Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding KINGSGATE GARDENS CORPORATION
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, MNDL-S, FFL

Introduction

This hearing convened as a result of a Landlord's Application for Dispute Resolution, filed on March 15, 2018, wherein the Landlord requested monetary compensation from the Tenants for loss of rent and damages to the rental unit, authority to retain the Tenants' security deposit and to recover the filing fee.

The hearing was conducted by teleconference at 11:00 a.m. on October 9, 2018.

The Landlord was represented by A.T., who identified himself as the Managing Director. Both Tenants called into the hearing as did their roommate, D.W. All in attendance were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to monetary compensation from the Tenants?

2. What should happen with the Tenants' security deposit?

3. Should the Landlord recover the filing fee?

Background and Evidence

The Landlord's representative testified that this tenancy began February 1, 2016. Monthly rent was payable in the amount of $1,750.00 and the Tenants paid a security deposit in the amount of $875.00.

Introduced in evidence was a copy of a document signed by the Tenants confirming that they would not smoke in the rental unit or have pets.

Pursuant to the fixed term, the tenancy was set to end on January 31, 2018. The Tenants moved from the rental unit on November 30, 2017.

On the filed Application for Dispute Resolution the Landlord claimed monetary compensation in the amount of $5,525.00; during the hearing the Landlord's Agent clarified the Landlord sought a total of $6,400.00 for the following:

Cleaning of the rental unit	$350.00
Painting of the rental unit	$1,750.00
Carpet repair	$650.00
Shampooing of carpet after replacement	$150.00
2 months' rent	$3,500.00
TOTAL	**$6,400.00**

Photos submitted by the Landlord depict the following:

- items, such as a mattress and clothes hangers, an office chair and a few small items left in the rental unit;
- small debris on the carpet indicating the floors were not vacuumed;
- two areas where the carpet appears to be separating; and,
- fibers missing in a small area of the carpet on the staircase.

The Landlord's agent testified that the Tenants had a cat, contrary to the signed agreement. In support the Landlord provided a photo of a cat in the window of the rental unit. The Landlord also introduced in evidence an email from the Tenant confirming that the Tenant, D.W., had a cat in the rental unit. This was not disputed by the Tenants.

The Landlord's agent stated that the carpet was approximately five years old at the time the tenancy ended.

The Landlord's agent testified that the Tenants damaged the walls, which he claimed had been painted before the tenancy began. He stated that there were dents and scratches "everywhere". He also stated that due to the presence of a cat in the rental unit they had to repaint the walls as they needed to ensure the rental unit was "no pets" .

The Landlord's agent testified that the rental unit was re-rented as of February 1, 2018 for $1,795.00. He stated that they "really tried" to re-rent the unit but the unit was not in a condition to rent it. He stated that they advertised the unit but could not secure a tenant until February 1, 2018. He also stated that by the time they completed the repairs prospective tenants were looking for rentals for February 2018.

The Landlord's agent also claimed that December is the worst time to rent a rental unit as people are thinking of Christmas.

In response to the Landlord's claims, the Tenant, D.C., testified as follows.

D.C. stated that he spoke to the Landlord's Agent on November 1, 2017 and he confirmed that the "break lease fee" would be waived. This conversation was confirmed in writing to the Landlord's agent and the other Tenants. (Notably no such fee, usually referred to as "liquidated damages" was claimed by the Landlord.)

D.C. stated that the Landlord brought prospective renters into the unit in November 2017, but failed to give them enough notice to clean the unit and prepare it for viewings. Introduced in evidence was a copy of a text message wherein the Landlord's agents asked to show the rental unit with less than an hours' notice.

D.C. further testified that the photos taken by the Landlord were taken *before* they finished cleaning the rental unit and before it was ready to be shown. In support they provided an audio recording from November 27, 2017 which confirms the Landlord's Agent went in and took the photos before they moved out.

D.C. testified that as early as November 1, 2017 he asked the Landlord's agent to come and look at the rental unit and tell them what repairs needed to be done before the end of the tenancy. He stated that the first time the Landlord's Agent was able to come and

inspect the rental unit was December 4, 2018. D.C. further stated that the Landlord's Agent stated the rental unit was clean at that time.

D.C. confirmed that the Landlord did not perform a move in or move out condition inspection.

D.C. also stated that when they moved in the carpet was lifting and pilling that when he was dragging his mattress across the carpet it pulled apart.

D.C. submitted that the walls were not damaged at the end of the tenancy and that any dents or scratches were merely a result of normal wear and tear. He stated that it was not painted when they moved in and likely required painting in any event of their tenancy. Further, he noted that when they first moved in the Landlord had someone come in and repair the walls, but the painting was not done because the painter was fired before the painting could be done. He stated that for the two years they lived there the walls were repaired but not painted. In support he provided a photo of the inside of a closet from May 2016 showing repairs to the walls which were left unpainted.

The Tenants submitted that negative online reviews impacted the Landlord's ability to re-rent the rental unit, not the alleged condition of the rental unit. Copies of these reviews were provided in evidence.

D.C. submitted that the Tenants also assisted the Landlord in showing the rental unit; D.C. confirmed there were six showings in November 2017 alone, three of which were conducted by D.C.

D.C. also submitted that the Landlord did not actively market the rental unit until the end of November, 2017 despite having received the Tenants' notice at the beginning of November. Introduced in evidence was a copy of an ad on a popular online site advertising the unit for $1,850.00 per month ($100.00 more than the amount the Tenants were paying).

D.C. confirmed that they paid $875.00 as a security deposit and did not agree to the Landlord retaining the funds. Introduced in evidence was a copy of an email from the Tenants to the Landlord on February 19, 2018 wherein the Tenants provided the Landlord with their forwarding address.

The Landlord applied for Dispute Resolution on March 15, 2018.

In reply to the Tenant's submissions A.T. stated that they started advertising the rental unit on November 1, 2017.

A.T. also claimed that the condition inspection report was completed and was submitted in evidence. He claimed that the report was completed on February 1, 2017 and was signed by all three Tenants. No such report was provided in evidence.

A.T. conceded that the move out inspection was not done as he claimed the Tenants did not "come up to do it". He also stated that the Landlord called the Tenants numerous times to schedule the inspection. He was not able to answer whether a "Notice of Final Opportunity to Schedule a Condition Inspection" was served on the Tenants.

Analysis

The full text of the *Residential Tenancy Act*, Regulation, and Residential Tenancy Policy Guidelines, can be accessed via the website**:** **www.gov.bc.ca/landlordtenant**.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Landlord has the burden of proof to prove their claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;

- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

Section 37(2) of the *Act* requires a tenant to leave a rental unit undamaged, except for reasonable wear and tear, at the end of the tenancy and reads as follows:

> **37** (1) Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.
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> (2) When a tenant vacates a rental unit, the tenant must
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> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and
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> (b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

After consideration of the testimony and evidence before me, and on a balance of probabilities I find the following.

Pursuant to section 23 and 35 of the *Act,* a Landlord is required to complete a move in and move out condition inspection report at the start of a tenancy and when a tenancy ends. Such reports, when properly completed, afford both the Landlord and Tenant an opportunity to review the condition of the rental unit at the material times, and make notes of any deficiencies.

Section 21 of the *Residential Tenancy Regulation* affords significant evidentiary value to condition inspection reports and reads as follows:

> **21** In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The importance of condition inspection reports is further highlighted by sections 24 and 36 as these sections provide that a party extinguishes their right to claim against the deposit if that party fails to participate in the inspections as required (in the case of the

Landlord this only relates to claims for damage; a Landlord retains the right to claim for unpaid rent.)

I accept the Tenant's evidence that the Landlord failed to perform a move in condition inspection. Although both parties provided testimony, the only documentary evidence provided to me in terms of the condition of the rental unit at the start is a photo from the Tenants showing the inside of a closet being unpainted.

I also find that the Landlord also failed to perform a move out condition inspection as required by the *Act* and the *Regulations.*

The Landlord submitted photos of the rental unit, purportedly taken at the end of the tenancy. The Tenants dispute this, alleging the photos were taken before the Tenants removed all of their possessions and before they cleaned the rental unit. In this case I prefer the evidence of the Tenants. The items depicted in the photos (mattress, desk chair, clothes hangers) suggest the Tenants were not finished removing their items or cleaning. Further, had the Tenants left those items, presumably the Landlord would be claiming for the cost of their removal and disposal.

Without a move out condition inspection report or compelling evidence as to the condition of the rental, such as photos taken *after* the Tenants moved out, I am unable to find that the rental unit required cleaning as claimed by the Landlord. As well, I note that the photos show minimal debris on the carpet. I accept the Tenants' testimony and find that the Tenants left the rental unit reasonably clean as required by section 37(2)(a). **I therefore dismiss the Landlord's claim for cleaning costs.**

Although the Landlord's Agent testified that the walls were damaged at the end of the tenancy, the Landlord failed to submit any photos of the walls to support this testimony. Further, the Tenants alleged that the walls were repaired at the start of the tenancy, but not painted; notably, the photo of the inside of the closet accords with the Tenants' submissions in this regard.

The Landlord's Agent submitted that the walls required repainting as the Tenants had a cat, contrary to the terms of the tenancy agreement. He suggested this was necessary to ensure the rental unit was "pet free". Without further evidence as to the necessity to paint walls in such a case, I am unable to find that this was a consequence of the Tenants having a cat.

I find the Landlord has submitted insufficient evidence to support a finding that Tenants damaged the walls and are responsible for the cost to repaint. **I therefore dismiss the Landlord's claim for painting costs.**

The Tenant admitted that he damaged the carpet when dragging his mattress across the floor. **I therefore find the Tenants are responsible for the cost to repair the carpet in the amount of $650.00 and I award the Landlord recovery of this amount.**

Residential Tenancy Branch Policy Guideline 1 provides the following guidance with respect to carpets in a rental unit:

> **CARPETS**
> 1. At the beginning of the tenancy the landlord is expected to provide the tenant with clean carpets in a reasonable state of repair.
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> 2. The landlord is not expected to clean carpets during a tenancy, unless something unusual happens, like a water leak or flooding, which is not caused by the tenant.
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> 3. The tenant is responsible for periodic cleaning of the carpets to maintain reasonable standards of cleanliness. Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year. Where the tenant has deliberately or carelessly stained the carpet he or she will be held responsible for cleaning the carpet at the end of the tenancy regardless of the length of tenancy.
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> 4. The tenant may be expected to steam clean or shampoo the carpets at the end of a tenancy, regardless of the length of tenancy, if he or she, or another occupant, has had pets which were not caged or if he or she smoked in the premises.

I find the Tenants had a pet contrary to the terms of the tenancy agreement. I am also satisfied that they did not attend to cleaning the carpets at the end of the tenancy. **As such, I find the Landlord is entitled to recovery the carpet cleaning costs in the amount of $150.00.**

The Landlord claimed two months' rent pursuant to the terms of the fixed term tenancy and claim they were not able to rent the rental unit for two months due to the condition it was left in by the Tenants.

The Tenants allege the Landlord did not exercise due diligence in advertising the rental unit until the end of November 2017. The Tenants also allege the Landlord gave them insufficient notice of showings such that they were not able to clean and repair the rental unit in time for such showings. As noted earlier in this my Decision, evidence of communication between the parties supports the Tenants' testimony in this regard.

The Landlord's Agent submitted that the proximity of the timing of the end of the tenancy with Christmas also made renting the unit more difficult.

The rental unit is located in a community in British Columbia with a very low vacancy rate. The "housing crisis" in B.C. at the present time has created a situation where rental vacancies are relatively rare.

A tenant is potentially liable for the balance of rent owing in a fixed term tenancy; however a Landlord must make their best efforts to minimize their losses as required by section 7 of the *Act.* The evidence confirms the Landlord advertised the rental unit out at a higher price, and rented it for more than the amount the Tenants were paying. I find it likely the increase in rental cost contributed to the Landlord's failure to rent the rental unit out sooner.

I do not accept the Landlord's evidence that the condition of the rental was such that the rental unit could not be rented for two months. I find one month to be reasonable and award the Landlord compensation for one month in the amount of **$1,750.00.**

The Landlord requests an Order authorizing them to retain the Tenants security deposit.

The evidence confirms that the Landlord received the Tenants' forwarding address on February 19, 2018. The Landlord applied for Dispute Resolution on March 15, 2018.

Sections 38(1) and (6) provide that a Landlord has 15 days from the latter of the end of the tenancy, or receipt of the Tenants' forwarding address in which to return the deposit to the Tenants or make an Application for Dispute Resolution. A Landlord who fails to return the deposit or make such an Application within that strict 15 day deadline, must pay the Tenant double the deposit paid. For greater clarity I reproduce section 38 as follows:

> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
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> (a) the date the tenancy ends, and
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> (b) the date the landlord receives the tenant's forwarding address in writing,
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> the landlord must do one of the following:
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> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) 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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I therefore find the Tenants are entitled to the sum of $1,750.00 representing double their security deposit ($875.00 x 2 = $1,750.00).

As the Landlord has only been partially successful, I decline their request for recovery of the filing fee.

Conclusion

The Landlord is entitled to monetary compensation in the amount of **$2,550.00** for the following:

Carpet repair	$650.00
Shampooing of carpet after replacement	$150.00
1 months' rent	$1,750.00
TOTAL	**$2,550.00**

As the Landlord failed to comply with section 38(1) of the *Act,* the Tenants are entitled to double their security deposit in the amount of **$1,750.00.**

These amounts are set off against the other such that the Landlord is entitled to a Monetary Order in the amount of **$800.00.** This Order must be served on the Tenants and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

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: November 8, 2018

Residential Tenancy Branch