Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes

MNSD, MNDC, FF

This was a cross-application hearing.

This hearing was scheduled in response to the tenant's Application for Dispute Resolution, in which the tenants have made application requesting return of the security and pet deposits paid, a monetary Order for damages or loss and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution. The landlord has made an Application for Dispute resolution, in which the landlord has requested to retain the security deposit paid by the tenants and to recover filing fee from the tenants for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself, the Application for Dispute Resolution was reviewed, the hearing process was explained to the parties and the parties were provided an opportunity to ask questions in relation to the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present oral evidence, to cross-examine the other party, and to make submissions during the hearing.

Preliminary Matter

At the commencement of the hearing the landlord requested that the hearing be adjourned. The landlord stated that she had a medical procedure four days ago, which made it difficult for her to use her glasses. It was determined that the landlord was able to hold her eye glasses to her face, that she could read but that she might require additional time to testify. A determination was made that the hearing would proceed and the landlord be provided with whatever time she required in order to adequately testify.

The landlord made two evidence submissions to the Residential Tenancy Branch which failed to meet the required time-frame; neither package was served within the five day period prior to the hearing. The tenants testified that they had been served with this evidence and had no objection to the inclusion of the evidence; therefore, this evidence has been referenced in this decision.

At the start of the hearing the landlord indicated that she had a witness who she planned on calling into the hearing. The landlord was given the opportunity to respond and to make final submissions, however, she did not choose to call her witness.

Issues to be Decided

Is the landlord entitled to retain the security deposit paid by the tenants?

Are the tenants entitled to compensation for the loss of use of a portion of the basement?

Are the tenants and landlord entitled to return of filing fees paid?

Background and Evidence

This tenancy commenced on September 1, 2006. Rent was $700.00 per month and increased to $750 on January 1, 2008. A security deposit in the sum of $350.00 was paid in mid-July 2006 and a $100.00 pet deposit was paid in January 2009.

The tenants gave written notice that they would move out by June 30, 2009 and vacated the rental unit in mid-June, 2009. A move-in and move-condition inspection was completed and a copy of this report was supplied as evidence. The move-out condition inspection is not signed by the tenants but the tenants acknowledge that this report is accurate. The condition inspection report does not include any notation referencing required repairs.

The landlord testified that when showing the rental unit to prospective tenants she noticed multiple holes in the living room wall and that she felt there was an excessive number of nail holes. The landlord stated that the home was built in the 1930's and was last painted in 2006 prior to the tenants moving in. The landlord has submitted receipts for costs related to painting and is claiming retention of the security deposit paid to cover the painting costs for the living room wall. The landlord stated that she had other work completed in the rental unit but that there were over 30 nail holes left by the tenants that had to be filled, sanded and painted.

The tenants testified that they were not informed of any deficiency at the time the move-out condition inspection report was completed. The tenants stated that they filled nail

holes with proper filler material and believed the landlord would then touch-up the walls with paint that was in the basement.

The tenants have made application for return of a portion of the rent previously paid as the result of having lost use of a portion of the basement throughout the term of the tenancy. The tenants testified that when they viewed the home prior to moving in, the agent for the landlord told them that the landlord's antique furniture in the home would be placed in the basement and then removed.

During the hearing the parties agreed that in the summer of 2008 the landlord attended at the rental unit and was reminded of the need to remove the furniture. In October 2008 the tenants wrote the landlord a letter containing a list of required repairs and a reminder that the furniture was to be removed. The parties also agreed that the landlord did offer to remove the furniture in late October but the tenants were going to be away and unavailable until after November 2, 2008. The landlord was then away for the month of November and the matter of furniture removal was not brought up again by either party. The tenant's Application for Dispute Resolution states that the tenants made "repeated requests both verbally and in writing to have (the landlord's) belongings removed from the house."

The landlord testified that she was not fully aware of the discussions that took place between her agent and the tenants at the start of the tenancy. The landlord submitted as evidence an October 14, 2009 letter written by her past agent who states that at the time the tenancy agreement was signed the tenants were aware that some of the landlord's furniture would be stored in the basement.

The landlord stated that after November 2008 her son was made available to assist the tenants with any repairs that were needed. The tenants stated that they did not feel that the landlord's son had been assigned as the landlord's agent and, therefore, did not discuss removal of the furniture with him.

The tenants are claiming compensation in the sum of $6,200.00 for the loss of use of 75% of the basement. The tenants stated that the house has three levels of equal size and that the presence of a large table, six chairs, a buffet, dresser, wall unit, medium – sized cabinet, utility table, a mattress and old bed head and foot reduced their use of the basement. The tenants have placed a value of the claimed loss at $175.00 per month from October 2006 to December 2007 (14 months inclusive) and $187.50 per month from January 2008 to June 2009 (17 months inclusive.)

Analysis

I find that the landlord's claim for painting costs is without merit. The move-in and move-out condition inspection reports provide each party with an opportunity to establish the existence of any deficiencies and to record the need for repairs. The move-out condition inspection report contains no evidence that any painting was required or of an excessive number of nail holes in the walls. On the move-out condition inspection report the tenants have indicated that the report fairly represents the condition of the rental unit. The landlord had a responsibility to adequately inspect the rental unit, to identify any deficiency at the time the report was completed and failed to do so. I find that the report is a definitive reflection of the state of the rental unit at the end of the tenancy; therefore, I dismiss the landlord's claim requesting retention of the security deposit paid.

The tenants have made a claim for loss of use of part of the basement. When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

There is agreement between the parties that the landlord did store furniture in the basement and that, at least by October 2008, the landlord had been informed in writing and had agreed to remove the furniture from the rental unit. There is no evidence before me that any attempt was made to inform the landlord in writing, prior to October 2008, that the tenants were concerned about the presence of the furniture. I have also considered the landlord's offer to remove the furniture in October 2008 and tenant's request to delay the removal until after November 2, 2008, when they would return from a pre-planned absence. From that point onward neither party discussed the furniture any further.

I have considered section 7 of the Act which provides:

> **7** (1) 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.
>
> (2) **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**.
>
> (Emphasis added)

There is no evidence before me that the tenants made repeated verbal and written requests to have the furniture removed. In the absence of any evidence of a written request for removal of the furniture prior to October 7, 2008, I have rejected the claim for compensation pre-dating that time. I find that, on the balance of probabilities and in the absence of evidence of written requests to the landlord; that the tenant's did not attempt to mitigate their loss between October 2006 and October 2008. Although there appears to have been at least one discussion in relation to the furniture some time during the summer of 2008.

The tenants acknowledged that after receipt of the October 7, 2009 letter the landlord did offer to remove the furniture later in October 2008, but this request was denied as the tenants were going to be away. The tenants did not offer any explanation as to why they did not allow the landlord to enter the rental unit to retrieve the furniture while they were absent. Removal of the furniture during October 2008 would have eliminated any further perceived loss to the tenants. Once the tenants returned home in November they did not contact the landlord again to discuss the furniture, which I find further undermines their claim for compensation.

I find that the tenants did not supply evidence of adequate attempts to mitigate the claimed loss and I base this decision upon the tenant's failure to allow the landlord to remove the belongings in October 2008. Therefore, I find that the tenants claim for compensation for loss of use of the basement is dismissed without leave to reapply.

I find that the tenants are entitled to return of the security deposit paid, plus interest, in the sum of $361.43 and the pet deposit in the sum of $100.00.

As the landlord's claim is without merit I find that the landlord is not entitled to filing fee costs.

As the tenants claim has partial merit I find that the tenants are entitled to return of a portion of the filing cost in the sum of $50.00.

Conclusion

I find that the tenants have established a total monetary claim of **$511.43** comprised of return of the deposits paid, plus interest, in the sum of $461.43 and $50.00 of the filing fee paid for this application and I grant the tenants an order under section 67 for that amount. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The landlord's claim for compensation is dismissed without leave to reapply.

The tenant's claim for compensation for damages and loss is dismissed without leave to reapply.

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: October 26, 2009.

Dispute Resolution Officer