Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNR, MNDC, FF

Introduction

This hearing was convened in response to applications by the landlord and the tenant.

The landlord's application is seeking orders as follows:

1. For a monetary order for loss of rent;
2. For damages to the rental unit;
3. To keep all or part of the security deposit; and
4. To recover the cost of filing the application.

The tenant's application is seeking orders as follows:

1. Return double the security deposit; and
2. To recover the cost of filing the application.

Both parties appeared, gave affirmed testimony, and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions at the hearing.

Landlord's application

The tenant acknowledges that they received the landlord's application for dispute resolution and evidence.

The tenant indicated that they both had previous cross applications, which were heard on November 6, 2020, and a decision made on November 20, 2020. The tenant submits that the landlord's application for loss of rent was already heard and dismissed. I have noted the file numbers on the covering page of this decision.

I have reviewed that decision on the issue of loss of rent. I find that matter was already heard. While the landlord is claiming this is for breach of the fixed term; however, the landlord was required to present that evidence at the prior hearing and had more than sufficient time to amend their application and file evidence, as the tenancy had ended on July 29, 2020. Therefore, I decline to hear the issue of loss of rent.

Tenant's application

The landlord did not receive the tenant's application or evidence

The tenant testified that they served the landlord with the required documents, sent by registered mail on August 29, 2020. The tenant stated that the package was returned marked moved. The tenant further submits that they did not attempt to reserve the landlord after they received the landlord's application for dispute resolution, which showed the landlord's new address for service.

In this case, I find the landlord was not served with the tenant's application or evidence as it must be served to the residence where the party was living at the time. The tenant clearly knew their application for dispute resolution was not received and made no attempt to reserve their application or evidence when they had the landlord new address for service. Therefore, I cannot consider the tenant's application or evidence.

However, having said the above, I must still consider whether the landlord has the authority under the Act to keep the tenant's security deposit as claimed in their application.

Issues to be Decided

Is the landlord entitled to monetary compensation for damages?
Is the landlord entitled to retain the security deposit in partial satisfaction of the claim?

Background and Evidence

The parties agreed that they entered into a fixed term tenancy which began on October 1, 2019 and was to expire on September 30, 2020. Current rent in the amount of $1,450.00 was payable on the first of each month. The tenant paid a security deposit of $800.00. The tenancy ended on July 29, 2020.

The landlord claims as follows:

a.	Damages to the rental unit	$390.00
b.	Filing fee	$100.00
	Total claimed	**$490.00**

The landlord testified that there were nail holes, holes everywhere on the walls and the rental unit was dirty. The landlord stated that the estimate cost of repair is the amount of $390.00. Filed in evidence are two photographs which shows some minor wall damage.

The tenant testified that they did not cause any damage to the rental unit and it was in the same condition that was at the start of the tenancy. The tenant stated the rental unit had damages when the tenancy started.

The tenant testified that a move-in condition inspection report was completed; however, the landlord did not do a move-out condition inspection. The tenant stated that they sent the landlord their forwarding address on July 29, 2020, which was received by the landlord on July 31, 2020. The tenant stated that the landlord extinguished their rights to the security deposit and also did not file their application within 15 days of receiving their forwarding address.

The landlord testified that they had arranged a move-out inspection on July 29, 2020 at 3PM. However, they received an message on that date from the tenant that they could not make that time and wanted the inspection to occur between 12 and 1pm. The landlord stated that a prior agreement was already made for the inspection to occur at 3pm and the tenant did not attend.

The landlord testified that they also sent a second request for an inspection by email for the tenant to attend the rental unit on August 7, 2020; however, they never heard from the tenant. The landlord stated that because the tenant did not attend either inspection, that it is the tenant who has extinguished their rights to the return of the security deposit.

The tenant argued that the landlord did not arrange a move-out condition inspection with them. The tenant stated that this was arranged with their partner. The tenant stated that the landlord did not have the right to arrange the inspection with their partner as they are not the tenant and were not acting as their agent.

The tenant argued that they informed the landlord that 3pm would not work for them as they had the police monitoring the move-out and the police would not be available to wait for an extended period of time. The tenant stated that they waited until 1:30pm; however, the landlord did not attend so they left, and sent the keys to the landlord by registered mail.

The tenant argued that they never received the email from the landlord for an inspection.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or 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.

How to leave the rental unit at the end of the tenancy is defined in Part 2 of the Act.

> **Leaving the rental unit at the end of a tenancy**
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> *37 (2) When a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear*.

Normal wear and tear does not constitute damage. Normal wear and tear refers to the natural deterioration of an item due to reasonable use and the aging process. A tenant is responsible for damage they may cause by their actions or neglect including actions of their guests or pets.

In this case, I am not satisfied that the landlord has proven the damage was caused by the tenant. The landlord did not provide a copy of the move-in condition inspection report for my review and consideration or photograph of the rental unit at the start of the tenancy. The evidence of the tenant was the damage was there at the start of the tenancy. I find the landlord has not met the burden of poof. Therefore, I dismiss the landlord's claim for damages.

As I have dismissed the landlord's claim for damages I must determine if either party are entitled to the security deposit, as the issue of extinguishment to the security deposit was raise. Both parties claim the other party did not met the requirements to complete the move-out condition inspection report.

Section 35 of the Act, reads as follows:

Condition inspection: end of tenancy

35(1)The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit

(a)on or after the day the tenant ceases to occupy the rental unit, or

(b)on another mutually agreed day.

(2)The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

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

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

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

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

(b)the tenant has abandoned the rental unit.

Section 36 of the Act, reads as follows:

Consequences for tenant and landlord if report requirements not met

36 (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 complied with section 35 (2) *[2 opportunities for inspection]*, and

(b)the tenant has not participated on either occasion.

(2)Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord

> (a)does not comply with section 35 (2) *[2 opportunities for inspection]*,
> (b)having complied with section 35 (2), does not participate on either occasion, or

In this case, the landlord did not arrange the move-out condition inspection with the tenant as it was arranged with the tenant's partner, who was not a tenant under the Act. I find the landlord did not comply with section 35 of the Act, as they did not have the right to arrange the inspection with a person other than the tenant. The tenant informed the landlord that they were unavailable, and the tenant propose an earlier time for the landlord to attend, which the landlord did not agree to.

Firstly, I find the landlord did not offer to the tenant the first opportunity to schedule the condition inspection by proposing to the tenant one or more dates and times as required by section 35 of the Act. Secondly, I find the email sent by the landlord to the tenant for an inspection on August 7, 2020, was not a second opportunity to schedule the inspection, as the first was not scheduled with the tenant, and even if it was, the email was not in the approved form as required by section 17 of the Residential Tenancy Regulations.

I find that the landlord did not meet the requirements under the Act and Regulations; not the tenant. Therefore, I find the landlord extinguished their rights to claim against the security deposit.

Since the landlord has no legal rights to retain the security deposit, and their claim was dismissed. I find that the tenant is entitled to the return of their security deposit in the amount of $800.00.

However, I also must consider whether the landlord has complied with section 38 of the Act, which in part reads,

> **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,
>
> 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.

…

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.

In this case, the landlord had the tenant's forwarding address on July 31, 2020. The landlord made their application for dispute resolution, claiming against the security deposit on September 7, 2020, which was not filed within 15 days of receiving the tenant's forwarding address. I find the landlord did not comply with section 38(1) of the Act. Therefore, I find the landlord must pay the tenant double the amount of the security deposit pursuant to section 38(6) of the Act ($800.00x 2=$1,600.00) for the total amount of **$1,600.00.**

I grant the tenant a formal order in the amount of **$1,600.00**, pursuant to section 67 of the Act. Should the landlord fail to pay the tenant the above amount forthwith, this order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court. The **landlord is cautioned** that costs of such enforcement are recoverable from the landlord.

Conclusion

The landlord's application is dismissed. The landlord failed to comply with section 35, 38 of the Act. The tenant is granted a formal order for the return of double their security deposit.

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 14, 2020

Residential Tenancy Branch