



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL, MNDL-S, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for unpaid rent and for damage to the rental unit 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 the filing fee for this application from the tenant pursuant to section 72.

The landlord's agent (the landlord) and the tenant attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

While I have turned my mind to all the documentary evidence, including the testimony of the parties, only the relevant details of the respective submissions and/or arguments are reproduced here.

The tenant acknowledged receipt of the Application for Dispute Resolution (the Application) which was sent to them by registered mail on June 11, 2018. In accordance with section 89 of the *Act*, I find that the tenant is duly served with the Application.

The tenant acknowledged receipt of an evidence package which was sent to him by registered mail on October 30, 2018. In accordance with section 88 of the *Act*, I find that the tenant is duly served with the landlord's evidence.

Preliminary Matters

At the outset of the hearing the landlord withdrew their monetary claim for the painting of the rental unit as it was not painted for over four years and its useful life had expired.

The landlord also requested to amend their application to include the unpaid rent for June 2018. As the landlord clearly indicated that they were seeking a balance owing from the tenant ledger on their Monetary Order Worksheet and the tenant indicated that they were prepared to respond to the landlord's claim, I allowed this amendment pursuant to section 64 of the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and for damage to the rental unit?

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

Documentary evidence was provided by the landlord showing that this tenancy began on December 07, 2015, with an initial monthly rent of \$2,550.00, due on the first day of each month. Both parties agreed that the landlord collected a security deposit in the amount of \$1,275.00 in addition to the last month's rent in the amount of \$2,550.00 at the outset of the tenancy. Both parties agreed that the landlord collected an additional \$150.00 for the security deposit when the parties signed new fixed term tenancy agreements and the landlord increased the monthly rent. The landlord confirmed that they currently retain the last month's rent in the amount of \$2,550.00 and a security deposit in the amount of \$1,425.00.

The landlord also provided in evidence;

- A copy of a Condition Inspection Report which is signed by the landlord and the tenant just prior to the beginning of the tenancy on December 07, 2015, which shows multiple issues with the rental unit to be addressed by the landlord. It appears that the move-out condition inspection report was also completed although the landlord did not sign and date it at the time the move-out inspection was completed;
- A copy of a fixed term tenancy agreement which commenced on June 01, 2017, with both parties initialling the vacate clause which states that the tenant would vacate the rental unit at the end of the term of the tenancy on May 31, 2018;
- A copy of a Notice of Rent Increase form which shows the monthly rent being increased from \$2,850.00 to \$2,964.00 effective as of June 01, 2018;
- Various pictures taken from within the rental unit, including one of some 'apoxsee' glue removed from the living room wall and another of a broken toilet seat;
- A copy of a tenant ledger showing a balance owing of \$414.00. The ledger shows the landlord having collected \$1,275.00 for the security deposit and \$2,550.00 for the last month's rent at the outset of the tenancy. The ledger also shows the landlord having collected an additional \$36.00 and \$114.00 during the course of the tenancy for additional security deposit based on increases in rent;
- A copy of an invoice for the painting of the rental unit dated June 11, 2018, which shows \$200.00 for drywall patches in the living room, caulking between the ceilings and walls and to paint the ceiling on the storage;
- A copy of an invoice dated October 23, 2018, for work completed on September 5, 2018, for the cleaning of the rental unit in the amount of \$586.95 which shows the tenant as responsible for replacing the smoke detectors in the amount of \$136.00, to

replace the toilet seat in the amount of \$110.00, to do polish cleaning in the amount of \$90.00 and to replace three burnt out lightbulbs in the amount of \$45.00; and

- A copy of a Monetary Order Worksheet which details the landlord's monetary claim of \$1,470.84 which consists of \$414.00 for money owed on the tenant ledger, \$656.79 for the painting of the rental unit and \$400.05 for the tenant's portion of the cleaning invoice which lists other repairs in the rental unit as noted above.

The landlord stated that they were seeking compensation for damage to the rental unit and a balance owing from the tenant on the tenant ledger. The landlord submitted that the tenant had only given notice to end their tenancy by e-mail in the middle of May 2018, to vacate the rental unit in the same month. The landlord stated that they are seeking unpaid rent for June 2018 in the amount of \$414.00 as they currently retain \$2,550.00 for the last month's rent.

The landlord submitted that apoxsee glue was removed from the drywall, which had to be repaired before painting the rental unit and that the landlord is seeking \$200.00 for this repair as shown on the painting invoice. The landlord testified that the smoke detectors were removed and they had to be replaced, for which the landlord is seeking to be compensated. The landlord stated that the toilet seat was broken and needed to be replaced in addition to cleaning and the replacement of three light bulbs.

The landlord submitted that they were not able to perform a move-out condition inspection with the tenant as the tenant was out of the country. The landlord stated that they had to re-paint the rental unit in June 2018 to have it ready to rent as soon as possible. The landlord admitted that the repairs and cleaning performed on the cleaning invoice were only performed in September 2018 when they received a new security deposit for the rental unit to be occupied again.

The tenant submitted that they had they had sent an e-mail in April 2018 to indicate that they were considering another tenancy but at no time had indicated that he was going to stay and that no tenancy agreement had been signed or commitment given from the tenant. The tenant testified that they had consulted with a lawyer and it was their understanding that the tenancy had a fixed date for the tenant to vacate the rental unit. The tenant stated that they were not required to provide notice to vacate the rental unit as it was already agreed upon in the tenancy agreement. The tenant stated that on May 08, 2018, he sent an e-mail to an agent of the landlord to advise them that he would be vacating the rental unit for May 31, 2018, and that the rental unit was empty on May 25, 2018. The tenant stated that he had provided his forwarding address in the e-mail ending the tenancy.

The tenant testified that the pictures of the toilet show that it is not broken, only that it needs a simple repair. The tenant stated that the smoke detectors were removed and set in the closet and did not need to be replaced. The landlord admitted that he had a person attend the rental unit to repair the wall and that they had used the apoxsee glue for the repair. The tenant submitted that the rental unit was professionally cleaned before he vacated the rental unit. The tenant questioned the amount paid for the replacement of three light bulbs as excessive.

Analysis

Pursuant to section 67 of the Act, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. In this case, to prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenant in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Section 45 (2) of the Act establishes that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, is not earlier than the date specified in the agreement and is the day before the day in the month that rent is payable under the tenancy agreement

Having reviewed the evidence and affirmed testimony, I find that it is undisputed that the tenant gave their notice to end the tenancy by e-mail in May 2018 with an effective date of May 31, 2018, which is not in compliance with section 45(2) of the *Act*. For the above reason I find that the landlord is entitled to the unpaid rent for June 2018 in the amount of \$2,964.00 as per the Notice of Rent Increase form. Therefore, I award the landlord \$2,964.00 for unpaid rent owing for June 2018.

Section 37 of the Act states that at the end of the tenancy the tenant must leave the unit reasonably clean, and undamaged except for reasonable wear and tear.

I find that it is undisputed that the tenant had removed the smoke detectors and had not put them back before they moved out of the rental unit. For this reason I allow the landlord's claim in the amount of \$136.00 for the replacement of the smoke detectors.

I further find that the tenant confirmed that they had attempted to repair the walls and I accept the landlord's testimony that they had to repair these holes before painting the rental unit. I find that the invoice indicates \$200.00 for extras which comprise of repairing the walls in addition to two other tasks. As I am not able to determine the amount of time for each task I have split the amount in three and I award the landlord \$66.00 for the repair of the wall.

Section 35 of the *Act* states that the landlord must offer the tenant at least two opportunities to inspect the condition of the rental unit with the tenant and complete a condition inspection report in accordance with the Residential Tenancy Regulations (the *Regulations*) before a new occupant occupies the rental unit on or after the day the tenant ceases to occupy the rental unit or on another mutually agreed day.

Section 17 of the *Regulations* provides that a landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times, and that if the tenant is not available at the first times offered, the tenant may propose an alternative time to the landlord. The *Regulations* goes on to state that the landlords must consider the tenants' proposed time before proposing a second opportunity to the tenants, different from the first opportunities described above, by providing the tenants with a notice in the approved form.

I find that the landlord was obligated to provide the tenant a Notice of a Final Opportunity to Schedule a Condition Inspection, the approved form pursuant to section 17 (2) (b) of the *Regulations*, before completing a final condition inspection of the rental unit.

Although the landlord claimed that the tenant left the country and they were not able to perform a move-out condition inspection, I find that they were notified of the tenant's intentions by e-mail and could have used that opportunity to schedule a move-out inspection. The landlord had the tenant's e-mail address but provided no evidence that they made any attempt to schedule any condition inspection at the end of the tenancy. The landlord also had the landlord's forwarding address which the landlord used to make the Application and send their notice of hearing by registered mail to.

I find that the landlord did not provide any evidence or affirmed testimony that they complied with section 17 of the *Regulations* and provided the approved form to the tenant to give notice of a final opportunity to schedule a condition inspection when the rental unit was vacant or had provided other opportunities for a move-out condition inspection with the tenant.

As there was no Condition Inspection Report completed at the end of the tenancy with the tenant, I find that the landlord is not able to confirm that the rental unit needed to be cleaned, that the toilet seat was broken at the end of the tenancy or that the light bulbs needed to be replaced. I find that the report that was submitted by the landlord was not signed or dated and it is not known when the move-out condition was actually completed by the landlord. I find that the repairs and cleaning were done in September 2018, after the landlord had the painter in the rental unit, and that repairs done in September 2018 do not necessarily reflect the condition of the rental unit when the tenant vacated prior to the painter performing their work.

Therefore, for the above reasons, I dismiss the landlords' Application for a monetary award for cleaning the rental unit, for the repair of the toilet seat and for the replacement of the light bulbs, without leave to reapply.

Section 36 (2) of the *Act* establishes that, unless the tenant has abandoned the rental unit, the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to the rental unit is extinguished if the landlord has not given two opportunities for inspection as per section 35 of the *Act* and Part 3 of the *Regulations*.

Residential Tenancy Policy Guideline #17 B 7 also states that the right of a landlord to retain the security deposit and pet damage deposit is extinguished if the landlord does not offer the tenant at least two opportunities for inspection as required and that the landlord must use Notice of Final Opportunity to Schedule a Condition Inspection (form RTB-22) to propose a second opportunity.

As I have found that the tenant was not given an opportunity to complete a Condition Inspection Report at the end of the tenancy in accordance with section 35 of the *Act*, I find that the landlord's right to retain all or a portion of the security deposit is extinguished pursuant to section 36 of the *Act*. For the above reason, the landlord's Application to retain all or a portion of the security deposit is dismissed, without leave to reapply.

As the landlord has been partially successful in their Application to obtain unpaid rent for June 2018 and some other damages, I allow them to recover \$50.00 of the filing fee.

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. Residential Tenancy Policy Guideline # 17 C 1 states that an arbitrator will order the return of a security deposit on a landlord's application to retain all or a part of the security deposit unless the right of a tenant has been extinguished under the *Act*.

Section 19 (1) of the *Act* states that a landlord must not require or accept a security deposit that is greater than $\frac{1}{2}$ of one month's rent payable under the tenancy agreement.

Residential Tenancy Policy Guideline #29 states that as a result of the definition of a security deposit in the *Act* and the regulations, the last months' rent paid by a tenant, irrespective of any agreement between a landlord or a tenant would be, or form part of, a security deposit. This guideline goes on to say that if the last month's rent, together with other monies paid, exceeds one-half of one month's rent, then the remedies afforded by the *Act* are available to a tenant. In addition, the *Act* provides that a landlord who contravenes these provisions commits an offence and is liable, on conviction, to a fine of not more than \$5,000. I also note that the section 20 of the *Act* establishes that a landlord must not require a security deposit at any time other than when the landlord and tenant enter into a tenancy agreement.

Residential Tenancy Policy Guideline # 17 C 3. states that unless a tenant has specifically waived the doubling of the deposit, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the *Act*.

As I have dismissed the landlord's Application to retain the security deposit due to the extinguishment of their right to keep it under the section 36 of the *Act*, I find that the tenant is entitled to a monetary award of \$7,950.00 ($(\$1,425.00 + \$2,550.00 = \$3,975.00) \times 2$) for double the return of the total security deposit.

Conclusion

Pursuant to section 67 of the *Act*, I grant a Monetary Order in the tenant's favour under the following terms, which allows the tenant to recover double the security deposit, less the damages, unpaid rent and the landlord's partial recovery of the filing fee:

Item	Amount
Double Security Deposit	\$7,950.00
Less Unpaid June 2018 Rent	-2,964.00
Less Smoke Detector Replacement	-136.00
Less Wall Repair	-75.00
Less portion of Landlord Filing Fee	-50.00
Total Monetary Order	\$4,725.00

The tenant is provided with this Order in the above terms and the landlord(s) must be served with this Order as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: December 12, 2018

Residential Tenancy Branch