



Date Issued: May 31, 2024
Docket: LR24011
Type: Rental Appeal

INDEXED AS: *Forgrave and Birt v. Haddad*
Order No: LR24-30

BETWEEN:

Erika Forgrave and Alex Birt (the "Tenants")

Appellants

AND:

Fouad Haddad (the "Landlord")

Respondent

ORDER

Panel Members:

M. Douglas Clow, Vice-Chair
Kerri Carpenter, Commissioner

Compared and Certified a True Copy

(Sgd.) Michelle Walsh-Doucette

Commission Clerk

Island Regulatory and Appeals Commission

A. INTRODUCTION

1. This appeal was heard by the Commission on April 9, 2024, and asks the Commission to determine whether the Residential Tenancy Office (the “Rental Office”) erred in finding that a landlord was entitled to keep the full security deposit, together with interest, and that the Tenants were required to pay additional compensation to the Landlord.

B. BACKGROUND

2. This appeal relates to Apartment 3, 237 University Avenue, Charlottetown, PE (the “Rental Unit”). The parties entered into a written fixed-term tenancy agreement on December 8, 2022. Rent was \$1,300 due on the first day of the month. A security deposit of \$1,300 was paid.
3. The Tenants vacated the Rental Unit on November 30, 2023.
4. On December 12, 2023, the Landlord filed a Form 2(B) Landlord Application to Determine Dispute (“Application”) with the Rental Office. The Application sought to make a claim against the security deposit and claimed that there was a smoke by-product on the ceiling, walls, doors, and trim, and that some paint was mismatched. The Application claimed the full amount of the security deposit, plus additional repair costs, for a total of \$1,500.
5. The hearing of the Landlord’s Application before the Rental Office was held on Thursday, January 25, 2024. The Rental Office issued Order LD24-038 on February 1, 2024. The Officer found that the Tenant was responsible for paint damage to the Rental Unit beyond ordinary wear and tear. The Officer ordered that the Landlord was entitled to retain the full \$1,300.00 security deposit, together with interest, in the amount of \$35.06 and the Tenant was also required to pay the Landlord compensation in the amount of \$164.94 on or before March 1, 2024.
6. On February 16, 2024, the Tenants filed a Notice of Appeal with the Commission.
7. The Commission originally scheduled the hearing for March 12, 2024. Due to concerns about evidence not previously disclosed, the hearing was postponed, and rescheduled to April 9, 2024. The hearing took place on April 9, 2024, by way of telephone conference call. The Tenants participated and represented themselves. The Landlord participated and represented himself.

C. PRELIMINARY ISSUE

8. Order LD24-038 named only Erika Forgrave as a Tenant, and described Alex Birt as a witness. A copy of the written lease was not filed in evidence before the Rental Office or the Commission; however, at the hearing before the Commission, Erika Forgrave and Alex Birt testified that both of their names were on the written lease. Further, the Landlord’s Form 2(B) describes the tenants as “Erika Forgrave & Alex Birt”. For these reasons, the Commission is satisfied that both Erika Forgrave and Alex Birt are the lawful tenants.

D. DISPOSITION

9. The appeal is allowed. The security deposit, together with interest in the amount of \$44.65¹ shall be returned to the Tenants.

E. EVIDENCE OF THE PARTIES

Tenants' Evidence and Submissions

10. The Tenants' position is that the damage to the Rental Unit and the need for re-painting was primarily due to heavy mold throughout the Rental Unit.
11. The Tenants testified that when they first moved into the Rental Unit in December 2022 they noticed a musty smell. The Rental Unit is a basement apartment, so they did not think this was unusual at first. However, over time, the Tenants noticed the need to wash cupboards and drawers and throw away clothing as a result of mold. In July 2023, the Tenants informed the Landlord about the mold via text message.

Hey I just wanted to send you a message to let you know that we've found mold growing on the walls in a few places such as the bathroom, the kitchen cupboards, and the bedroom. We noticed it when we first moved in but had just cleaned it and thought nothing of it but it seems to be coming back no matter how much we clean it. We're going to be getting a dehumidifier in the next few days but we're wondering what else can be done.

12. The Landlord replied the next day, saying:

It's the humidly [sic] by the sound of it. The humidifier will definitely help. Try keep [sic] the bathroom fan on longer after showers

I'll setup a dehumidifier as well in the laundry area next week

13. The Tenants testified that despite dehumidifiers, the mold kept coming back. They submitted photographs of clothing and other items covered in mold. They also submitted witness statements from visitors who noticed the presence of mold. One described a "very strong smell of mold" in the hallway and the Rental Unit. The other said the mold in the building and Rental Unit was "more than shocking". We note that neither of these witnesses appeared at the hearing to provide direct testimony.
14. The Tenants admitted that they had a jar candle that they may have used a couple hours a day a few times each week. They acknowledged that their candle may have caused some of the discolouration to the walls; however, they are of the view that the moisture issue and mold significantly contributed to the problem.
15. The Tenants also acknowledged that they did chip paint where they had fastened and then later removed light strips. They touched up the paint in those areas and concede that their touch up paint did not match. Further, they agreed that they used tacks to put up posters but testified that the Landlord indicated that tacks were permissible.

¹ Calculated from December 1, 2022, to the date of this Order.

16. The Tenants testified that they were not present when the Landlord performed his inspection for the inspection report after they moved out. They testified that the Landlord did not invite them to participate in the inspection.
17. Overall, the Tenants feel that \$1,500.00 is far too much for washing walls and touching up paint. They estimate the size of the apartment as 300 to 400 square feet, and submitted that even with the cost of materials, \$1,500.00 is more than justified for the re-painting necessary.
18. Finally, the Tenants stated that they were rather surprised when a video taken by the Landlord appeared in the evidence. They say the video was taken while they were in the process of moving out and that they had not given the Landlord permission to take this video. The Tenants expressed their concerns that the Landlord had violated their privacy.

Landlord's Evidence and Submissions

19. The Landlord's position is that the Tenants were responsible for the damage to the Rental Unit, primarily due to stains from a smoke by-product all over the ceiling, walls, doors and trim. Also, there were tack holes, scratch marks on some walls and mismatched paint in some rooms. At the hearing, the Landlord testified that the Rental Unit was not cleaned.
20. The Landlord Condition Inspection Report was filed in evidence. The Inspection Report indicates the inspection was completed on December 1, 2023. However, the Landlord did not sign it until December 11, 2023. It states that the Landlord and his contractor were present for the inspection, and observed a smoke by-product on all the ceilings, walls, doors and trim "likely from burning candles or incense". The Inspection Report also notes the tack holes and mismatched paint. It claims a total amount of \$1,500.00 for the cost of repairs. The Landlord testified that his contractor made no mention of mold, only smoke damage.
21. The Landlord testified that while he did not specifically invite the Tenants to be with him for the inspection after they moved out, he did make them aware that he would be at the Rental Unit at 1:00 p.m. on December 1, 2023, to perform the inspection.
22. The Landlord also submitted an invoice for \$1,500.00, dated December 9, 2023. The invoice states that "apartment had extensive smoke by-product from something burning everywhere". The work done included a coat of a 'cover stain' primer and then two top coats on the walls, trim, doors, windows, and baseboards. The ceiling only required one coat. They also "fix[ed] numerous pin holes on walls".
23. With respect to the mold, the Landlord testified that the Tenants told him that they terminated the lease in order to move into a larger apartment and they did not tell him they left because of mold. He acknowledged that he received a text message from the Tenants about mold in July 2023, and that he set up a dehumidifier in the laundry room a few days later. He also testified that the bathroom vent fan has an automatic humidity sensor and should turn on when humidity goes up. However, the Landlord claimed he did not know the extent of the mold claimed by the Tenants as he did not hear from them again.
24. When asked by the Commission whether he inspected the Rental Unit for mold after the Tenants text message in July 2023, the Landlord said he could not remember. He did

recall that he had checked an adjacent apartment but he could not say whether he had inspected the Tenants' Rental Unit.

25. Finally, the Landlord stated that he did not realize he needed to notify tenants before taking a video. He stated he took the video during a showing of the Rental Unit to perspective new tenants before the Tenants moved out. He took the video just in case he needed evidence. He stated that he did give the tenants 24 hours notice before showing the Rental Unit.

F. ANALYSIS

26. The question the Commission must determine is whether the Landlord was entitled to keep the full security deposit and receive and award for additional compensation, in order to cover the full cost of re-painting the Rental Unit.
27. The *Residential Tenancy Act* provides that a tenant is responsible for "undue damage" to a rental unit that is caused by the actions or neglect of the tenant (s. 28(3)). Tenants are not responsible for reasonable wear and tear.
28. Where a landlord makes application to the Director per s. 40 of the *Act* to claim against the security deposit, the onus is on a landlord to establish that there was undue damage, beyond ordinary wear and tear, caused by the tenant(s) during the tenancy. Therefore, in this case, the burden of proof lies with the Landlord.
29. For the reasons that follow, the Commission finds that the Tenants are not responsible for the cost to re-paint the Rental Unit. The evidence before us indicates there was a presence of mold in the Rental Unit, and therefore cleaning and painting by the Landlord was required in any event.
30. We note that the Tenants were not present for the Landlord's inspection of the Rental Unit. Section 38 of the *Act* requires a landlord and tenant to inspect the condition of the rental unit "in each other's presence". The *Act* requires the landlord to offer the tenant(s) at least two reasonable opportunities for the inspection. A landlord may only make the inspection without the tenant(s) if they have given two opportunities and the tenant does not participate either time. In this case, the parties both testified that the Tenants were not present for the inspection. While the Landlord testified that he told the Tenants it would happen the day after they vacated, this does not comply with the requirements of the *Act*. For this reason, we will give no weight to the Inspection Report.
31. The Tenants were credible witnesses. They acknowledged responsibility for the mismatched paint touch up in one room. They also acknowledged the possibility that their candle could have contributed some soot, which they said was likely exacerbated by the moisture issue in the Rental Unit. The Tenants also acknowledged having hung posters on the walls, but testified that the Landlord had indicated tacks were permitted.
32. Regarding the mold, the Tenants provided evidence consistent with a mold problem in the Rental Unit. Upon noticing the severity of the mold issue, the Tenants notified the Landlord in July 2023. The text message exchange is reproduced above at paragraphs 11 and 12. The Tenants also submitted photographs into evidence depicting mold on clothing, bedding, furniture, books, and even a toothbrush.

33. Tenants are responsible for “undue damage” to a rental unit that is caused by their actions or neglect (s. 28(3)). However, the *Residential Tenancy Act* also requires the Landlord to maintain the Rental Unit in an appropriate state of repair (s. 28(1)). Based on the facts and evidence presented to us by both parties, we are satisfied that there was a mold problem in the Rental Unit that was the responsibility of the Landlord to address, which in this case required cleaning and painting. Therefore, while the Tenants acknowledged the mismatched paint touch up in one room, the Landlord had to clean and paint anyway, and we do not find the Tenants responsible for that cost.
34. In conclusion, the Commission allows the appeal. The security deposit, together with interest in the amount of \$44.65, shall be returned to the Tenants.
35. As a final comment, we have concerns about the Landlord taking a video of the Rental Unit without the consent, or even knowledge, of the Tenants. It is clear that the video was taken while the Tenants still occupied the Rental Unit. They were not made aware of the video until the Landlord submitted it into evidence for the purpose of this hearing. **The Act clearly states that tenants are entitled to the right to reasonable privacy. This video was a violation of the Tenants’ right to privacy.** With the benefit of the hearing, and now this Order, the Commission is satisfied that the Landlord is now aware he should not have taken the video under these circumstances without express permission. The Commission wishes to make clear to all landlords on Prince Edward Island that a video made in such circumstances is unacceptable.

G. CONCLUSION

36. The appeal is allowed. The security deposit, together with interest in the amount of \$44.65, shall be returned to the Tenants.

IT IS ORDERED THAT

- 1. The appeal is allowed.**
- 2. The security deposit, in the amount of \$1,300.00, together with interest in the amount of \$44.65, shall be returned to the Tenants.**
- 3. The Landlord shall pay the Tenants \$1,344.57 within seven (7) days of the date of this Order.**

DATED at Charlottetown, Prince Edward Island, 31th day of May, 2024.

BY THE COMMISSION:

(sgd. M. Douglas Clow)
M. Douglas Clow, Vice Chair

(sgd. Kerri Carpenter)
Kerri Carpenter, Commissioner

NOTICE

Subsections 89 (9), (10) and (11) of the *Residential Tenancy Act* provides as follows:

89. (9) A landlord or tenant may, within 15 days of the decision of the Commission, appeal to the Court of Appeal in accordance with the *Island Regulatory and Appeals Commission Act* R.S.P.E.I. 1988, Cap. I-11, on a question of law only.

(10) Where the Commission has confirmed, reversed or varied an order of the Director, the landlord or tenant may file the order with the Supreme Court.

(11) Where an order is filed under subsection (10), it may be enforced as if it were an order of the Supreme Court.