

DECISION

Dispute Codes MNSD MNDC MND FF
 MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking a Monetary Order to keep all or part of the pet and or security deposit, for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, for damage to the unit, site or property, and to recover the cost of the filing fee from the Tenant.

The Tenant filed seeking a Monetary Order for the return of double her security deposit, and to recover the cost of the filing fee from the Landlord.

Service of the hearing documents by the Landlord to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on approximately January 29, 2010. The Tenant confirmed receipt of the Landlord's hearing documents.

Service of the hearing documents by the Tenant to the female Landlord was done in accordance with section 89 of the *Act*, sent via registered mail on January 11, 2010. The Landlord confirmed receipt of the Tenant's hearing documents.

The Landlord and Tenant appeared, confirmed receipt of the evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Is the Landlord entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Is the Tenant entitled to a Monetary Order under sections 38, 67 and 72 of the *Residential Tenancy Act*?

Background and Evidence

The Tenant's Witness testified at the onset of the hearing that he was present during the signing of both tenancy agreements and has been involved throughout the tenancy. He confirmed that he provided a written witness statement in the Tenant's evidence. I requested the Witness to remove himself from the hearing and request that he stand by in case additional testimony was required from him.

The undisputed testimony was the original fixed term tenancy agreement was effective August 15, 2008 and expired August 31, 2009. The Tenant paid a security deposit of \$892.50 and a pet deposit of \$892.50 on August 15, 2008. On August 10, 2009 the same parties entered into another written fixed term tenancy agreement effective August 31, 2009 which was set to expire on August 31, 2010 at which time the Tenant was required to vacate the rental unit. Rent was payable on the first of each month in the amount of \$1,856.00 effective September 1, 2009.

The Landlord testified the rental unit is located on the main floor of a house that was purchased by the Landlord in the summer of 2005 and is approximately eighteen years old. The Landlord advised the basement suite was rented out and the main floor was occupied by the previous owner at the time she purchased the house. Since owning the property the Landlord has rented the main floor in two separate tenancy agreements prior to renting the main floor to this Tenant. The Landlord stated that there was no work performed on the rental unit since owning the house; that the appliances, flooring, and

window coverings were all in the rental unit when she purchased it, and the main floor was completely re-painted just prior to the Tenant taking occupancy, as noted on the first tenancy agreement

On October 19, 2009, the Tenant issued the Landlord a written notice to end the tenancy effective November 30, 2009 and requested the Landlord use the security deposit and pet deposit as payment towards the November 2009 rent. The Landlord was not in agreement to use the pet and security deposits as rent and agreed to pick up the November 2009 rent from the Tenant's place of business on October 30, 2009. The Landlord confirmed she picked up the November 2009 rent payment; that the rent was paid in full up to November 30, 2009; and the Landlord signed and then scratched out her signature and the date on the letter as provided in the Tenant's evidence.

The Tenant testified and referred to her volumes of documentary evidence in support of her testimony that she provided the Landlord with her forwarding address, in writing, on several occasions beginning with the letter written October 30, 2009. The Tenant argued she was initially told by the Landlord that she had to be out of the rental unit by December 1, 2009 and then received a telephone call from the Landlord on the afternoon of November 30, 2010 when the Landlord told the Tenant she was supposed to be out of the rental unit by noon on November 30, 2010 so if the Tenant did not vacate by that evening the Landlord would be calling the police. The Tenant claimed the Landlord instructed her to leave the keys in the mailbox so the construction workers could gain entrance into the unit. The Tenant confirmed she is seeking the return of double her security and pet deposits.

The Landlord argued that she never called the Tenant, that she never threatened to call the police on the Tenant, and that she never instructed the Tenant to leave the keys in the mailbox. The Landlord testified that she discussed with the Tenant how they would meet at the rental unit at noon on December 1, 2009 to check out the rental unit and return the keys but that when she attended the unit at 11:45 a.m. the keys were in the mailbox, the unit was vacant and dirty.

The Landlord filed her application for a monetary order in the amount of \$8,350.00. The Landlord was asked to provide her testimony and advise the participants what she was claiming after which the Landlord testified that she was seeking \$3200.00 for painting; \$4500.00 for replacement of the carpet; and \$650.00 for professional cleaning costs.

The Landlord argued that the Tenant damaged the paint in the rental unit which caused her to have to hire painters at the end of the tenancy and referred to her invoice provided in evidence. The Landlord then stated that because the Tenant's dogs had left urine on the carpets she had no choice but to have the carpets replaced. Upon review of the Landlord's invoice provided in the evidence the Landlord confirmed that she had new carpet installed in the three bedrooms and on the stairs, had laminate flooring installed in the living room, hallway, and dining room; and she had new flooring put in the entrance and tile installed in the kitchen. The Landlord stated that the Tenant did not clean the rental unit which resulted in the Landlord having to hire professional cleaners. The Landlord referred to her photographic evidence to show the condition of the rental unit and testified the photos were all taken on December 1, 2009 before noon.

The Tenant argued that she did have the rental unit cleaned at the end of the tenancy and referred to her photographic evidence which consisted of photos taken at the onset, during, and at the end of the tenancy after the cleaning. The Tenant also referred to her receipt whereby she paid a cleaning person to complete the move out cleaning which included cleaning "everything, the kitchen, bathrooms, floors, cupboards, everything." The Tenant confirmed that she did not have the carpets cleaned because she says the Landlord told her not to worry about them as she was having them replaced. The Tenant confirmed the painting was "good" at the onset of her tenancy agreement and that there were baseboards throughout the rental unit.

The Landlord stated that she first listed her house for sale with the realtor on December 4, 2009, that she accepted the offer on February 10, 2010, and the title transferred to the new owner on March 31, 2010.

Upon final review of the Landlord's claim the Landlord stated that she was also seeking reimbursement for the nine months of rent from December 1, 2009 to August 31, 2010 for the period the Tenant broke the lease for a total amount of \$16,704.00.

In closing the Tenant argued that the Landlord had attempted to obtain a monetary order against the downstairs tenant and that the Landlord used the same invoices in the downstairs tenant's claim as she is using for this claim. The Landlord argued that she used the same contractors but that there were different invoices and different amounts for each claim.

Analysis

All of the testimony and documentary evidence was carefully considered.

Section 7(1) of the Act provides that 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 the damage or loss which results. That being said, section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

Landlord's Application

Throughout the entire hearing the Landlord testified that her claim was for costs relating to replacing the carpet, painting the unit, and cleaning the unit. It was only during the last five minutes of the hearing, upon final review of the Landlord's application did the Landlord mention that she was also seeking \$16,704.00 in loss of rent for the period remaining in the fixed term tenancy between December 1, 2009 and August 31, 2010. Upon a quick review of the application I noted that the amount of \$8,350.00 was listed on the application as the amount requested by the Landlord for a monetary order and the loss of rent is referred to only in the details of the dispute.

The evidence supports the Landlord advertised the rental unit between October 25, 2009 and November 30, 2009 and then stopped advertising it for rent when she listed the property for sale on December 4, 2009. There is no evidence before me to substantiate the Landlord attempted to re-rent the unit once the tenancy ended November 30, 2009, and therefore the Landlord has failed to prove she sufficiently mitigated her loss of rent from December 1, 2009 to when the ownership title transferred to the new owners on March 31, 2010. The Landlord made a personal choice to put the house up for sale while it was vacant and chose not to have renters for the four months prior to the title transfer and therefore did not sufficiently mitigate her loss. Based on the aforementioned I find the Landlord has failed item #4 in the test for damage or loss, as listed above, and I hereby dismiss her claim for loss of rent.

Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, such as flooring or interior wall paint it is necessary to reduce the repair or replacement cost by the depreciation of the original item.

The Landlord's evidence refers to a claim for carpet replacement in the amount of \$4,500.00 however the invoice provided for this claim includes costs to install tiles and laminate flooring in addition to carpet. The evidence provides opposing testimony as to the condition of the carpets and there is no move-in inspection report or move-out

inspection report to refute the opposing testimony. The evidence supports the carpet and other flooring was approximately eighteen years old. Based on the *Residential Tenancy Policy Guidelines* the normal useful life of carpet and flooring is only ten years; therefore the depreciated value of the carpet and flooring the Landlord replaced was zero. Based on the aforementioned I hereby dismiss the Landlord's claim of \$4,500.00.

The evidence supports the painting at the onset of the tenancy was listed as being "new paint" and the testimony confirms this. In reviewing the photographic evidence provided by both parties for periods from the onset of the tenancy, during the tenancy, and afterwards, there is evidence to support there was damage done to some of the walls during the tenancy which required filling, sanding, priming and painting. That being said, I find the evidence does not support the Tenant damaged all of the walls, every doorframe, handrail, or had anything to do with the new baseboards purchased after the end of the tenancy. Section 32 of the Act provides that a tenant must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the property by the tenant. Based on the aforementioned I find the Landlord has proven the test for damage or loss, as listed above and I approve the Landlord's claim in the amount of \$840.00 which is $\frac{1}{4}$ of the total cost to repair and paint the rental unit.

The Landlord provided evidence that she paid a professional cleaner \$650.00 to perform "special cleaning" which was completed on December 11, 2009; while the Tenant provided opposing evidence that she paid to have the rental unit cleaned November 30, 2009. I note that the tenancy ended November 30, 2009; the Landlord had the flooring removed from the entire unit and new flooring installed; and the entire unit sanded, new baseboards installed, and everything repainted; all before the date the cleaning was performed. Based on the aforementioned, and in the presence of opposing evidence, I find the Tenant cannot be held responsible for the cost of cleaning a rental unit after contractors were working in the unit for ten days prior to the cleaning; therefore I dismiss the Landlord's claim of \$646.80.

As the Landlord has been partially successful with her claim I hereby award her recovery of the \$100.00 filing fee.

Landlord's Monetary Claim – I find that the Landlord is entitled to a monetary claim from the Tenant as follows:

Repair and Painting ¼ of the cost	\$840.00
Filing fee	<u>100.00</u>
Subtotal (Monetary Order in favor of the Landlord)	\$940.00

Tenant's Application

The evidence supports the Landlord signed for receipt of the Tenant's forwarding address and the November 1, 2009 rent payment on October 31, 2009 and the tenancy ended on November 30, 2009.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security and pet deposits, to the tenant with interest or make application for dispute resolution claiming against the security and pet deposits. In this case the Landlord was required to return the Tenant's security and pet deposits in full or file for dispute resolution no later than December 15, 2009. The Landlord filed her application for dispute resolution on January 27, 2010, after the Tenant filed seeking the return of her security and pet deposit on January 11, 2010.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposit and the landlord must pay the tenant double the security deposit. I find that the Tenant has succeeded in proving the test for damage or loss as listed above and I approve her claim for the return of double of her security and pet deposits plus interest.

I find that the Tenant has succeeded with her application therefore I award recovery of the \$50.00 filing fee.

Tenant's Monetary Claim – I find that the Tenant is entitled to a monetary claim as follows:

Doubled Security Deposit 2 x \$892.50	\$1,785.00
Doubled Pet Deposit 2 x \$892.50	1,785.00
Interest owed on the Security and Pet Deposit of \$1,785.00 from August 15, 2008 to June 22, 2010	10.17
Filing Fee	50.00
TOTAL AMOUNT DUE TO THE TENANT	\$3,630.17

Off-Set Monetary Claims – Cross Applications – These claims meet the criteria under section 72(1) of the *Act* to be offset against each other's claims as follows:

Monetary Order in favor of the Tenant	\$3,630.17
Less Monetary Order in favor of the Landlord	-940.00
TOTAL OFF-SET AMOUNT DUE TO THE TENANT	\$2,690.17

Conclusion

A copy of the Tenant's decision will be accompanied by a Monetary Order for **\$2,690.17**. The order must be served on the respondent Landlord and is enforceable through the Provincial Court 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: June 22, 2010.

Dispute Resolution Officer