

DECISION

Dispute Codes MND MNR MNSD MNDC FF

Introduction

This hearing dealt with the landlord's application for Dispute Resolution for a Monetary Order for damage to the unit, for unpaid rent or utilities, to keep all or part of the security and pet deposits, for money owed or compensation for damage and loss under the *Act*, and to recover the cost of the filing fee from the tenants for this application.

Service of the hearing documents, by the landlords to the tenants, was done in accordance with section 89 of the *Act*, sent via registered mail on March 14, 2009. Canada Post tracking number was submitted into verbal testimony by the tenants. The tenants were deemed to be served the hearing documents on March 19, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The female landlord and both tenants appeared, gave affirmed testimony, were provided the opportunity to cross examine the other party, to present their evidence orally, in writing, and in documentary form.

All of the testimony and documentary evidence was carefully considered.

Preliminary Issues

The tenants submitted evidence late and have requested an adjournment because they have not yet received a copy of the move-out inspection report from the landlord.

I find that the tenants were not prevented in submitting their evidence on time by not having a copy of the move-out inspection report and deny their request to adjourn the hearing. The hearing will proceed as scheduled.

Issues(s) to be Decided

The issues to be decided are:

- Whether the landlords are entitled to a Monetary Order for damage to the unit, for unpaid rent, and for money owed or compensation for damage or loss under section 67 of the *Residential Tenancy Act*
- Whether the landlords are entitled to keep all or part of the security deposit and pet deposit under section 38 of the *Act*
- Whether the landlords are entitled to recover the filing fee from the tenants for this application under section 72 of the *Act*.

Background and Evidence

The tenancy began as a fixed term tenancy on February 1, 2008 expiring prior to February 1, 2009. The tenants paid a security deposit of \$750.00 and a pet deposit of \$750.00 on January 23, 2008. The fixed term tenancy was renewed on January 26, 2009 for a period of three months commencing on February 1, 2009 and scheduled to expire on April 30, 2009, with monthly rent payable of \$1,500.00 on the first of each month.

The landlord testified that the tenants provided only a partial month's notice to end tenancy and that she did not receive their notice until February 4, 2009 for a move out date of February 28, 2009. The landlord confirmed that an agreement was made to allow the tenants to move out prior to the end of the fixed term tenancy providing that they gave one months notice to end the tenancy.

The tenants confirmed that they provided short notice to end the tenancy, but that they had made a previous verbal agreement with the landlords to do so. The tenants testified that they had wanted a six month tenancy but that the landlords refused and only offered a three month tenancy. Because of the shorter tenancy the tenants stated that the landlords agreed to allow them to end the tenancy early if they were able to find another place, and that the tenants knew nothing about the 1 month required notice until after they submitted their notice to leave.

The landlord testified that a move-in inspection report was completed, with the tenants, on February 1, 2008 and that the male landlord conducted a move-out inspection with

the tenants on February 28, 2009. The landlord testified that the only deficiencies listed on the move-out inspection were two holes in the master bedroom wall, which the landlords were not claiming for as they could fix the holes, bedroom #2 had paint on the wall; again the landlords were not claiming this, and the cost of the chimney sweep. The landlord testified that they were only claiming for costs incurred to clean up the exterior of the house. The landlord confirmed that there are no notations on the move-out inspection report relating to an inspection of the property, out side of the rental home, after the snow melts, but later testified that there was a verbal agreement to do another inspection in the spring.

The tenants testified that they have not yet received a copy of the move-out inspection report from the landlord. They testified that they did do a walk through of the property and agreed with the male landlord that the tenants were responsible for the cost of cleaning the chimneys. The tenants testified that the male landlord was happy with the condition inspection and did not notate anything on the inspection report, other than the chimneys, that were the tenants' responsibilities, and that there was no mention or agreement made of an outside inspection to be done after the snow melted.

The female landlord testified that a copy of the move out inspection report was left for the tenants at the rental property, after they vacated the property, in the tenants' car that was still located on the property. The landlord later changed her testimony to say a copy was left in the wood box on the rental property and a copy was later mailed to the tenants but that they must not have received it.

The landlord confirmed that the tenancy agreement does not provide for the charge of NSF fees for returned cheques.

The landlord testified that she put an advertisement on a local free website to rent the property as soon as possible. The landlord stated that they had several responses to their advertisement, that the male landlord met prospective tenants during the first week of March 2009, and that the property has been re-rented effective May 1, 2009.

The landlords are claiming \$640.00 to clean up the exterior of the rental home which represents 32 hours at \$20.00 per hour. The cost of the chimney sweeping at \$262.50, the cost to re-key the locks at \$101.43, the insufficient fund fee of \$4.00, and three months of unpaid rent for February, March and April 2009. The landlord has requested that the tenants be ordered to remove their car and boat that were left on the rental property.

The tenants confirmed that they left their car and boat on the rental property, with the agreement that they would be moved once the snow was gone. The tenants stated that the snow has been gone for approximately two weeks.

The tenants testified that they gave the landlord their forwarding address at the time the move-out inspection was conducted on February 28, 2009.

Analysis

In regards to the landlords' right to claim damages from the tenants, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, 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 to order payment under these circumstances.

I find that in order to justify payment of damages under section 67 of the *Act*, the Applicant landlord 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 landlord 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 landlord 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 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

While both parties were represented in the move-out inspection the tenants contend that they have not received a copy of the move out inspection report. The tenants have testified that the only item that they did not comply with was to have the chimneys cleaned and that the tenants had agreed with the male landlord to be responsible for the cost of the chimney cleaning.

The female landlord provided contradictory testimony in relation to what the move-out inspection report stated, and if in fact the tenants were given a copy of the report. The female landlord testified that a verbal agreement was made for an additional inspection after the snow melted.

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

In the circumstances before me, I find the version of events provided by the tenants to be highly probable given the conditions that existed at the time. Considered in its

totality, I favor the evidence of the tenants over the landlords, in relation to the issuance and receipt of a move-out inspection report.

Based on the aforementioned, I hereby find that the landlords have contravened section 35(4) whereby the landlord has failed to provide the tenants with a copy of the move out inspection.

In failing to submit a copy of the move-in and move-out inspection report into evidence, the landlords have failed to prove the existence of loss at the time the tenants moved out of the rental unit. I hereby dismiss the landlords' claim for damage incurred to the rental home and property, without leave to reapply.

Given that the tenants have testified that they knew they were responsible for the cost of the chimney cleaning, I HEREBY approve the landlords' claim of \$262.50 to clean the chimneys at the rental unit.

Section 7 of the *Residential Tenancy Regulations* stipulates that a landlord must not charge a non-refundable fee for the return of a tenant's cheque unless the tenancy agreement provides for that fee. As the landlord testified that the tenancy agreement did not provide for such a fee I hereby dismiss the landlords claim to recover the NSF fee of \$4.00 without leave to reapply.

There was no evidence supplied by either party in relation to the landlord's claim to cover costs to re-key the locks at the rental unit. The landlord testified that keys were not returned but she did not provide evidence that the landlords specifically requested the return of the keys. Section 25(1)(a) of the *Residential Tenancy Act* stipulates that at the start of a new tenancy, if the tenants request, the landlord must re-key or otherwise alter the locks so that previously issued keys will not work in the locks and that the landlords must pay all the costs associated with such re-keying. In the absence of evidence to support the landlord's claim, I hereby dismiss their claim of \$101.43 to re-key the locks.

There was conflicting testimony relating to any agreement for the tenants to be allowed to leave their car and boat on the rental property after they vacated the rental unit. In the absence of the male landlords' testimony, I find that there was an agreement to allow the tenants to leave their boat and car on the rental property until the snow was gone. The tenants confirmed that the snow has been gone for about two weeks now and that they have not made any effort to remove the car and boat from the rental property. I hereby order the tenants to have the car and boat removed from the rental unit within two days from the date of this hearing, 5:00 p.m. May 13, 2009. If the tenants do not comply with this Order to have the car and boat removed by 5:00 p.m. on May 13, 2009 then the landlord's rights and obligations as stipulated under section 25 of the *Residential Tenancy Regulations* take effect.

The landlord has claimed loss of rent for February, March and April 2009 in the amount of \$1,500.00 per month. While there is evidence to support that there was a verbal agreement to allow the tenants out of the fixed term lease early, I find that one months notice would still be required pursuant to section 45(1)(b) which stipulates that notice to end tenancy must be given on the day before the day in the month that rent is payable. So in this case the notice to end tenancy would have to have been given on January 31, 2009 to be effective February 28, 2009. The notice to end tenancy was not given until February 4, 2009 so I find that the tenancy would have not ended until March 31, 2009 and that the tenants are responsible for rent for the months of February and March 2009.

Section 7(2) of the *Act* stipulates that a landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this *Act*, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss. In this case the landlord had an obligation to do whatever is necessary to re-rent the rental unit as quickly as possible. The landlord testified that they advertised the rental unit on only one website and that they had numerous showings as a result. The landlord did not supply documentary evidence to support when the new tenancy agreement was actually entered into or if any other attempts were made to re-

rent the unit. I hereby dismiss the landlords' claim for loss of rent for the month of April 2009.

As the landlord was primarily successful in their application, I hereby allow their claim to recover the filing fee for this application.

Monetary Order – I find that the landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the tenant's security and pet deposits, and that the landlord is entitled to recover the filing fee as follows:

Unpaid Rent for February and March 2009 (\$1,500.00 x 2)	\$3,000.00
Cost to clean the chimneys	262.50
Recovery of the filing fee	50.00
Sub total (Monetary Order in favor of the landlord)	\$3,312.50
Less Security Deposit of \$750.00 plus Pet Deposit of \$750.00 plus interest of \$20.59	-1,520.59
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$1,791.91

Conclusion

I HEREBY FIND in favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for \$1,791.91. The order must be served on the respondent and is enforceable through the Provincial Court and enforced as an order of that Court.

I HEREBY ORDER the tenants to remove their car and canoe from the landlord's property prior to 5:00 p.m. on Wednesday May 13, 2009.

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: May 11, 2009.

Dispute Resolution Officer