Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MND MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord for a Monetary Order for damage to the unit, site or property, to keep the security deposit and to recover filing fee from the tenant for the cost of this application.

The landlord and tenant appeared and gave testimony in turn.

Issue(s) to be Decided

The issue to be determined based on the testimony and the evidence is whether the landlord is entitled to a monetary Order under section 67 of the *Residential Tenancy Act* for damages or loss by proving that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act.

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

Preliminary Issue

The landlord testified that the tenant had not served the tenant's evidence on the landlord as required. Pursuant to the Residential Tenancy Rules of Procedure, Rule 4.1 requires that the respondent file and serve the evidence at least 5 days prior to the hearing and if the date of the dispute resolution proceeding does not allow the five (5) day requirement to be met, then all of the respondent's evidence must be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding. I note that the tenant's evidence was received

to the file well within the time limit. The tenant testified that they had couriered their evidence to the landlord, but did not submit proof of service and were not able to provide the tracking number during the proceedings.

Therefore, the tenant's written evidentiary submissions were not considered. However, the tenant was permitted to give verbal testimony regarding their evidence. The landlord was duly permitted to offer rebuttal to the tenant's testimony.

Background and Evidence

The tenancy began on December 1, 2008 for a fixed term ending on November 30, 2009 and the tenant vacated at that time. Rent was $1,100.00 per month and a deposit of $550.00 was paid by the tenant.

The landlord testified that at the start of the tenancy a walk-through was done with both the tenant and the landlord present, but there was not enough time to complete a move-in inspection report. However, according to the landlord, the unit was clean and in good repair. The landlord pointed out that a previous inspection report from when the prior tenant moved out, confirmed this fact. However, the report being referred to was not submitted into evidence. The landlord testified that at the end of the tenancy the tenant met with the landlord's son in the lobby. The landlord testified that she was told about what had transpired at that meeting. The landlord testified that, according to the information she received from her son, the tenant gave back the keys and refused to participate in a move-out inspection and did not leave any written forwarding address at that time. The landlord's son was not present at the hearing to give witness testimony on this incident. The landlord stated that numerous attempts were subsequently made to contact the tenant to arrange a move-out inspection, but the tenant did not respond. The landlord testified that the unit was left damaged and unclean.

The landlord submitted evidence including:

- a copy of the tenancy agreement signed on November 22, 2008

- a copy of an unpaid utility bill in the amount of $182.60 stating that the costs will be added to the taxes
- copies of invoices for appliance repair, replacement faucet, carpet cleaning, paint supplies and labour.
- a copy of a letter from the current tenant attesting that the move-in date was postponed due to repairs.
- Photographs of the unit illustrating the condition and damage

The landlord was claiming monetary compensation in the amount of $1,682.00 including $182.60 for utilities, $209.04 for stove repairs, $111.99 for new water tap, $80.00 for carpet cleaning, $79.30 for purchase of paint, $759.30 for repainting. The landlord also testified that there was a loss of one week's rent because the new tenant could not move in due to repair-work, but this was not being claimed.

The tenant readily conceded that $182.60 was owed to the landlord for utilities.

In regards to the claim for the appliance repair, the landlord testified that comments noted on the repair bill dated February 25, 2010, indicated that someone had apparently damaged the stove handle by closing the oven door with excessive force. Evidently the glass in the door was also shattered during the repair of the handle, but only the repair costs of $209.04 for the handle were being claimed against the tenant.

The landlord testified that the water faucet had to be replaced at a cost of $111.99 because it no longer worked and although the problem was reported by the new occupant, the landlord attributed the cause to abuse by the tenants during the tenancy.

In regards to the $80.00 for carpet cleaning, the landlord referenced the photographs showing the carpets in what appeared to be an unclean and stained state.

The landlord testified that the tenants also left holes in the wall, damaged drywall around a closet and caused fist-sized indentations in a door that required patching.

Photos were in evidence. The landlord testified that the patching, painting and supplies were included in the invoice for $795.30 from the painter.

The tenant disputed the landlord's testimony. The tenant testified that the unit was left in cleaner condition than when the tenant moved in. The tenant testified that at the end of the tenancy, the tenant met with the landlord's son in the lobby and nothing was said about conducting a move-out inspection. The tenant testified that they gave the landlord's son and envelope containing the keys and their written forwarding address at that time. The tenant stated that they asked that the landlord contact them if there was any issues affecting the return of the deposit. According to the tenant, the landlord did not contact them at all and they did not pursue the return of the security deposit.

The tenant testified that this position changed however, in January 2010, when they discovered that the landlord had deposited one of the tenant's rent cheques of $1,100.00 that was originally given for November's rent, but which the landlord told them at that time failed to clear. According to the tenant, at the landlord's request, the alleged NSF cheque was replaced with a duplicate rent cheque of $1,100.00 for November and in November, this replacement cheque had been duly cashed to pay for November's rent. The tenant testified that the landlord evidently held on to the original "NSF" cheque and once the tenancy had ended then cashed the original $1,100.00 cheque in January 2010.

The tenant testified that when this came to light, they sought information from the RTB and on the advice they received, then sent a second written copy of their forwarding address for the return of the deposit. The tenants stated that attempted to discuss the cheque-cashing issue with the landlord but were merely offered a settlement by the landlord's son in the amount of $500.00. The tenant stated that they did not agree and advised the landlord that they would be seeking dispute resolution.

The tenant stated that in February they received a Notice of Dispute Resolution from the landlord who was now seeking damages of $1,682.00, in addition to the $1,100.00 that

the landlord had already taken without authorization from their bank account after the tenancy had long ended.

In regards to the claim for the appliance repair, the tenant stated that the handle was loose because some screws had come out and denied abusing the appliance. The tenant pointed out that the repair work for which the costs were being claimed occurred months after the tenancy had ended and during a subsequent tenancy. The tenant disputed that they should be responsible for the $209.04 repair.

While the tenant acknowledged that the faucet failed during the tenancy, the tenant testified that nothing unusual had been done to damage the fixture and objected to paying the replacement cost of $111.99.

In regards to the carpet cleaning, the tenant testified that shortly before the tenancy ended, the carpets were shampooed with a rental machine. However, the stain shown in the photos, according to the tenant predated the tenancy and in fact was mentioned by the landlord to the tenant during the tenant's initial walk-through at the start of the tenancy. The tenant does not agree to the $80.00 being claimed.

In regards to the $795.30 from the painter the tenant disputed that re-painting was necessary because of damage caused solely by the tenant. The tenant pointed out that there was damage left by previous occupants when they moved in. The tenant acknowledged responsibility for the dents in the door, and some minor holes where they had fastened things to the wall, but not to the damage around the closet.

The tenant disputed the majority of the landlord's claims other than the $182.60 cost of utilities, and compensation for dents in the door and minor holes in the drywall.

Analysis: Damage Claim

In regards to the landlord's monetary claim of damages to the unit, I note that, in order to support compensation under section 67 of the *Act*, the landlord had the burden of proving the following:

(1) Proof that the damage or loss existed

(2) Proof that this damage or loss happened solely because of the Respondent and in violation of the Act or agreement

(3) Verification of the actual amount or cost of repairing or rectifying 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.

Section 37(2) of the *Act* states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

I find that the landlord's testimony and evidence does show that repairs and cleaning were done and I accept that the landlord spent money on the unit after the tenancy ended. In that respect, I find that element 1 and element 3 of the test for damages has been successfully met.

In regards to meeting element two of the test for damages, however, I find that the landlord would need to prove that the stove repair, faucet replacement, carpet cleaning and need for repainting were due to the tenant's violation of the Act.

Maintenance and repairs of appliances and plumbing are the landlord's responsibility under the Act. Unless the claimant is able to furnish proof that the tenant had wilfully and with intention, damaged the item beyond normal wear and tear, the tenant would not be required to pay for repairs or replacement. In regards to the carpet stain and the damage to the walls, even if accepted that it existed, in order to meet the test for damages, the landlord would need to prove that at the start of the tenancy the unit was free of any condition issues or damage. I find that this can only be established with evidentiary verification of the condition of the unit at the time the tenancy began as compared to the condition of the unit after the tenancy had ended. In other words, valid move-in and move-out inspection reports signed by both parties were vital to the claim.

Section 23(1) on the Act requires that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.

Section 23(3) and section 35 both state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and states that both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

In regards to the landlord's allegation that the tenants did not cooperate, the Act does anticipate such situations. In particular, section 17 of the Regulation details exactly how the inspection must be arranged as follows:

(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

Section 23(6) of the Act states that the landlord must make the inspection and complete and sign the report without the tenant if:

(a) the landlord has complied with subsection (3), and

(b) the tenant does not participate on either occasion.

Both sections 25 and 35 which deal with the Start of Tenancy and the End of Tenancy Condition Inspection Report requirements contain similar provisions as outlined above.

In this instance, I find that the landlord is not able to rely on anything other than the "after" photos and invoices for comparison with verbal testimony about the move-in condition of the unit, that was disputed by the tenants.

I find that there were also some concerns regarding the invoices and the dates that some of the claimed repairs were done. On the painting and patching invoice, I find that there was insufficient detail. There was no breakdown documenting what tasks were done, how much time was spent on each and their respective costs nor hourly rate.

Based on the testimony and the evidence discussed above, I find that the test for damages was not satisfied in regards to the claims of $209.04 for stove repairs, $111.99 for the tap, $80.00 for carpet cleaning and $759.30 for patching and repainting. I find that the landlord has not sufficiently met the burden of proof to the extent required to support the landlord's claim.

However, in regards to the utility charges, I find that the landlord is entitled to $182.60 compensation from the tenant.

I find that the tenant's submission about the landlord's actions in holding on to and cashing a rent cheque in January 2010 after the tenancy ended, despite the fact that the cheque had previously been replaced and already cashed back in November 2009, is not relevant to the dispute before me at present. This application was to deal with the landlord's claims for monetary compensation and I have no authority01 to determine any of the tenant's monetary claims against this landlord. However, the tenant is at

liberty to file a separate application for dispute resolution to make a claim for reimbursement from the landlord in regards to the cheque and the funds in question.

However, in regards to the matter before me, I find that the landlord is entitled to retain $182.60 from the tenant's security deposit.

The parties were not in agreement as to the date when the written forwarding address was given to the landlord. The tenant stated that the landlord's son acting on behalf of the landlord, had accepted an envelope containing the keys and the forwarding address at the end of the tenancy on November 30, 2009, while the landlord testified that no written forwarding address was given to the landlord by the tenant until February 2010. I find that in the absence of witness testimony by the landlord's agent who was representing the landlord on November 30, 2009, I accept the tenant's testimony that a written forwarding address was given to the landlord on November 30, 2009.

Section 38 of the Act provides that, within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, the director orders that the landlord may retain the amount.

In this instance, I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposit within 15 days of receiving the forwarding address. Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that the tenant's security deposit was $550.00 and that the landlord failed to follow the Act by retaining the funds being held in trust for the tenant for more than 15 days without making application or giving a refund. I find that the tenant is therefore entitled to compensation of double the deposit, amounting to $1,100.00. From this amount, I find that the landlord may retain $182.60 leaving $917.40 still owed to the tenant.

Conclusion

Given the above, I find that the tenant is entitled to a refund of the remaining portion of the security deposit in the total amount of $917.40.

I hereby issue a Monetary Order in favor of the Tenant in the amount of $917.40 pursuant to section 38(10)(c) of the *Act*. The tenant must serve the monetary order on the landlord in person or by registered mail and should the landlord fail to comply with the order, a claim may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

I hereby dismiss the remainder of the landlord's application without leave to reapply.

May 2010
Date of Decision

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Dispute Resolution Officer