Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* (the *Act*). The landlord 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 her filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- 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 landlord 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, to call witnesses and to cross-examine one another.

Preliminary Issues – Service of Documents

The landlord confirmed that she received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on February 25, 2014. In accordance with sections 89(1) and 90 of the *Act*, the landlord was deemed served with the tenant's dispute resolution hearing package on March 3, 2014.

The landlord testified that she sent the tenant a copy of her dispute resolution hearing package by registered mail on March 3, 2014. The landlord entered into written evidence a copy of the Canada Post Customer Receipt including the Tracking Number

to confirm this registered mailing. The landlord testified that Canada Post returned the package the landlord mailed to the tenant at the address provided in the tenant's application for dispute resolution as unclaimed. The tenant said that she was unaware of the contents of the landlord's application for dispute resolution, although she did receive a copy of the landlord's written evidence. In accordance with section 89(1) and 90 of the *Act*, I find that the tenant was deemed served with a copy of the landlord's dispute resolution hearing package, including the landlord's application for dispute resolution, on March 8, 2014, the fifth day after its mailing.

As noted above, the tenant confirmed receiving the landlord's written and photographic evidence. I have considered the landlord's written and photographic evidence, although some of the photographic evidence was not of a quality that it was possible to draw the same conclusions as those forwarded by the landlord as to the condition of the rental unit at either the beginning or end of the tenancy.

The tenant testified that she did not serve the landlord with a copy of the written and photographic evidence she submitted to the Residential Tenancy Branch (the RTB). As the tenant failed to serve her written and photographic evidence to the landlord, I advised the parties that I would be unable to take this evidence into consideration in making my decision.

Issues(s) to be Decided

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

Background and Evidence

The parties signed a Lodging Agreement (the Agreement) for a periodic tenancy commencing on August 31, 2013. As per the terms of the Agreement, monthly rent of $700.00 became due on the 29th of each month, payable in advance. The landlord continues to hold the tenant's $350.00 security deposit paid on August 19, 2013.

The parties agreed that they participated in a joint move-in inspection on August 31, 2013. The landlord entered into written evidence a copy of the "report" of that inspection which was comprised of photographs and comments beside photographs of various aspects of this tenancy at that time. The tenant confirmed that the landlord

provided her with a copy of the joint move-in condition inspection report, each page of which was initialled by both the landlord and the tenant.

The tenant testified that on December 31, 2013, she handed the landlord a written notice that she intended to end her tenancy by January 29, 2014. Although the landlord did not dispute the tenant's claim that she handed the landlord this written notice to end her tenancy, the landlord said that this happened at some point between December 29 and December 31, 2013.

The parties agreed that they participated in a joint move-in condition inspection on August 31, 2013. The landlord submitted written and photographic evidence of the "report" she created of that inspection initialled by the landlord and the tenant at that time. The copy of the report the landlord entered into evidence to the RTB consisted of seven generally poor-quality photographs of different features of the rental unit (e.g., a floor or a wall) with comments written beside each photograph outlining the condition of that room. These photographs were of such poor quality that they add little to my understanding of the condition of the rental unit at the beginning of this tenancy.

The landlord testified that no joint move-out condition inspection occurred at the end of this tenancy. She testified that she did conduct her own inspection of the rental unit and created a report of that inspection which she sent to the tenant. This report again consisted of photographs of the condition of the rental unit with comments beside the photographs. The tenant confirmed that she received the landlord's photographs but there were no comments beside these photographs. The photographs of the condition of the rental unit at the end of this tenancy submitted by the landlord to the RTB did not contain any comments with the photographs. The landlord said that she must have overlooked including the comments on the copies of the photographs she sent to the RTB.

The tenant testified that she handed the landlord her forwarding address in writing at the time that she handed the landlord her keys to the rental unit on January 29, 2014. The landlord gave sworn testimony that the tenant provided her forwarding address to the landlord on February 15, 2014. However, this sworn testimony varied from the information provided by the landlord in the Details of the Dispute section of the landlord's application for dispute resolution, in which she claimed that the tenant did not provide her forwarding address until February 28, 2014.

Since the tenant had not received a copy of the landlord's application for dispute resolution, I asked the landlord to read into sworn testimony the contents of the landlord's application for a monetary award of $974.80. The landlord read into sworn

testimony the contents of the following Monetary Order Worksheet she had entered into written evidence to support her claim for a monetary award:

Item	**Amount**
Unpaid Utilities (50% of $356.00)	$178.00
Painting (3 rooms @ $100.00 per room = $300.00)	300.00
Carpet Cleaning (including Pet Stains)	100.00
Clogged Toilet	75.00
Sink Strainers	20.00
Bathroom Fan	75.00
Outdoor Tool Caddy Damage by Movers	75.00
Fridge Dent ($999.00 x 20 % = $199.80)	199.80
Total of Above Items	**$1,022.80**

The tenant's application for a monetary award of $1,400.00 included a request for the return of double her $350.00 security deposit due to the landlord's alleged failure to return her security deposit within the 15-day time period required under the *Act* and for the recovery of one month's rent of $700.00. She requested the recovery of her last month's rent as she alleged that the landlord had made her rental unit uninhabitable by removing the stove in her rental unit on or about December 28, 2013, by entering the rental unit without permission, and for threatening to evict her and remove her belongings from the rental unit if she did not pay rent that became due on December 29, 2013 before January 1, 2014.

Analysis – Security Deposit

Although the Agreement contained a number of provisions that would not be allowed under a Standard Residential Tenancy Agreement, I find that the key features of the Agreement bring this Agreement within the terms of the *Act*. I make this finding despite the following attempt by the landlord to avoid her responsibilities as a landlord under the *Act*:

> *...No residential tenancy in law is being created and the student/guest acknowledges that he/she is a lodger, signed agreement with the accommodation provider...*

Section 5 of the *Act* states that parties cannot avoid or contract out of the *Act* any attempt to do so is of no effect. At the hearing, the landlord made no claim that this Agreement fell outside the jurisdiction of the *Act*, and, in fact, the landlord submitted her

own application for dispute resolution pursuant to the *Act*. I find that the Agreement does fall with the jurisdiction of the *Act*.

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 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 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." As there is no evidence that the tenant has given the landlord written authorization at the end of this tenancy to retain any portion of her security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

In this case, I heard conflicting testimony as to when the tenant gave the landlord her forwarding address in writing. The tenant said that this happened on January 29, 2014. She stated that she "dropped off" her forwarding address to the landlord, but also stated that she left the keys for the landlord inside the rental unit without actually seeing the landlord. The tenant did not provide a copy of the document advising the landlord of her forwarding address. She did not actually hand her forwarding address to the landlord.

Under these circumstances, I find that the tenant has not demonstrated to the extent required that she served the landlord with her forwarding address in writing until the landlord acknowledged receiving this information on February 15, 2014. I find that the landlord had 15 days after February 15, 2014 to either return the tenant's security deposit in full or apply to the Residential Tenancy Branch (the RTB) for authorization to retain it. In this case, the landlord applied for dispute resolution on March 3, 2014. As the 15th day following February 15, 2014, fell on the weekend, the landlord had until March 3, 2014 to submit her application for dispute resolution in order to remain in compliance with the provisions of section 38 of the *Act*. As the RTB received her application on the 15th business day after February 15, 2014, I dismiss the tenant's application for a monetary award of double the value of her security deposit.

Analysis – Landlord's Claim for a Monetary Award

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 landlord 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.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in and move-out condition inspections and inspection reports are very helpful. In this case, the initialled comments in the joint move-in condition inspection report of August 31, 2013, showed that the rental unit was in acceptable condition at the beginning of this tenancy, but for five burn marks in one of the carpets and some scratches and dents on walls and appliances. However, no joint move-out condition inspection was conducted, no report was issued by the landlord, and the only evidence provided as to the condition of the rental unit at the end of the tenancy was the landlord's sworn testimony and photographs she took. While the landlord said that she wrote comments beside the photographs, neither the tenant nor the RTB received these comments from the landlord.

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 35 of the *Act* reads in part as follows:

> ***35*** *(1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit*
>
> *(a) on or after the day the tenant ceases to occupy the rental unit, or*
>
> *(b) on another mutually agreed day.*
>
> *(2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.*

(3) The landlord must complete a condition inspection report in accordance with the regulations.

(4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(5) The landlord may make the inspection and complete and sign the report without the tenant if

(a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or

(b) the tenant has abandoned the rental unit...

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...

The landlord has failed to provide evidence that she gave the tenant two opportunities for inspection of the rental premises at the end of this tenancy. Although the landlord conducted her own inspection of the rental unit after this tenancy ended, her photographs do not meet the requirement established under section 35(5) of the *Act* to create a report of that inspection and forward a copy to the tenant.

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-out condition inspection and inspection report, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. However, 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 parties

entered conflicting evidence regarding the condition of the rental unit when this tenancy ended. The tenant and her witness, her father, testified that the rental unit was left in similar or better condition than when this tenancy began.

In considering the landlord's claim for a monetary award, I have also taken into account the landlord's failure to produce any receipts, invoices or estimates regarding the damage she has claimed. The landlord explained that many of the people who perform work for her on the rental property do so as a favour to her due to her age and deeply discount their fees. She said that these individuals steadfastly refuse to issue receipts or any documents regarding the work they undertake. For similar reasons, the landlord said that none of these individuals were willing to enter sworn testimony at this hearing. The landlord also testified that she has not incurred any costs for a number of the damaged items listed in her claim. In this regard, she said that she has not replaced the outdoor tool caddy, has not repaired the bathroom fan, and has no plans to repair the dent in the fridge, the latter of which constituted what would appear to be the landlord's arbitrary estimate that the value of the fridge has depreciated by 20% due to this dent.

Under these circumstances, I find that the landlord has failed to demonstrate her entitlement to a monetary award for damage arising out of this tenancy. I find that the landlord has not met the burden of proof required to obtain any monetary award. The landlord has also failed to provide any proof of any actual losses arising out of this tenancy. I find that any lack of cleaning that occurred at the end of this tenancy resulted from the landlord's precipitous action to attempt to take possession of this rental unit without any legal right to do so. I dismiss the remainder of the landlord's claim without leave to reapply.

Analysis – Tenants' Claim for a Monetary Award

I order the landlord to return the tenant's $350.00 security deposit plus applicable interest. No interest is payable over this period.

I have also given careful consideration to the tenant's claim that the landlord's actions led to such a reduction in the value of her tenancy that she is entitled to a monetary award equivalent to a full month's rent.

Section 28 of the *Act* establishes a tenant's right to quiet enjoyment of the rental unit which includes but is not limited to the following rights:

> *(a) reasonable privacy;*
>
> *(b) freedom from unreasonable disturbance;*

> *(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
>
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference.*

In this case, the tenant provided sworn testimony and written evidence that the landlord repeatedly entered her rental unit, particularly in the latter stages of her tenancy, without giving adequate written notice to do so. The tenant said that the landlord commenced showing the rental unit to prospective tenants without informing the tenant or obtaining her permission. Although the landlord denied that she entered the rental unit illegally, she did confirm that she accessed the rental unit with an upstairs tenant so as to deliver a Christmas hamper to the tenant in December 2013. At that time, the landlord took photographs of the condition of the rental unit and issued a warning letter regarding the condition of the rental unit. The tenant maintained that the landlord took photographs of one of her documents from the Ministry of Social Development in an effort to cause problems with that agency for the tenant. The landlord did not deny taking these photographs, but testified that she took the photograph of the Ministry document from the outside of the window to the rental unit.

In addition to the allegations of unauthorized access, the loss of quiet enjoyment can also result from a landlord's provision of illegal threats to evict a tenant or to remove the tenant's possessions. Such an allegation is often difficult to prove. However, in this case, I find that the landlord's own written evidence in the form of her December 26, 2013 letter to the tenant demonstrated a flagrant disregard for the safeguards provided in the *Act* to protect the tenant's right to quiet enjoyment of her rental unit. In this letter, the landlord identified three issues which she described as being in breach of their signed agreement for "Boarding Accommodations." These included:

1. The tenant keeping a cat in her rental unit.
2. The tenant not paying her monthly rent on time.
3. The tenant's alleged failure to abide by "a cleanliness clause."

Without issuing any form of a notice to end tenancy, the landlord advised the tenant of the following:

> *...If you have not corrected these issues by the Jan. 1 I will have removed your personal items, I have a crew coming in on the Jan. 1 to remove the items and store them in the carport until you can move them. The locks will also be changed on the FIRST of Jan. 2014.*

If your rent comes in after that time, I will be returning it to Social Assistance and getting a receipt of the returned item.

When asked about the contents of the above letter, the landlord observed that she did not go ahead with her claim that she was going to evict the tenant as per her letter of December 26, 2013. She noted that her letter prompted some positive actions by the tenant and led to the tenant's December 30, 2013 full payment of the rent due on December 29, 2013.

Section 65(1)(f) of the *Act* allows me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement." Section 65 of the *Act* reads in part as follows:

> ***65*** *(1) Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:...*
>
> *(c) that any money paid by a tenant to a landlord must be*
>
> *(i) repaid to the tenant,...*
>
> *(f) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;...*

In this case, I heard conflicting evidence from the parties as to whether the landlord removed the tenant's stove on December 28, 2013, as was claimed by the tenant and her witness. The tenant and her witness gave straightforward sworn testimony that the landlord removed the stove between December 28, 2013 and December 30, 2013, and did not return it during January 2014, while the tenant was still paying rent. The tenant maintained that she notified the landlord shortly thereafter that she needed to have the stove returned to her as it made the suite uninhabitable. Since the tenant did not believe that she and her child could continue living in this rental unit under these conditions she gave the landlord her notice to end this tenancy, but did not live in the rental unit during January 2014, as she was afraid to do so, given the landlord's actions and letter of December 26, 2013.

The landlord denied having removed the tenant's stove. However, as evidence of her claim, she said that the male tenant who lives upstairs in the rental unit could confirm that he had always had a stove. Based on this testimony, it appeared that the landlord was claiming that the stove available to the tenant in her rental unit was a shared stove

in the upstairs kitchen. On questioning from the tenant and an undisputed clarification offered by the tenant, it became apparent that the upstairs stove referred to by the landlord is not accessible to the tenant who lived in one of the basement rooms and who had her own separate kitchen, including a stove.

Given the nature of the tenant's allegation and the straightforward testimony given by the tenant and her witness in contrast to that provided by the landlord, I find on a balance of probabilities that the landlord did remove the stove from the tenant's rental unit on December 28, 2013, as claimed by the tenant. The timing of this allegation is consistent with the written warnings issued to the tenant on December 26, 2013, which could only be acted upon in stark contravention of the *Act*. The landlord's willingness to put such statements in writing on December 26, 2013 lead me to conclude that the landlord may also have been quite willing to illegally remove the tenant's stove two days later as a further incentive to obtain the actions the landlord was seeking.

Section 27 of the *Act* reads as follows:

> ***27*** *(1) A landlord must not terminate or restrict a service or facility if*
>
> > *(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or*
> >
> > *(b) providing the service or facility is a material term of the tenancy agreement...*

Based on the evidence before me, I find that the stove in the tenant's rental unit was a service or facility that was essential to her use of the rental unit as living accommodation and constituted a material term of their tenancy agreement. The landlord's removal of that stove between December 28 and 30, 2013 breached a material term of the tenancy agreement between the parties. I find that this breach coincided with a concerted effort by the landlord to end this tenancy as soon as possible through a variety of means. These included the landlord's entry into the tenant's rental unit without legal authorization to do so and illegal measures outlined in the landlord's December 26, 2013 letter to the tenant. Read in their entirety, I find that the measures taken by the landlord breached the terms of the tenancy agreement and effectively prevented the tenant from continuing to live in this rental unit for the last month of her tenancy.

Under these circumstances, I find that the landlord's actions in reducing the tenant's quiet enjoyment of the rental unit and the landlord's withdrawal of services and facilities that constituted a material term of the tenancy agreement caused such a loss in value of

the tenancy that the tenant is entitled to a monetary award of $700.00. Pursuant to section 65(1)(c)(i) of the *Act*, I issue a monetary award in the tenant's favour in the amount of $700.00, an amount intended to compensate the tenant for the loss in value of her tenancy for the final month of that tenancy.

As the tenant has been successful in her application, I allow her to recover her $50.00 filing fee from the landlord.

Conclusion

I issue a monetary award in the tenant's favour under the following terms, which allows the tenant to recover rent she paid the landlord for the final month of her tenancy, her filing fee and her security deposit:

Item	**Amount**
Return of Security Deposit	$350.00
Monetary Award for Loss in Value of Tenancy Agreement	700.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$1,100.00**

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: June 12, 2014

Residential Tenancy Branch