

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution to retain the security deposit.

The hearing was conducted via teleconference and was attended by the landlord and tenant. The tenant had one witness attend. The tenant had provided a list of seven witnesses – most were called but were not available at the time of the hearing. Two witnesses for the landlord were called but were also not available at the time of the hearing.

The landlord noted during the hearing that he had not received any evidence from the tenant, although I had received evidence from the tenant. The tenant confirmed she did not provide the landlord with any evidence.

Issues(s) to be Decided

The issues to be decided are whether the landlord is entitled to retain all of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to sections 38, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord provided into evidence the following documents:

- A copy of a tenancy agreement and addendum signed by the parties on March 1, 2009 for a month to month tenancy with a monthly rent of \$800.00 due on the 31st of the month. The addendum included a clause that the tenant is not allowed to smoke in the rental unit or inside the apartment building. A security deposit of \$400.00 was paid on March 1, 2009;
- A Summary of Events regarding the tenancy and most particularly about the ending of the tenancy;
- Witness statements from 4 individuals stating they smelled "a strong cigarette odour". Attempts were made during the hearing to call three of these witnesses and none were available;
- A copy of an undated Condition Inspection Report completed and signed by both parties for the move in inspection;
- A warning memo from the landlord to the tenant dated March 16, 2009 reminding the tenant there is to be no smoking in all units;
- A copy of the tenant's written notification of her forwarding address; and

- A copy of an invoice for painting the ceiling, including using an odour eliminator dated October 31, 2009 in the amount of \$394.96.

The tenant submitted a summary of events and a note indicating that one of the people who signed the landlord's witness statements was coerced to do so and that he would participate in the hearing. This witness was not available when called into the hearing.

The tenant confirmed in the hearing that she left her forwarding address at the landlord's office on November 14 and 15, 2009. The landlord confirms that he received it on November 17, 2009. The landlord filed his Application for Dispute Resolution on November 19, 2009.

The landlord testified that he had on several occasions provided verbal warnings to the tenant to not smoke in the rental unit. He testified that he had never, during the tenancy seen the tenant smoking in the rental unit. He stated that on one occasion the tenant was smoking in the outside doorway, as it was cold outside.

Despite the statement in the addendum that should the tenant commit a single violation of the no smoking rule the landlord testified that he didn't think that it was that serious and that he could work with the tenant to ensure it didn't continue. The landlord testified that he was not as concerned about the smoking as warning the tenant that she had to ensure the rental unit didn't smell like smoke at the end of the tenancy.

The tenant contends that she did not smoke in the rental unit during her tenancy and that at the end of the tenancy the rental unit did not have a smell of cigarette smoke. The tenant's witness confirmed that he didn't smell any cigarette smoke in the rental unit on the final day of the tenancy.

The tenant's witness testified also that the landlord tried to show them that the ceiling would be discoloured and removed a light fixture. The witness stated that the light fixture was near the stove which could cause discolouration of the ceiling. The landlord confirmed there was no discolouration.

Analysis

Section 38 of the *Act* requires a landlord to return to a tenant a security deposit within 15 days of the end of the tenancy and receipt of the tenant's forwarding address or file an Application for Dispute Resolution. I accept the landlord has filed an application within that 15 day timeframe in compliance with the *Act*.

The Residential Tenancy Policy Guidelines state the landlord is responsible for painting the interior of the rental unit at reasonable intervals. Section 32 of the *Act* states a tenant must repair damage to a rental unit that is caused by the actions or neglect of the tenant and Section 37 states that when a tenant vacates the rental unit the tenant must leave the unit reasonably clean, and undamaged except for reasonable wear and tear.

In order to make a claim against the tenant to paint the rental unit because the tenant or her guests breached the tenancy agreement by smoking in the rental unit, the landlord must provide evidence that the tenant smoked in the unit contrary to the tenancy agreement. The assertion that the rental unit smelled of cigarette smoke is not sufficient, it must be shown that the tenant caused that smell. The landlord has failed to provide any evidence supporting his assertion that the tenant breached the tenancy agreement.

In addition, I note that the invoice submitted into evidence for painting the rental unit was only for painting the ceiling. It would be reasonable to think that had a person smoked inside a small rental unit that all paintable surfaces should be painted to eliminate such an odour and that only painting the ceiling would have little impact on eliminating the odour.

Conclusion

Based on the above, I dismiss the landlord's application in its entirety, without leave to reapply.

I order the landlord must return the full security deposit to the tenant

I order the landlord must return the security deposit and interest held in the amount of \$400.00. I grant a monetary order in the amount of **\$400.00**. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) 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: March 25, 2010.

Dispute Resolution Officer