



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MND MNDC MNSD FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the landlord for a monetary order for money owed or compensation for damage or loss under the Residential Tenancy Act, (the Act), and an order to retain the security deposit in partial satisfaction of the claim.

Although served with the Application for Dispute Resolution and Notice of Hearing by registered mail sent on November 29, 2008, the Tenant did not appear.

Issue(s) to be Decided for the Landlord's Application

The landlord was seeking to retain the security deposit and receive a monetary order for damage to the unit and for money owed or compensation for damage and loss under the Act for a total claim of \$1,591.00, originally submitted on November 27, 2008 and then amended to \$2,000.00 on January 8, 2009.

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for damages or loss and to retain the security deposit. This determination is dependant upon answers to the following questions:
 - Has the landlord submitted proof that the specific amounts being claimed are validly owed by the tenant to this landlord?

- Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a balance of probabilities:
 - a) that the damage was caused by the tenant and
 - b) a verification of the actual costs to repair the damage
 - c) that the landlord fulfilled the obligation to do what ever is reasonable to mitigate the costs

The burden of proof regarding the above is on the landlord/claimant.

Background and Evidence

The tenancy began on March 1, 2007 ending on October 31, 2008. The landlord testified that , although no written notice of forwarding address was provided, the landlord independently confirmed that the tenant's permanent address was the [province] address specified on this application and the landlord testified that the landlord received confirmation that this address was correct for service during telephone conversations with the tenant. Submitted into evidence, by the landlord, was proof of service of the Application and Hearing Notice filed on November 27, 2008 that was mailed by registered mail on November 29, 2008. The landlord testified that the amended application and the evidence was also mailed by registered mail on January 8, 2009, the same day that the amended application and evidence had been faxed to the Residential Tenancy Branch. The landlord did not provide proof of service for the amended application and the evidence package sent on January 8, 2009, and neglected to provide a tracking number for this registered mail package. Submitted into evidence, along with the amended application, were copies of invoices including: \$126.00 dated December 1, 2008 for carpet dying; \$63.00 dated October 31, 2008 for carpet cleaning; \$187.00 dated October 31, 2008 for general cleaning; \$1,155.00 dated October 25, 2008 for wall and trim repairs and painting. The landlord also submitted an

estimate for new carpeting dated December 4, 2008 in the amount of \$469.00, which the landlord is also claiming from the tenant. The landlord testified that the monetary claims represent compensation for damage that exceeds normal wear and tear and testified that there are photographs documenting the damage, but they were not submitted into evidence due to the difficulty in distinguishing damage on walls and trim painted white via a photo. A partial copy of a move-in condition inspection report, page 2 of 4 and page 3 of 4, was submitted into evidence showing checkmarks beside each row on the page and also featuring undated signatures. A copy stated to be the move-out condition inspection report with pages 1, 2 and 3, (of 4), was submitted verifying the move-out date as October 31, 2008, and indicating there was damage and unclean conditions in many categories. Page 3 indicated that the "*Tenant did not appear for inspection*", but this was not signed nor dated by either party. The landlord testified that the tenant did not show up despite being given notification. The written notification of the proposed inspection was not submitted into evidence and the landlord explained that this was because the tenant had already abandoned the unit by October 31, 2008. In regards to the floor damage, the landlord testified that the tenant had left a burn mark on the carpet of one bedroom and attempts to first clean the mark, then to dye the mark, were unsuccessful. Therefore it was eventually determined that the carpet must be replaced and an estimate was obtained on December 4, 2008.

Analysis

In regards to an applicant's right to claim damages from the another party, Section 7 of the Act states that, if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and order payment in such circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the tenant. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to mitigate the damage or losses that were incurred.

Section 32 of the Act, and terms in the tenancy agreement also requires the tenant to maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the residential property to which the tenant has access. While a tenant of a rental unit must repair damage to the rental unit caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant, a tenant is not required to make repairs for reasonable wear and tear.

According to the landlord, the carpet was new and efforts were made to restore the carpet without success. In this instance I find that a burn mark in a carpet would be beyond the normal wear and tear.

In regards to the claims against the tenant for damage to the walls requiring patching and painting \$1,150.00, I note that the landlord had not identified what proportion of the claim related to repairing the wall and what proportion related to finishing the surface, nor has the landlord verified the actual cost of the paint, drywall fill and other supplies. The landlord had testified that the unit had been recently painted and that there was no damage to the trim when the tenant took possession. I accept this testimony and find that and significant damage to the walls and trim would also be considered as beyond t normal wear and tear.

The landlord provided verification of cleaning costs and although the documents relating to the condition inspection reports are not as complete as would be expected and the claim of damage is not supported by photographic evidence, I find that I can accept the testimony of the landlord in regards to these expenditures. Therefore I find that all elements of the test for damages has been met for the items discussed above.

In regards to the issue of service I find that the landlord's initial application was served to the address where the tenant resides and I accept the landlord's testimony that this Ontario address was confirmed to the landlord by the tenant himself. That being said, I note that the amended application, along with all of the evidence, was purportedly sent to the tenant at the same address on January 7 or January 8, 2009 by registered mail, but the landlord did not supply a tracking number to verify that the amended application and the evidence was properly served.

The landlord also did not provide an adequate explanation as to why some key pieces of evidence were not sent to the tenant with the original application and hearing package, or at least on an earlier date than January 2009. I note that the invoices for carpet cleaning and general cleaning were dated October 31, 2008 and the invoice for the painting shows that it was prepared on October 25, 2008.

Rule 3.4 of Residential Tenancy Rules of Procedure specifically states that, to the extent possible, the applicant must file copies of all available documents, including photographs, video or audio tape evidence, at the same time as the application is filed.

Failing that, Rule 3.5 requires that evidence not served with the hearing notice must be served at least five days prior to the hearing, not counting the day of mailing and the day of receipt. I note that the landlord's submission was filed, and purportedly sent, extremely close to this cut-off point.

More importantly, the Residential Tenancy Rules of Procedure, Rule 3.3, demands that, if the respondent does not attend the dispute resolution proceeding, the applicant must prove to the Dispute Resolution Officer that each respondent was served as required under the Act. The landlord did offer verbal testimony that this requirement was met in regards to the amended application and evidence, but stopped short of furnishing the requisite proof.

However, I have found that the landlord succeeded in proving service of the original hearing package containing the amount of the claim and showing the allocation of costs that total \$1,541.50, plus filing. Therefore, I find it has been sufficiently established that the tenant would have been aware of this amount and despite that chose not to attend nor submit evidence refuting the claimed amount.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to monetary compensation of \$1,591.50, comprised of \$199.50 in relation to carpet damage, \$1155.00 for painting and repairs, \$187.00 for cleaning costs and the \$50.00 fee paid by the landlord for this application. I order that the landlord retain the security deposit and interest of \$539.57, in partial satisfaction of the claim and hereby issue a monetary order for the remainder in the amount of \$1,051.93. This order must be served on the Respondent and may be filed in the Supreme Court, (Small Claims), and enforced as an order of that Court.

Dated: January 2009