Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the Landlord: FFL, MNDCL, MNDL
For the Tenant: FFT, MNSD

Introduction

This hearing was convened as a result of Applications for Dispute Resolution by both Parties seeking remedy under the *Residential Tenancy Act* (*"Act*"). On September 6, 2018, the Landlord applied for compensation for damage caused by the Tenant, their pet or guests, compensation for monetary loss or other money owed, and to recover the cost of the filing fee for a total of $397.71.The Tenants applied for all or part of their security deposit back in the amount of $8,175.00, plus recovery of the cost of the filing fee.

The Landlord and the Tenants attended the teleconference hearing. The Landlord also had two witnesses available by telephone, if they were needed to be called to testify. The hearing process was explained to the Parties and they were given an opportunity to ask questions about the hearing process. Thereafter the Parties were affirmed and provided with the opportunity to present their evidence orally in the hearing. The Parties had the opportunity to provide documentary evidence prior to the hearing.

Both Parties confirmed that they received and had the opportunity to review documentary evidence served upon them from the other Party. I, therefore, find that there are no issues regarding service.

I have reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

On October 1, 2018, the Landlord submitted an amendment to his application to change his monetary claim from $244.31 to $397.71; however, there is no evidence before me

that the Landlord served this amendment on the Tenants, so I will not consider this amendment and will consider the Landlord's original claim in this decision.

The Parties confirmed their email addresses at the outset of the hearing, and they confirmed their understanding that the decision would be emailed to both Parties, and that any applicable orders would be emailed to the appropriate Party.

Issues to be Decided

- Is the Landlord entitled to a monetary order under section 67 of the *Act,* and if so, in what amount?
- Is the Landlord entitled to the recovery of the cost of the filing fee under section 72 the *Act?*
- Are the Tenants entitled to a monetary order under sections 38 and 67 of the *Act,* and if so, in what amount?
- Are the Tenants entitled to the recovery of the cost of the filing fee under section 72 of the *Act?*

Background and Evidence

The Parties signed a tenancy agreement that ran from April 29, 2018 to August 29, 2018, with a monthly rent of $5,450.00 due on the 29th of each month. The Parties agreed that initially, the Landlord charged the Tenants $5,450.00 for a security deposit, but as this was more than the *Act* allows by half, the Landlord allowed the Tenants to pay half of their rent for August 2018, which left the Landlord with a security deposit of $2,725.00 at the end of the tenancy.

This short-term tenancy was relatively uneventful, until the Landlord discovered some damage to the rental unit after the tenancy ended, for which he deducted an amount from the Tenants' security deposit before returning the balance to them. The Tenants made a cross application claiming that the Landlord did not return the full amount of their security deposit and arguing that the *Act* requires the Landlord to pay them double the amount of the deposit.

Section 23 of the Act states that landlords and the tenants 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. Section 35 of the Act requires the parties to inspect the condition of the rental unit before a new tenant begins to occupy the rental unit.

In the matter before me, the Parties agreed that the Tenants obtained and completed a condition inspection report ("CIR") at the beginning of the tenancy after inspecting the rental unit on their own. The Tenants said they provided the CIR to the Landlord, who did not dispute the manner in which the Tenants' completed the incoming CIR.

The Parties did not complete an outgoing CIR, although the Landlord said that he inspected the rental unit with the Tenants present and did not find any damage, until after the Tenants had left. The Tenants agreed that the Landlord inspected the condition of the rental unit on their last day there. The Landlord said the Tenants would not sign the outgoing CIR; the Tenants did not deny or explain why they refused to sign a CIR, which indicated they had not caused any damage to the unit. There is nothing before me to indicate that the Tenants preferred to conduct the move-out CIR at a different date or time. The Landlord did not submit the completed, unsigned CIR into evidence before me; however, I note there is no dispute that the Tenants did not damage the rental unit, aside from possibly the Air Shell, which I address below.

After the Tenants vacated the rental unit, the Landlord said he discovered a damaged "air outlet volute shell" (the "Air Shell"). The Air Shell was attached to a portable air conditioner ("AC") that the Parties agreed the Landlord purchased for the Tenants and installed in the rental unit on July 27, 2018.

On September 11, 2018, the Landlord applied for dispute resolution at the RTB for a monetary order for damage or compensation under the *Act*. The Landlord applied for $241.33 in relief from the Tenants in this regard. On October 27, 2018, the Tenants cross-applied for dispute resolution, claiming a monetary order of $8,175.00 for the return of their security deposit. The Landlord applied to the RTB first, so I will outline his claims, followed by those of the Tenants.

Landlord's Application

The Landlord's monetary claim of $397.71 consists of the following:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Air Shell	$44.31
2. Strata move-in fee	$200.00
3. Filing fee	$100.00
4. Cost of serving Hearing documents on Tenants in U.S.	$53.40
TOTAL	**$397.71**

The Landlord said he deducted the first three amounts from the Tenants' security deposit before returning the balance to them in the amount of $2,380.69 on September 9, 2018. There is email evidence before me stating that the Tenants did not deposit the Landlord's cheque, because their documentary and testimonial evidence is: "If we did so, you would argue that doing so constituted a compromise of our claims against you. We don't want partial payment of what you owe us – we want the full thing."

Regarding item 1, the Landlord submitted a photo of the Air Shell that attaches to the AC he purchased for the rental unit. In the photo, a portion of one end of the Air Shell appears warped or melted. The Landlord's evidence is that the Air Shell was in perfect condition when he unpacked it from its box in the rental unit. The Landlord said a friend accompanied him to the rental unit and witnessed the AC coming out of the packaging in perfect condition, including the Air Shell. He said it was not in the same perfect condition when he inspected it after the Tenants moved out approximately a month later.

The Landlord said that the AC is portable and has to be removed from the window when the Tenants leave the rental unit, because it is impossible to lock the window with the unit in place. The Landlord suggested that the Air Shell could have been damaged by the Tenants on one or more of the occasions when the Tenants removed the AC from or re-inserted it into the window.

Regarding item 2, the Landlord said that the building strata corporation charges people a move-in fee of $200. The Landlord noted that this amount is itemized on the bottom of the second page of the tenancy agreement, indicating that the fee is not included in the rent and "is applicable upon move-in payable to [the strata corporation]." In the hearing the Tenants said they do not contest that this fee was not paid, but that it was merely forgotten by the Parties at the start of the tenancy.

Regarding the third and fourth items, the Landlord said he claims these, because he incurred these costs as a result of this claim. The Landlord said he had to serve the Tenants with the Notice of Dispute Resolution Proceeding, his application, and documentary evidence for this matter in the United States in order to proceed with his claim; he said this was more expensive than serving documents in Canada, so he is claiming it as a cost against the security deposit.

Tenants' Application

In the hearing, the Tenants said they wrote to the Landlord on August 30, 2018, asking

for the return of their security deposit of $2,725.00. Their subsequent claim resulted from the Landlord not refunding their security deposit in full. I note their forwarding address is set out in the CIR they provided at the beginning of the tenancy.

The Tenants' application counters the Landlord's, as follows. Regarding the Air Shell, the Tenants said it is "a $45 piece of plastic that attaches outside the unit". The Tenants said the AC and Air Shell may have been in perfect condition when first unpacked, but that the Landlord installed the unit and could have caused the damage to the Air Shell, himself.

The Tenants said they could not understand how they could have damaged the Air Shell, unless they went outside onto the patio to do something to it, which they denied doing. The Tenants did not comment on the Landlord's suggestion that it could have been damaged when they were taking the AC in or out of the window; rather, they said this item was not listed in a CIR and that the Landlord cannot claim it against their security deposit after the fact. The Tenants said this is fatal to the Landlord's ability to claim against the security deposit for the damage.

Regarding the Landlord's second item, the $200 Strata move-in fee, the Tenants do not dispute that this amount was owed, but they said it was owed to the Strata corporation, not to the Landlord. The Tenants argued that the Landlord was not authorized to deduct this amount from their security deposit; they said they would have paid the fee directly to the Strata corporation, but they never received an invoice for it.

The Tenants also argued that the *Act* limits a landlord's ability to use the security deposit to claim for a fee that is not set out in the Regulation, such as the cost of serving the documents in the U.S. They cited section 5(3) of the Regulation and section 38(8)(c) of the *Act* to support this position.

In their Notice of Dispute Resolution Proceeding, the Tenants claimed part or all of their security deposit back. They said:

> Landlord failed to conduct – or offer to conduct – both a move-in and move-out conditions inspection. For this reason, withholding our security deposit was *per se* unlawful. See RTA section 24(2)(c) & 36(2)(c). The sole damage claimed by [the] Landlord was to the exterior exhaust port of an AC unit he himself installed.

The Tenants submitted a Monetary Order Worksheet setting out their claim for the security deposit in the amount of $5,450.00; however, in their Notice of Dispute

Resolution Proceeding, they claimed $8,175.00 from the Landlord. In the hearing they said they claim double the security deposit from the Landlord, because he “illegally withheld twice the amount allowable for a security deposit” and because the Landlord did not generate a move-in CIR. The Tenants claim that they should get double the amount they paid for the security deposit from the start to $10,900.00, although they credited the Landlord with $2,725.00 for a total claim of $8,175.00.

As noted above, the Parties agreed that the Tenants paid the Landlord $5,450.00 as a security deposit initially, but that they decreased their August rent by half to bring the security deposit into compliance with the Act. Accordingly, the Tenants’ security deposit was in the amount of $2,725 in the course of the tenancy. I address the amount of their claim further below.

Condition Inspection Report

The evidence before me is that the Tenants completed a CIR upon moving in and that the Landlord accepted it as accurate. Further, the Landlord advised that he inspected the rental unit with the CIR when the Tenants were moving out and found no damage; however, the Tenants were not willing to sign this form.

In the hearing, the Tenants did not dispute the Landlord’s evidence in this regard, but they said a comprehensive CIR was not completed – it did not address the Air Shell, which affects their claim.

The Landlord uploaded a copy of the move-out CIR he completed to the RTB system; however, he uploaded this document the day before the hearing took place, which did not give the Tenants time to review it and prepare to address it in the hearing. As a result, I have not considered this document in my deliberations, other than in terms of what the Parties told me about it in the hearing.

Analysis

Item 1 – the Air Shell

When a tenant vacates a rental unit, the tenant must “leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear”, pursuant to section 37(2)(a) of the Act. Further, section 32 states:

Landlord and tenant obligations to repair and maintain

Section 32 states:

> . . .
> (3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.
>
> (4) A tenant is not required to make repairs for reasonable wear and tear.

Awards for damages are intended to be restorative. The Air Shell was approximately one month old when the damage was discovered after the tenancy ended. The Landlord has the burden of establishing the validity of their damage claim on a balance of probabilities. I find it more likely than not that the Air Shell was not defective when it was purchased and that it was damaged at some point in its brief time in the rental unit. The unit may have been installed incorrectly by the Landlord or it may have been removed and reinstalled incorrectly by the Tenants, but there is nothing before me to determine which scenario is more likely. I find that the Landlord has not met his burden of establishing on a balance of probabilities that the fault for this damage lies with the Tenants. I dismiss the Landlord's application for the first item of his claim without leave to reapply.

Item 2 – the Strata Move-in Fee

There are two types of fees a landlord may charge a tenant pursuant to the Regulation: refundable and non-refundable fees. The Strata move-in fee falls into the non-refundable category of fees. Section 7 of the Regulation sets out the non-refundable fees a landlord may charge a tenant. Section 7(1)(f) states that a landlord may charge "a move-in or move-out fee charged by a strata corporation to the landlord." Further, the Tenants signed and initialed just below this fee requirement on the second page of the tenancy agreement. I find that the strata move-in fee is a non-refundable fee authorized by the Regulation, which the Tenants owe to the Landlord. I therefore grant the Landlord's claim for compensation in the amount of $200.00 for this fee.

Item 3 – Filing Fee

I address this claim at the end of the Analysis section.

Item 4 – Cost of serving Hearing documents on Tenants in U.S.

I disagree with the Tenants' argument that sections 38(8)(c) of the Act and section 5(3) of the Regulation are relevant to the Landlord's claim for the cost of serving the hearing documents. These sections say:

5(3) A landlord must not charge a fee in relation to any cost incurred by the landlord to repay a deposit as described in section 38(8)(c) of the Act *[return of deposit].*

Section 38(8)(c) of the Act states:

(8) For the purposes of subsection (1) (c), the landlord must repay a deposit

. . .

(c) by using any form of electronic

(i) payment to the tenant, or

(ii) transfer of funds to the tenant.

The Landlord's fee in this matter is not in relation to repaying a deposit, so section 5(3) is not relevant to the Tenant's argument. I find that section 38(8)(c) strictly addresses the electronic forms in which a landlord may repay a deposit. The sections are not broad enough to encompass the cost of serving documents in the matter before me.

However, the Landlord has not submitted anything to support his claim that this is a fee that he may deduct from a tenant's security deposit. Section 7 of the *Act* gives an arbitrator broad authority to award costs, provided there was a breach of the *Act*. However, I find that there is nothing in section 7 of the Regulation that mirrors this type of fee.

Section 72(1) of the Act provides that an Arbitrator may award one party recovery of the filing fee from the other party; however, the Act does not provide for recovery of other costs associated with making an Application for Dispute Resolution, gathering evidence, or serving hearing documents. As a result, I dismiss the Landlord's claim to be refunded the $53.40 he incurred in serving the hearing documents on the Tenants, without leave to reapply.

Security Deposit

The undisputed testimony before me is that the Tenants created the move-in CIR at the start of the tenancy and that the Landlord reviewed the rental unit at the end of the tenancy and completed the move-out portion of this report. The Tenants did not dispute that they refused to participate in the move-out inspection. Further, the Landlord's testimony is that he did not find anything wrong with the rental unit, so the final CIR would have been consistent with the report that the Tenants' generated themselves at the beginning of the tenancy. I find that the Parties produced a move-in and move-out CIR consistent with the intent of the legislation.

The Landlord applied for dispute resolution on September 6, 2018, and returned the portion of the security deposit that he found reasonable on September 12, 2018, both of which were within 15 days of the end of the tenancy, consistent with the requirements of section 38(1) of the *Act*.

The Tenants argued that the Landlord's failure to do a CIR at the beginning and the end of the tenancy is fatal to his ability to recover from the security deposit. Section 24(2) of the Act addresses the consequences for tenants and landlords who do not meet the CIR requirements of section 23 of the Act. Section 24(2) states that the right of a landlord to claim against a security deposit for damage to residential property is extinguished if the landlord has not complied with sections 23 of the Act. This affects a landlord's ability to claim against the security deposit for damage to the unit. As I have dismissed the Landlord's claim for the damage to the Air Shell, which is the only damage claim, the legitimacy of the CIR in this regard is irrelevant to the Landlord's ability to claim against the security deposit in other ways. In this case, the Landlord has made a valid claim against the security deposit for the $200.00 move-in fee required by the Strata.

The Tenants' claim is also based in part on section 38 of the Act, which requires a landlord to double the security deposit paid, if the landlord did not comply with the relevant provisions of the Act. One argument is that the Landlord required the Tenants to pay more than half of the amount of rent for the security deposit; however, pursuant to section 19 of the Act, the Landlord allowed the Tenants to deduct the overpayment from the rent as a means to recover the overpayment. I acknowledge that this deduction did not happen immediately, but rather, when the Parties realized that the amount of the security deposit was not authorized by the Act. The Act does not set out that the repayment must be immediate. Based on the Act and the evidence before me in this situation, I find that the Tenants are not eligible for double the damage deposit back due to the overpayment of the security deposit.

In terms of a landlord`s requirement to return the security deposit, section 38(1) of the Act states:

> **Return of security deposit and pet damage deposit**
>
> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

> (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.

In this case, the Landlord did both (c) and (d). The tenancy ended on August 29, 2018 and the Tenants had provided their forwarding address on the incoming CIR; as such, the Landlord had until September 13, 2018 to repay the security deposit or apply for dispute resolution claiming against the security deposit. As noted above, he did the latter on September 6, 2018, and the former in part on September 9, 2018.

I find that the Tenants' non-participation in the move-out inspection did not extinguish their right to the return of the security deposit, pursuant to section 24(1) of the *Act*, as the Landlord did not offer them two opportunities for the move-out inspection; however, there is no evidence before me that this prevented the Tenants from participating in the move-out inspection. The Parties completed move-in and move-out condition inspection reports, which indicated that the Tenants were not responsible for any damage to the unit. Further to this, Policy Guideline 17 states that in cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss.

As stated above, I have already found that the Landlord extinguished their right to claim against the security deposit for damage to the rental unit when they failed to comply with their obligations under section 23 of the Act. While this extinguishment had no material impact on the outcome of this hearing as the Landlord's claim for damage was dismissed and his remaining claims were filed in compliance with section 38 of the Act, I nevertheless find that as the Landlord extinguished their rights in relation to the security deposit, and as a result, I find that the Tenants have not extinguished their rights to claim for the return of their security deposit pursuant to Policy Guideline 17.
The Landlord provided the Tenants with a cheque for $2,380.69 after deducting $344.31 from the $2,725.00 security deposit.

As explained above, I find the Landlord is authorized to retain only the $200.00 claim for the Strata move-in fee from the security deposit. Further, since both Parties' claims are partially successful, I do not award recovery of the filing fee to anyone.

Accordingly, I order the Landlord to pay the Tenants the $144.31 excess amount he

deducted from the security deposit.

Conclusion

The Tenants have been granted a Monetary Order pursuant to section 67 of the Act, in the amount of $144.31. The Tenants must serve this Order on the Landlord and the Order may then be filed in the British Columbia Provincial Court (Small Claims Division) and enforced as an Order of that court.

The decision will be emailed to the Parties as noted above and the Monetary Order will be emailed to the Tenants only for service on the Landlord, as required.

Although this decision has been rendered more than 30 days after the conclusion of the proceedings, section 77(2) of the *Act* states that the Director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period set out in subsection (1)(d).

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: February 20, 2019

Residential Tenancy Branch