as testimony from an unbiased witness, a condition inspection report, or an email in which the parties discuss the odor, I find that the Landlord has not met the burden of proof. I therefore dismiss the claim for replacing the sofa and the mattress.

Even if the Landlord had established that the sofa smelled, the Landlord would also have to establish that the Witness for the Landlord did not damage the sofa, given that she occupied the unit for some, or all, of this tenancy. The Landlord submitted no

evidence to establish that the Witness for the Landlord was not responsible for the odor on the sofa.

In determining this matter I have placed no weight on the photographs of the mattress that were submitted in evidence, simply because I could not see the stains the Landlord alleges were present. I find it possible that the stains were not particularly visible and, as such, were simply not noticed at the start of the tenancy by the Landlord or the Tenant. In the absence of a condition inspection report that corroborates the Landlord's claim that the mattress was not damaged at the start of the tenancy, I find there is insufficient evidence to establish that the stains were caused by the Tenant.

In determining this matter I have placed limited weight on the photograph of the box spring that was submitted in evidence. Although there are stains visible on the box spring, I find it entirely possible that the Tenant did not see these stains at any point in the tenancy, as people do not frequently lift a mattress off the box spring. In the absence of evidence to suggest that the parties jointly inspected the box spring at the start of the tenancy, I find it possible that the stains were present at the start of the tenancy.

In determining this matter I have placed little weight on the fact the Tenant sprayed Febreze at the end of the tenancy or that the Landlord burned incense at the start of the tenancy. While it is entirely possible that both parties were attempting to mask a smell by their actions, it is also possible that they were simply attempting to present the rental unit in a good light.

I find that the Landlord has failed to establish the merit of his Application for Dispute Resolution and I therefore dismiss his application to recover the fee for filing an Application for Dispute Resolution.

Conclusion

The Tenant has established a monetary claim of \$425.00, which represents double the security deposit and I grant the Landlord a monetary Order for this amount. In the event that the Landlord does not voluntarily comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order 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: October 30, 2013

