Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF, MNSD

Introduction

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

- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover her 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.

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. The landlord's agent (the agent) confirmed that the landlord received a copy of the tenant's dispute resolution hearing package placed in the landlord's mailbox by the tenant on April 30, 2014. The tenant confirmed that she received a copy of the landlord's dispute resolution hearing package sent by the landlord or her agent by registered mail on May 13, 2014. I find that both parties have served one another with their hearing packages and their written evidence packages in accordance with the *Act.*

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, utilities, damage and losses arising out of this tenancy? Is the landlord entitled to recover the filing fee for her application from the tenant? 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*?

Background and Evidence

On March 16, 2013, two landlords and three tenants signed a one-year fixed term Residential Tenancy Agreement (the Agreement) that enabled the three tenants to move into the rental unit by April 1, 2013. Monthly rent was set at $1,000.00, payable in advance on the first of each month. The three tenants were also each responsible for paying 1/3 of the utilities for this rental property. The tenants paid a $500.00 security deposit on March 16, 2013, a deposit still held by the landlord.

By May 20, 2013, one of the three tenants had vacated the rental unit and the remaining two tenants (i.e., the tenant in this hearing and Tenant SMP) and one of the landlords (i.e., the

landlord in the current application) signed an amendment to the Agreement in which the remaining two tenants agreed to assume the liabilities for the tenant who had departed.

By October 1, 2013, Tenant SMP had also departed from the rental unit. He and the tenant in this hearing signed an additional amendment to the Agreement. In this amendment, Tenant SMP agreed "to pay any and all outstanding costs (Utilities) for breaking lease contract and will not be receiving his damage deposit." These two tenants agreed that the tenant in the current hearing would become responsible "for the entirety of the rent and utilities" as of October 1, 2013. Although the landlord entered into written evidence copies of all of the above documents, including the amendments, neither party submitted any written evidence of an amendment signed by either of the landlords regarding the October 1, 2013 change when Tenant SMP left the rental property. As such, this amendment is only an agreement between Tenant SMP and the tenant in this hearing, and has no bearing on any contractual rights or responsibilities of these two tenants with respect to the landlord(s).

The parties agreed that the tenant in this application (the tenant) gave the landlord or her agent verbal notice on March 1, 2014, that she intended to end her tenancy by March 30, 2014, the day before the scheduled end to this fixed term tenancy. The tenant vacated the rental unit by March 29 or March 31, 2014, after paying the full $1,000.00 rent for March 2014.

No joint move-in inspection was conducted for this tenancy. At the end of the tenancy, the tenant could not arrange a suitable time to conduct a joint move-out condition inspection until April 6, 2014. Neither the landlord nor her agent produced any condition inspection report for the April 6, 2014 inspection of the rental unit, nor did the landlord send the tenant any written request to conduct a joint move-out condition inspection. The only formal condition inspection report entered into written evidence by either party was an undated report on a Residential Tenancy Branch (RTB) form completed by the tenant on or about April 29, 2014, the date when she filed her application for dispute resolution. This undated and unsigned report outlined the tenant's assertions regarding the condition of the rental unit at the beginning and end of this tenancy. In the tenant's move-in condition inspection report, the tenant checked every box indicating that the rental unit was in good condition at the beginning of this tenancy. The only variation in her move-out condition inspection report from the condition identified at the start of this tenancy was the tenant's agreement that:

- the floor/carpet and cabinets and doors in the kitchen were dirty and needed a small wipe down;
- the walls and trim in the main bathroom were in fair condition (and had been repaired at the tenant's expense);
- the floor/carpet in the master bedroom were dirty in "minor spots"; and
- the floor/carpet and walls and trim in the second bedroom were dirty.

The tenant's application for a monetary award of $1,000.00 sought the return of double her security deposit. She maintained that the landlord had failed to abide by the provisions of section 38 of the *Act* in withholding the security deposit for this tenancy without legal

authorization to do so. The tenant testified that she sent her forwarding address to the landlord by email, at the landlord's request, on April 9, 2014. The agent confirmed that the landlord received the tenant's forwarding address shortly after the tenant sent this material on April 9, 2014, and likely that same day.

The landlord's application for a monetary award of $3,300.76 included the following items:

Item	**Amount**
Unforwarded Security Deposit from Tenant's Sub-Tenant	$250.00
Unpaid Utility (Estimated March 2014 Bill)	92.11
Replacement of Broken Glass-top in Bathroom	214.20
Removal of Tenants' Items from Rental Unit	262.50
Carpet Deep Cleaning for One Bedroom	166.95
General Cleaning	157.50
Estimated Cost of Repainting Bathroom Wall	157.50
Loss of Two Month's Rent (April and May 2014)	2,000.00
Total Monetary Order Requested	**$3,300.76**

The agent testified that the only actual expenses incurred as of the date of this hearing, over four months after this tenancy ended have been the utility bill and the replacement of the broken glass-top in the bathroom. She said that the landlord has been unable to advertise the availability of the rental unit because the tenant has not removed belongings left behind from this tenancy. The tenant maintained that the belongings that remained were not hers and were from one of her two former two co-tenants-roommates. She and her advocate presented written evidence asserting that it was not her responsibility to remove these items from the rental unit.

The agent entered photographic evidence of the items that remain in the rental unit. The agent also submitted photographs of the alleged condition of the rental unit before and after this tenancy. She also entered into written evidence copies of emails and texts exchanged between the landlord and the tenant. Once of these emails, sent on April 6, 2014, identified the following problems identified at the final viewing of the suite, earlier that day:

1. *Bathroom glass-top on the side wall is broken;*
2. *Bathroom countertop wasn't clean;*
3. *Living room floor wasn't clean;*
4. *Oven-top wasn't clean;*
5. *Shelves inside of kitchen cabinets were not clean; and*
6. *Several dirty spots on bedroom carpet.*

The tenant acknowledged having received this email, but questioned the accuracy of the items identified in the landlord's email and observed that this email was not a signed joint move-out condition inspection report.

The agent also entered into written evidence a copy of a 2009 decision of the Supreme Court of British Columbia with respect to an application for judicial review of two decisions issued by Dispute Resolution Officers appointed under the *Act*. Although I have reviewed this decision and asked the agent to clarify the relevance of this decision to the applications before me, it remained unclear as to how this decision had any real relevance to the totally different set of applications before me.

Analysis

Pursuant to section 63 of the *Act,* the Arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. During the hearing, the parties discussed the issues between them without my participation in these discussions, engaged in a conversation, turned their minds to compromise and achieved a resolution of a relatively small portion of their dispute. They agreed that the tenant will make arrangements to remove all of the belongings remaining in the rental unit by 5:00 p.m. on August 13, 2014. To give effect to this very limited area of agreement between the parties, I issue an order to the tenant to make arrangements with the landlord's agent as soon as possible to remove any remaining belongings from the rental unit by 5:00 p.m. on August 13, 2014.

Although I provided the parties ample time to try to resolve the monetary issues in dispute in their applications, they chose only to discuss who should remove the remaining items from the rental unit and when this should occur. While this is important to the extent that the landlord and her agent have delayed taking any action to try to re-rent the premises until these belongings are removed, this was by no means the central issue in either of the parties' applications for significant monetary awards.

Analysis - Tenant's 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, to either return the security deposit in full 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 security 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 landlords written authorization at the end of this tenancy to retain any portion of his security deposit, section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

In this case, the landlord had 15 days after April 9, 2014, the date when the agent acknowledged the landlord received the tenant's forwarding address to take one of the actions outlined above. Although the landlord did eventually apply for authorization to retain the tenant's security deposit, the RTB did not receive her application until May 9, 2014, well after the expiration of the 15 day time period specified in section 38 of the *Act*.

Based on the undisputed evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. There is no evidence that the tenant waived her right to obtain a payment pursuant to section 38 of the *Act* owing as a result of the landlord's failure to abide by the provisions of that section of the *Act*. In fact, as noted above, the tenant specifically applied for a return of double her security deposit, due to the landlord's delay in returning her deposit. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is therefore entitled to a monetary order of $1,000.00, amounting to double the value of the security deposit paid for this tenancy with interest calculated on the original amount only. No interest is payable. In making this determination, I note that the tenant is jointly and severally liable for any rights and responsibilities attached to her signing of the original Agreement on March 16, 2013.

Analysis – Landlord's Application

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.

I first note that any security deposit paid by a sub-tenant to the tenant is a matter between those two parties and not the landlord. The only security deposit paid to the landlord was the $500.00 paid when this tenancy began on March 16, 2013. As such, I dismiss without leave to reapply the landlord's request to retain the sub-tenant's security deposit paid to the tenant.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. In this case, as no joint move-in condition inspection was conducted by the landlord at the beginning of this tenancy, it is difficult to accurately determine the condition of the rental unit when this tenancy began. Although the parties did eventually undertake a joint move-out condition inspection on April 6, 2014, the only "report" of that inspection produced by the landlord was the short email outlined above. While some of this email does identify issues noted in the tenant's own move-out

condition inspection report produced on or about April 29, 2014, this email is not a proper substitute for a signed joint move-out condition inspection report.

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

> **23** *(1) The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day...*
>
> *(3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.*
>
> *(4) The landlord must complete a condition inspection report in accordance with the regulations.*
>
> *(5) 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.*
>
> *(6) The landlord must make the inspection and complete and sign the report without the tenant if*
>
> > *(a) the landlord has complied with subsection (3), and*
> >
> > *(b) the tenant does not participate on either occasion...*

Section 24 of the *Act* reads in part as follows:

> **Consequences for tenant and landlord if report requirements not met**
>
> **24** *(1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if*
>
> > *(a) the landlord has complied with section 23 (3)* [2 opportunities for inspection]*, and*
> >
> > *(b) the tenant has not participated on either occasion.*
>
> *(2) The right of a 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 23 (3)* [2 opportunities for inspection]*,*
> >
> > *(b) having complied with section 23 (3), does not participate on either occasion, or*

> *(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...*

Section 35 and 36 of the *Act* establish similar requirements regarding the move-out condition inspection process. Section 36 also extinguishes a landlord's right to claim against a security deposit if a joint move-out condition inspection report is not produced.

The tenant and her advocate correctly noted that the landlord's ability to claim against the security deposit for this tenancy has been extinguished by the deficiencies in the landlord's compliance with the sections of the *Act* relating to joint move-in and move-out condition inspections. However, the landlord's omissions in this regard do not prevent the landlord from making a separate claim for a monetary award for damage and loss arising out of this tenancy pursuant to section 67 of the *Act*.

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. However, I find that there is some agreement between the parties as to the condition of the rental unit as described in the landlord's April 6, 2014 email and the tenant's own description of the condition of the rental unit at the end of her tenancy in her move-out condition inspection report and in the emails exchanged between the parties. Based on the oral, written and photographic evidence of the parties, I find on a balance of probabilities that the tenant did not comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit "reasonably clean" as some cleaning was likely required by the landlord after the tenant vacated the rental unit. Although the landlord has not yet cleaned the premises, I still find that the landlord is entitled to a monetary award for $100.00 in general cleaning, which would have been necessary when this tenancy ended.

I dismiss the remainder of the landlord's application for carpet cleaning and for the repair of damage to walls and repainting without leave to reapply. I do so as I find that the landlord's failure to conduct a joint move-in condition inspection leaves the condition of the rental unit at the beginning of this tenancy in sufficient question to disentitle her to any monetary award for these items.

In considering the landlord's claim for $92.11 in estimated unpaid utilities owing from March 2014, the last month of this tenancy, I note that neither the tenant nor her advocate disputed the actual amount claimed by the landlord for this item. Rather, the tenant's advocate submitted a written assertion that "the unpaid utility is to be paid by (his client's) previous roommate." He claimed that the tenant should not be held responsible for this unpaid bill because she had "already submitted her share of the utility bill."

As noted above, by signing the original Agreement, each of the three tenants committed to jointly accept the rights and responsibilities for the entire terms of that Agreement. While this enables the tenant to claim for the return of the entire security deposit for this tenancy, it also

requires her to meet the responsibilities that the three tenants shared for this tenancy. In addition, I note that the tenant signed a further document which established that she alone was to be held responsible for any and all obligations contained in the original Agreement as of October 1, 2013. As the March 2014 utility bill clearly occurred after October 1, 2013, the tenant remains responsible for the tenants' portion of the utilities as identified by the landlord. If the tenant had some additional arrangement with her sub-tenant regarding the payment of utilities that is an issue between her and her sub-tenant. The landlord is in no way precluded from claiming for unpaid utilities based on an agreement between the tenant and her sub-tenant, or based on an agreement between the tenant and Tenant SMP. For these reasons, I issue the landlord a monetary award of $92.11 for unpaid utilities owing from this tenancy.

I have also carefully considered the landlord's claim for the replacement of the glass-top in the bathroom. The landlord has entered into written evidence a copy of a May 14, 2014 receipt for $214.20 to replace the glass-top in the bathroom.

The tenant's advocate entered written evidence that "The glass-top in the bathroom is likely to have been damaged before (his client) moved in." He maintained that the condition of the glass-top at the beginning of this tenancy was unknown because the landlord had not provided the tenant(s) with an opportunity to conduct a joint move-in condition inspection at beginning of this tenancy, as required by section 24(2) of the *Act*. He asserted that the tenant never used this glass-top "and was unaware of its state due to her short height" and was not liable for these damages.

While I have given the above evidence due consideration, I also note that the tenant's own report of the condition of the rental unit at the beginning of her tenancy made no mention of any problems with the glass-top in the bathroom. Since the tenant did not prepare this report until almost a month after her tenancy ended, the accuracy of her move-in report may be questionable. However, by that time, she was aware that the landlord had identified concerns about the broken glass-top in the bathroom in the landlord's April 6, 2014 email describing the condition of the rental unit at the end of this tenancy. I find that some of the position taken by the tenant's advocate in this regard relies on an acceptance of the principle that the tenant should only be held responsible for damage that she caused, although the tenant's advocate requested full reimbursement for the security deposit paid by all three tenants at the start of this tenancy. As noted above, the tenant is jointly and severally liable for any damage that was caused during this tenancy. While the landlord could have chosen to name other respondents who signed the original Agreement, she identified only the tenant, the last remaining person living there who had signed the original Agreement. Under these circumstances and based on a balance of probabilities, I find it more likely than not that the damage to the glass-top occurred during the course of this tenancy. While someone else may have physically caused this damage, the tenant remains responsible for damage that occurred during the course of her tenancy. As such, I find that the landlord is entitled to recover the $214.20 in losses that she has incurred to replace the glass-top in the bathroom of this rental unit from the tenant.

As the tenant has agreed to remove the remaining belongings from the rental unit within a week of this hearing, I dismiss the landlord's claim for a monetary award for the removal of these items without leave to reapply. The landlord has not incurred any actual costs in removing these items, although she expected to incur these costs when she filed her application for dispute resolution.

Although I have given the landlord's application for the recovery of two month's loss of rent careful consideration, I have difficulty in understanding why the landlord would be entitled to any loss of rent for these months. This fixed term tenancy ended on the date it was originally supposed to end. The agent testified that the landlord has been unable to re-rent the premises because belongings have been left in the rental unit such that she could neither advertise the premise for rental nor show the premises in its current condition. The rental property has remained vacant for over four months, while the parties have awaited a hearing of their respective applications for dispute resolution. Based on the discussions undertaken between the parties at the hearing, it would seem that neither party believed it was their responsibility to remove furniture and possessions that were left by one of the previous tenants who signed the original Agreement. The landlord and her agent were fully aware that the tenant had no need for these belongings and claimed that they were left by one of her former roommates who had abandoned the rental unit well before the expiration of the Agreement he had signed.

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. 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, once the tenant surrendered her key to the rental unit and advised the landlord that she had no desire to keep the materials left behind by one of her former roommates, the landlord had the option of removing these materials from the rental unit and placing them in storage if the landlord considered them to be of value. The landlord would then have been required to safeguard them for a period of time and could have claimed storage costs from whichever of the original tenants she decided to name as a Respondent in her application. Rather than taking any action to mitigate her loss of rent, the landlord chose to wait over four months for this hearing to decide what should be done with the materials left behind from this tenancy. While the landlord can certainly choose to leave such materials in the rental unit to await the outcome of a dispute resolution hearing, I find that the landlord's failure to take any action to reduce her loss of rent has not met the test required by section 7(2) of the *Act* to take reasonable actions to minimize her loss of rent for this period. For these reasons and because this fixed term tenancy was scheduled to end on March 31, 2014, I dismiss the landlord's application for a monetary award for loss of rent for April and May 2014, without leave to reapply.

As the landlord has been only partially successful in her application, I find that she is entitled to recover $25.00 of her $50.00 filing fee from the tenant.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to recover double her security deposit, less unpaid utilities and damage arising out of this tenancy:

Item	**Amount**
Return of Double Security Deposit as per section 38 of the Act ($500.00 x 2 = $1,000.00)	$1,000.00
Less General Cleaning	-100.00
Less Unpaid Utilities	-92.11
Less Damage to Glass-top in Bathroom	-214.20
Less Landlord's Recovery of ½ of her Filing Fee	-25.00
Total Monetary Order	**$568.69**

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.

I order the tenant to make arrangements with the landlord's agent as soon as possible to remove any remaining belongings from the rental unit by 5:00 p.m. on August 13, 2014.

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: August 08, 2014

Residential Tenancy Branch