Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MND, MNDC, MNSD, FF

Introduction

This matter dealt with an application by the Landlord for compensation for damages to the rental unit, to recover the filing fee for this proceeding and to keep the Tenants' security deposit in partial payment of those amounts. The Tenants applied for the return of their security deposit and for compensation due to the Landlord's failure to return the deposit within the time limits required by the Act.

At the beginning of the hearing the Landlord sought to amend her application by adding a claim for loss of rental income for 5 months (or by $6,100.00). Given the significant increase in the monetary amount sought and given further that the Tenants had no notice of it, I did not allow the Landlord to amend her claim but she may reapply for it.

Issues(s) to be Decided

1. Is the Landlord entitled to compensation for damages to the rental unit and if so, how much?
2. Are the Tenants entitled to the return of their security deposit and if so, how much?

Background and Evidence

This fixed term tenancy started on January 1, 2009 and expired on June 30, 2009 at which time the Tenants moved out. Rent was $1,220.00 per month. The Tenants paid a security deposit of $610.00 at the beginning of the tenancy.

The Landlord admitted that she did not do a move in or a move out condition inspection report with the Tenants. The Landlord said that when she inspected the rental unit in December 2008 on her own it was in good condition, however after the tenancy she claimed it had extensive damages. The Landlord provided copies of photographs she said she took on or about June 28, 2009 when the Tenants were in the process of moving out. The Landlord said that the tenancy agreement contained a term whereby the Tenants agreed that all of the appliances were in good working order.

The Landlord claimed that 3 door jambs and the trim around them were damaged as well as some walls which had to be repaired and repainted. The Landlord initially claimed that the carpets had to be removed because they were infested with fleas from the Tenants' pets but later claimed that they were damaged from urine. The Landlord

also claimed that the Tenants broke a washer, dryer and refrigerator all of which could not be repaired and had to be replaced. The Landlord admitted that she had not had the appliances checked to see if they could be repaired. The Landlord also provided no receipts or estimates for repairs in support of her claim.

The Landlord said that she received complaints from the Strata about 2 disturbances involving the Tenants and the police were called on one of those occasions. The Landlord argued that the damages to the rental unit probably occurred at these times. The Landlord said she received 2 fines totalling $300.00 as a result of these incidences and argued that the Tenants should be responsible for paying them. The Landlord also argued that it was a term of the tenancy agreement that in exchange for a reduced rent, the Tenants would be responsible for all repairs and maintenance.

The Tenants denied that they caused the damages to the rental unit and argued that it was in that condition at the beginning of the tenancy. The Tenants said they viewed the rental unit approximately a month before moving in and the Landlord's agent said that the damages would be repaired before they moved in but they weren't. The Tenants also argued that they received a copy of the tenancy agreement for the first time in the Landlord's evidence package and discovered that she had added comments to it after they signed it one of which was that "apt. taken as viewed." The Tenants denied that this was the case and claimed that repairs were supposed to be made before they moved in.

The Tenants provided photographs of the rental unit that they said they took at the beginning of the tenancy. The Tenants also relied on witness statements of 4 people that helped them move in and who claimed that the rental unit was dirty and in a state of disrepair at the beginning of the tenancy and in particular had damages to the walls, doors, door frames and carpets. The Tenants claimed that they tried a number of times to arrange a move out condition inspection with the Landlord but she would not do one. The Tenants provided copies of photographs they said they took at the end of the tenancy and argued that it was in substantially the same (if not better) condition.

The Tenants admitted that they signed the tenancy agreement acknowledging that the appliances were in good working order but said they signed it a month before the tenancy started and mistakenly assumed that they did work. The Tenants said that they advised the Landlord at the beginning of the tenancy that the washer and dryer did not work. The Tenants also claimed that the refrigerator was very old, was stained on the inside and did not work properly. The Tenants admitted that there were disturbances and agreed that they should be responsible for paying the Strata fines.

The Tenants said they gave their forwarding address in writing to the Landlord in an e-mail on May 28, 2009 and again 2 weeks later by registered mail. The Landlord said

she received the Tenants' forwarding address a couple of weeks after they moved out. The Tenants also said that they did not give the Landlord written authorization to keep their security deposit.

Analysis

Section 38(1) of the Act says that a Landlord has 15 days from either the end of the tenancy or the date she receives the Tenant's forwarding address in writing (whichever is later) to either return the Tenant's security deposit or to make an application for dispute resolution to make a claim against it. If the Landlord does not do either one of these things and does not have the Tenant's written authorization to keep the security deposit then pursuant to s. 38(6) of the Act, the Landlord must return double the amount of the security deposit to the Tenant.

I find that the Landlord received the Tenants' forwarding address in writing on June 15, 2009 but did not return their security deposit and did not make an application for dispute resolution to make a claim against the deposit until July 27, 2009. I also find that the Landlord did not have the Tenants' written authorization to keep the security deposit and that her right to make a claim against it was extinguished under s 24(2) and s. 35(2) of the Act because she did not do a move in or a move out condition inspection report. As a result, I find pursuant to s. 38(6) of the Act that the Landlord must return double the amount of the security deposit ($1,220.00) to the Tenants. As the Tenants have been successful in this matter, I also find that they are entitled to recover the $50.00 filing fee for this proceeding.

Section 32 of the Act says that a Tenant is responsible for repairing damages caused by her act or neglect but is not responsible for reasonable wear and tear. That section also states (in part) that a Landlord must maintain a residential property in a state of decoration and repair that makes it suitable for occupation.

Sections 23 and 35 of the Act say that a Landlord must complete a condition inspection report at the beginning of a tenancy and at the end of a tenancy in accordance with the Regulations and provide a copy of it to the Tenant (within 7 to 15 days). A condition inspection report is intended to serve as some objective evidence of whether the Tenant is responsible for damages to the rental unit during the tenancy or if she has left a rental unit unclean at the end of the tenancy. In the absence of a condition inspection report, other evidence may be adduced but is not likely to carry the same evidentiary weight especially if it is disputed.

In this case, the Landlord has the burden of proof and must show (on a balance of probabilities) that the Tenants caused the damages as alleged. This means that if the Landlord's evidence is contradicted by the Tenants, the Landlord will generally need to

provide additional, corroborating evidence to satisfy the burden of proof. In the absence of any corroborating evidence from the Landlord as to the condition of the rental unit at the beginning of the tenancy, I cannot conclude that it was in good condition as she claimed. Instead, given the photographs of the Tenants and the corroborating witness statements (which the Landlord did not challenge), I conclude that the rental unit was already damaged at the beginning of the tenancy.

I accept the Tenants' evidence that the washer, dryer and refrigerator were old and not in good working order at the beginning of the tenancy. Consequently, I conclude that it is more likely the appliances were suffering the effects of age or wear and tear and were not damaged due to an act or neglect of the Tenants.

However, the Landlord added to Clause 13 of the tenancy agreement a statement that, "the Tenant is responsible for any repairs or replacements needed." RTB Policy Guideline #8 says that a term of a tenancy agreement that is grossly unfair or unconscionable is of no force and effect. I find that this clause is grossly unfair in so far as it purportedly requires the Tenants to replace old appliances that could not be repaired. I also find this clause is unconscionable in requiring the Tenants to repair appliances (which are included in the rent) that the Landlord has a duty under sections 27 and 32 of the Act to ensure are in good working order at the beginning of the tenancy. I further find that there is nothing in the tenancy agreement that says the Tenants' rent was reduced by assuming these responsibilities. As a result, I find that this clause is unenforceable.

For all of the above-noted reasons, I find that there are no grounds for the Landlord's claim for compensation for damages to the rental unit. However, I do find that the Landlord is entitled to recover the $300.00 for Strata fines. As the Landlord has been unsuccessful on the balance of her application, she is not entitled to recover the filing fee for this proceeding. I order the Landlord pursuant to s. 62(3) and 72 of the Act to keep **$300.00** of the Tenants' security deposit in payment of the Strata fines. I further order the Landlord to return the balance to the Tenants as follows:

	Security deposit:	$1,220.00
	Accrued interest:	$0.00
	Filing fee:	$50.00
	Subtotal:	$1,270.00
Less:	Strata fines:	($300.00)
	Balance owing:	$970.00

Conclusion

A Monetary Order in the amount of **$970.00** has been issued to the Tenants and a copy of it must be served on the Landlord. If the amount is not paid by the Landlord, the Order may be filed in the Provincial (Small Claims) Court of British Columbia and enforced as an Order of that Court.

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: November 23, 2009.

Dispute Resolution Officer