Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDL-S, MNDCL-S, MNSD, FFT**

Introduction

This hearing dealt with monetary cross applications. The landlord applied for compensation for damages or loss from breach of contract, damage to the landlord's property, and late fees; and, authorization to retain the tenant's security deposit and pet damage deposit. The tenants filed an application seeking return of double the security deposit and pet damage deposit.

Both the landlord and the tenants appeared for the hearing and were affirmed.

The hearing was held over three dates and two Interim Decisions were issued. The Interim Decisions should be read in conjunction with this final decision.

It should be noted that I was provided a considerable amount of submissions, arguments and evidence, both in writing and orally, all of which I have considered; however, with a view to brevity in writing this decision I have only summarized and referenced that which is most relevant and necessary to understand my decision.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation for the amounts claimed?
2. Are the tenants entitled to doubling of the security deposit and pet damage deposit?
3. Award of filing fee(s).
4. Disposition of the security deposit and pet damage deposit.

Background and Evidence

The parties executed a tenancy agreement for a fixed term tenancy set to commence on June 1, 2020 and end on June 30, 2021 and then continue on a month to month basis thereafter ("the first agreement"). The parties executed a subsequent tenancy agreement for a fixed term tenancy set to commence on October 1, 2021 and end on September 30, 2022 ("the second agreement").

The landlord had also included copies of three other versions of a tenancy agreement that were not signed by the parties and I have not considered those documents given the existence of executed agreements that covered the period of time the tenants occupied the rental unit.

The landlord collected a security deposit of $1200.00 and a pet damage deposit of $600.00. The landlord continues to hold both of the deposits pending the outcome of this proceeding.

The tenants paid rent for April 2022 and vacated the rental unit on April 26, 2022. The tenants were of the position they ended the fixed term early, with just cause, due to breach of quiet enjoyment. The tenants pointed to letters they sent to the landlord on February 7, 2022 and March 15, 2022 in support of their position. I did not explore whether the tenants legally ended the tenancy early as the landlord's application did not include a claim for loss of rent.

The tenants prepared a move-out inspection report on their own, without the landlord, and put their forwarding address on the report. The report was left for the landlord in the rental unit along with the keys.

In the few days that followed the tenant returned to the property. The landlord had a cheque for the full amount of the deposits prepared but would only give the cheque to the tenant unless he signed a release absolving the landlord of any future liability. The tenants were not willing to sign away their rights and did not sign the release. The landlord withheld the refund cheque and proceeded to file her Application for Dispute Resolution against the tenants and their deposits on May 7, 2022.

Landlord's claims

Blow, I have summarized the landlord's position and evidence and the tenant's response and evidence.

a. Ceiling drywall repair labour

The landlord had submitted an invoice in the sum of $3674.40 in filing her claim. This amount was for drywall supplies and labour; however, the landlord acknowledged that the tenants were only responsible for performing labour under their tenancy agreement. Accordingly, the landlord reduced her claim to $1964.00 which is the labour component of the invoice.

The landlord submitted that when the tenancy started there was pre-existing damage to the drywall and ceiling from a previous water leak. The tenants had agreed to make the repair and it is reflected in their tenancy agreement.

The tenants acknowledge they agreed to make the repair in the tenancy agreement but felt pressured to agree t other term for fear of being evicted during the winter because the landlord indicated she would move into the rental unit and rent out her upstairs unit on Airbnb.

The tenants submitted that the water leak was supposed to be fixed before the drywall was repaired but it was not so the repair was not made. Also, they noted structural damage and they informed the landlord of this. Since the structure required repairs there was no point to repairing the drywall. Besides, if they had repaired the drywall, it would have been damaged when there was another water leak in January 2022. The tenants described how buckets of water leaked through the space in January 2022.

The landlord explained that the tenants were required to make the repair because they indicated they were handy with repairs when the tenancy formed and the landlord reduced the monthly rent in recognition of their agreement to perform repairs and maintenance. The tenants refuted that the rent was reduced as compensation in exchange for making repairs and maintenance.

The landlord acknowledged that there was another water leak in January 2022 but the landlord attributed the leak to an insufficient deck repair that the tenant had done under a separate contract for services.

The landlord acknowledged that she had the drywall repaired after the leak of January 2022.

The tenants maintain they left the ceiling and wall in the same condition it was in when their tenancy started and should not be held liable for the pre-existing damage.

b. Hot tub maintenance

The landlord submitted that the tenants were required to maintain the tub or drain it as a term in their tenancy agreement. The landlord was responsible for purchasing the supplies and chemicals and the tenants was responsible for monitoring and maintaining the chemical levels. Since the tenancy ended in April 2022 and the tenants were no longer maintaining the hot tub, the landlord hired a company to do this work from May 2022 until September 2022. I noted that the landlord's invoice indicated she was being charged $109 per month for the company to provide supplies and labour but the tenants were only responsible for labour. The landlord was agreeable to reducing the claim to $60.00 per month to reflect the labour component.

The tenants acknowledged they signed the second tenancy agreement indicating they would perform hot tub maintenance but claim they did so under duress, for fear of eviction during the winter. The tenants did perform the chemical maintenance of the hot tub but that it was used by the landlord and her family. The tenants were of the view they should not be held liable to continue to maintain the hot tub used by the landlord and her family after the tenancy ended.

c. Gardening

The landlord submitted that the tenants were required to perform gardening on the right side of the house that lead to their suite. After the tenancy ended, the landlord paid a gardener $367.50 for yard work and gardening at the property. In recognition this included areas other than the right side of the house, the landlord was willing to reduce the claim to $150.00.

The tenants submitted that they did perform gardening in the summer months without any complaints from the landlord. The parties did not set out any specific tasks as to

what was required of them. When they vacated in late April 2022 there was still snow on the ground, the ground was frozen and the plants were dead. The tenants are unclear as to what the landlord expected them to do. The tenants are of the position they left the garden in better shape than when their tenancy started.

d. Damage to a coffee table and side table

The landlord withdrew this claim during the hearing session of January 19, 2023.

e. Late payment fees

The landlord had also claimed for late payment fees of $475.00; however, I dismissed this claim summarily as the amount exceeded the allowable charge permitted under section 7 of the Residential Tenancy Regulations.

f. Hot tub cover

The landlord had sought compensation to replace a 6 year old hot tub cover. The landlord stated the hot tub cover was approximately six years old and had become waterlogged from rainwater. The landlord could not provide a basis to explain why the tenants are responsible for rainwater seeping into the hot tub cover over many years and I dismissed this claim summarily.

Extinguishment

The landlord was of the position the tenants extinguished their right to return of the security deposit and pet damage deposit by failing to participate in the move-out inspection with her. Both parties provided evidence that included several emails exchanged with each other concerning a date and time for a move-out inspection. The tenants submitted that they prepared a move-out inspection report by themselves, just as they had done for the move-in inspection.

The tenants were of the position the landlord failed to perform the move-in inspection report with them. The tenants described how they completed the move-in inspection report upon taking possession of the rental unit and after they completed it they delivered it to the landlord. The landlord then signed it, scanned it and emailed them a copy of the signed report. The landlord testified that she went through each of the rooms of the rental unit with the tenant at the start of the tenancy but that the tenant was filing in the report and then the tenant wanted to review it in greater detail so the tenant

kept it a while longer and then returned it to the landlord. The tenant denied that to be true and stated the landlord was not with her when they completed the move-in inspection report. The landlord stated that she always makes sure she completes the documents required of her under the Act.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. Awards for compensation are provided in section 7 and 67 of the Act, and, as provided in Residential Tenancy Policy Guideline 16: *Compensation for Damage or Loss* it is before me to consider whether:

- a party to the tenancy agreement violated the Act, regulation or tenancy agreement;
- the violation resulted in damages or loss for the party making the claim;
- the party who suffered the damages or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

As the claimant, the landlord bears the burden to prove her entitlement to the amounts claimed against the tenants.

Based on everything before me, I provide the following findings and reasons.

a. Drywall repair

Under section 32 and 37 of the Act, a landlord may pursue a tenant for damage caused by the tenant or a person permitted on the property by the tenant due to their actions or neglect, but a landlord may not pursue a tenant for reasonable wear and tear or pre-existing damage. It is undisputed that the drywall was damaged before the tenancy commenced. It was also undisputed that there was a subsequent water leak in January 2022 from the deck above the rental unit; however, this is not the result of the tenant's actions or neglect under the tenancy agreement. Therefore, I find there is no breach of sections 32 or 37 by the tenants.

The landlord was of the view the leak of January 2022 was the result of unsatisfactory work performed by the tenant under an earlier contract for services; however, I do not

have jurisdiction to resolve disputes concerning a contract for services and I do not consider that position further.

The landlord characterized her claim for compensation as being due to breach of contract. Under section 7 of the Act, a party may seek compensation where a party has violated a term in the tenancy agreement and that violation resulted in the claimant suffering a loss as a resulf of the violation. The landlord relies upon term 11 in the Addendum to the second tenancy agreement in support of her claim. Term 11 provides:

> 11. Drywall and repairs to ceiling in lounge room will be completed by Dec 31, 2021. Material cost paid by landlord. Tenant to provide receipts. Landlord will reimburse.

It is undisputed that the tenant did not make the repairs to the ceiling by the deadline of December 31, 2021 or after that. There is evidence before me to show the amount the landlord paid to a contractor to repair the drywall after the tenancy ended. At issue is whether the tenant is liable to compensate the landlord for the work she paid someone to perform.

The landlord claims the monthly rent was reduced to compensate the tenants for their repair and maintenance labour. However, I have reviewed the tenancy agreement in detail and there is no indication of such. Nor, do I consider the disputed oral testimony to be sufficient for me to conclude the tenant was otherwise compensated for performing labour to repair the ceiling. Also, I note the requirement to perform the ceiling repair was not in the first tenancy agreement and the rent was set at $2400.00 and the second tenancy agreement had a requirement the tenant perform the ceiling repair but the rent was not reduced. Therefore, I find I am unsatisfied that the tenants were compensated to make the ceiling repair by way of reduced rent.

I am of the view that to require a tenant to repair the landlord's property for damage that was not caused by the tenants, without compensation, is unconscionable. The tenants bear all the expense (loss of time and effort) and all the landlord reaps the benefit, which I find is grossly unfair to the tenants.

Under section 6 of the Act, a term in a tenancy agreement is not enforceable if the term is unconscionable. Section 3 of the Residential Tenancy Regulations define "unconscionable" as being:

> **3** For the purposes of section 6 (3) (b) of the Act *[unenforceable term],* a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

For the above reasons, I dismiss the landlord's claim to recover the cost of the ceiling repair from the tenants.

b. Hot tub maintenance

The landlord relies upon the following term in the addendum to the second tenancy agreement:

> 12. Hot Tub Maintenance by tenant. Landlord to pay for chemical cost. Tenant to submit receipts and landlord will reimburse.

The hot tub at the property was used and available for use by the landlord and her family. As such, I find the hot tub to be a common service or facility. In keeping with Residential Tenancy Policy Guideline 1, landlords are generally responsible to maintain common areas or common facilities.

I find that requiring the tenant to maintain a common facility exceeds a tenant's responsibility. Further, I find it unconscionable to require the tenants to pay for maintenance of a common service or facility after the tenancy has ended and the hot tub is being used by the landlord, landlord's family, and possibly the subsequent tenants to be unconscionable. Therefore, I dismiss the landlord's claim for hot tub maintenance.

c. Gardening

As provided under Residential Tenancy Policy Guideline 1, a tenant in a single family home is generally responsible for ordinary yard maintenance such as grass cutting, reasonable amount of weeding in the garden beds, and snow clearing from the walk way while the landlord is responsible for larger tasks such as tree trimming and pruning. Where a tenant is in a multiple unit building, the landlord typically maintains the yard except areas that are for a tenant's exclusive use.

Arguably, the garden on the side of the house could be seen as a common area; however, I do not have enough information to determine whether it was common area or exclusive use for the tenants only.

Assuming the side garden was for the tenant's exclusive use and the tenants are responsible for maintaining the garden, the tenants would be responsible for reasonable weeding. I make this determination because the Addendum to the tenancy agreement that provides for the gardening requirement is not specific. Based on the photographs, there was no grass for the tenants to cut and there was no snow on the walkway, which leaves the requirement to perform a reasonable amount of weeding in the garden bed(s).

I viewed the video and photographic evidence and I do not see many weeds in the garden beds and there is not much difference in how the side garden looked when the tenancy began and when it ended except for one small piece of litter in the photograph taken by the landlord on May 7, 2022.

The landlord's gardening invoice is for a number of tasks and I am unable to determine the amount attributable to weeding the side garden bed(s), if anything. I make no award to pick up the small piece of litter as I find this to be frivolous. Therefore, I dismiss the landlord's request for compensation for gardening.

d. Damage to coffee table and side table

The landlord withdrew the claim for damage to the tables during the hearing.

e. Late fees

Section 7 of the Residential Tenancy Regulations limits the amount a landlord may claim for late fees to $25.00 provided such a charge is in the tenancy agreement. The landlord's claim for $475.00 in late fees well exceeds the limit in the Regulations. Therefore, I dismiss the landlord's claim for late fees.

f. Hot tub cover

A tenant's obligation to repair and maintain is provided under section 32 and 37 of the Act as provided previously in this analysis. The landlord could not provide any basis under the Act to hold the tenants responsible to pay for a new hot tub cover when it became waterlogged due to age and rainfall. Therefore, I dismiss the landlord's claim for compensation for a hot tub cover.

Doubling of security deposit and pet damage deposit

Section 38(1) of the Act provides that the landlord has 15 days, from the date the tenancy ends or the tenant provides a forwarding address in writing, whichever date is later, to either refund the security deposit, get the tenant's written consent to retain it, or make an Application for Dispute Resolution to claim against it. Section 38(6) provides that if the landlord violates section 38(1) the landlord must pay the tenant double the security deposit.

In this case, the tenants vacated the rental unit and provided their forwarding address on April 26, 2022. The landlord filed an Application for Dispute Resolution on May 7, 2022 which is within the 15 day time limit. Therefore, I find the tenants are not entitled to doubling of the deposits and I dismiss their application in its entirety.

Extinguishment and disposition of deposits

The landlord asserts the tenants extinguished their right to return of the deposits by failing to participate in the move-out inspection with the landlord. However, I find it unnecessary to further consider that position as I find the landlord failed to schedule and then participate in the move-in inspection with the tenants.

Residential Tenancy Policy Guideline 17 provides that where both parties extinguish, the party that extinguished first shall bear the loss. Below, I provide the relevant section from policy guideline 17:

> *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. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even*

> *though the tenant may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord's breach occurred first.*

The parties provided disputed versions of events with respect to completing the move-in inspection report. Despite proclaiming herself as a landlord who ensures she meets all her documentary requirements, the Act actually requires the landlord to complete the move-in inspection report which is why there is space on the report for the tenant to indicate whether they agree or disagree with the landlord's assessment. The landlord did not fill in the move-in inspection report, the tenant did. The landlord claimed that although the tenant filled in the move-in inspection report the landlord was with her and they inspected each room together. However, I find it highly unusual that a landlord would hand the report to the tenant to fill in the report while they went through the rental unit together, except perhaps in unusual circumstances such as where a landlord is having difficulty reading or writing but I heard no such circumstances in this case. Since the tenant completed the move-in inspection report, and the landlord thanked her for doing so in a subsequent email, it sounds more probable to me that the tenant completed the form while the landlord was not present and then delivered the form to the landlord for the landlord's signature, as described by the tenants.

Since I have found, on a balance of probabilities, that the landlord did not schedule a move-in inspection with the tenants and then participate in the move-in inspection together with them, as required under section 25 of the Act, I find the landlord extinguished the right to retain the deposits first, under section 26 of the Act. Therefore, I find it is inconsequential that the tenants may have subsequently extinguished their right by failing to participate in the move-out inspection with the landlord.

Since both parties extinguished, both applications have been dismissed, but the deposits are still held in trust, I find it appropriate to dispose of the deposits so that they do not remain in trust indefinitely. Therefore, I order the landlord to return the tenant's deposits to them, plus accrued interest, without further delay.

I calculate the accrued interest to be $26.00 as of today's date.

Provided to the tenants with this decision is a Monetary Order in the sum of $1826.00 to ensure payment is made.

Conclusion

I have dismissed both applications without leave to reapply. I have ordered the landlord to return the tenant's security deposit and pet damage deposit and interest to the tenants without any further delay.

Provided to the tenants with this decision is a Monetary Order in the sum of $1826.00 for the tenants to serve and enforce upon the landlord.

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: September 27, 2023

Residential Tenancy Branch