DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with cross applications. The landlord applied for a Monetary Order for unpaid rent; damage to the rental unit; damage or loss under the Act, regulations or tenancy agreement; retention of the security deposit and recovery of the filing fee. The tenant applied for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; return of double the security deposit and pet deposit; and, recovery of the filing fee. Both parties appeared at the hearing and were provided the opportunity to be heard and to present witnesses. Both parties confirmed service of documents upon them.

Issues(s) to be Decided

1. Is the landlord entitled to compensation for unpaid rent?
2. Is the landlord entitled to compensation for damage to the rental unit?
3. Is the landlord entitled to compensation for damage or loss under the Act, regulations or tenancy agreement?
4. Is the tenant entitled to compensation for damage for loss under the Act, regulations or tenancy agreement?
5. Did the landlord violate the Act with respect to handling the security deposit and is the tenant entitled to double the security deposit and pet deposit?

Background and Evidence

The parties provided undisputed evidence as follows. The tenancy commenced October 1, 2009. The tenants were required to pay monthly rent of $1,350.00 for the

one-bedroom rental unit. The tenancy was for a fixed term set to expire September 30, 2010. The tenants paid a $675.00 security deposit and a $200.00 pet deposit on September 9, 2009. The tenants gave more than one month of written notice to end the tenancy as of November 30, 2009 and provided written authorization for the landlord to retain $300.00 of the security deposit for breaking the lease. The tenants vacated the rental unit and provided a forwarding address on November 30, 2009. The landlord made an Application for Dispute Resolution on December 14, 2009.

Landlord's application

In making this application the landlord is seeking compensation of $875.00 but identified the amounts owed by the tenants as:

Loss of rent for December 2009	$ 1,350.00
Liquidated damages	300.00
Carpet cleaning	80.00
Filing fee	50.00
Total	$ 1,780.00

Upon enquiry, the landlord testified that the rental unit was vacant December 2009 through February 2010 but is only claiming loss of one month of rent. The landlord attributed the inability to quickly re-rent the unit to the lack of demand for one bedroom apartments. The landlord advertised in the city newspapers and online for available apartments in the residential property and this unit in particular on November 2, 2009. There were one or two showings in November 2009. The unit was left in good condition by the tenants although the carpets were professionally cleaned in accordance with the terms of the tenancy agreement.

The tenant agrees to pay for carpet cleaning of $80.00 and submitted that $300.00 was already authorized as a deduction from the security deposit. The tenant disputed that loss of rent was owing for December 2009 as she complied with the term of the tenancy agreement that provides for the following:

> "To terminate this lease prior to the expiry date on the 31st day of August 2010 the Tenant will be required to pay $300 and must give one calendar month's notice. The Tenant agrees that the lease breaking sum may be deducted from the security deposit or otherwise be paid."

Further, the tenant claimed that upon signing the tenancy agreement the landlord's agent informed the tenants that if they wanted to end the tenancy early they would just need to pay the $300.00 for liquidated damages and give one month's notice. At that time they were not told that they would also be held responsible for loss of rent in addition to paying the liquidated damages. The landlord refuted the tenant's position by stating that the manager would have informed the tenants of their continued liability for loss of rent. Upon enquiry, the landlord informed me that the manager was not available to testify at the hearing.

As an alternative position, the tenant submitted that the landlord's inability to re-rent the unit quickly was attributed to evidence of a mice infestation during the one showing in November 2009, plans for the building to be demolished, a non-functioning gym and brown water coming from the taps. The landlord acknowledged mice traps were likely in the rental unit at the time of the showing to a prospective tenant but claims the gym was largely functional and doubted the tenant's claim that brown water was evident when the showing took place. The landlord also explained that new fixed term tenancy agreements are still entered into despite the plans to redevelop the property and that those agreements would be honoured.

As evidence, the landlord provided copies of the tenancy agreement, the tenant's notice to vacate, and proof of advertising and pest control efforts.

Tenants' application

In making this application, the tenants are seeking return of double the security deposit and pet deposit on the basis the landlord's application to retain the deposits is frivolous.

The tenants are also claiming $270.00 for the six days of rent the tenants paid in November 2009 during which time the tenants did not stay at the rental unit due to a mouse infestation. The tenant claimed there were dozens of mice in the rental unit and it was several days before the infestation was under control. The tenant attributed the delay to the landlord's refusal to use another pest control company. The landlord acknowledged a mouse infestation but claims the pest control company was very busy at that time and it took longer than usual to have the pest control company attend.

The tenants are claiming $160.00 for the lack of a functional gym which was advertised in the advertisement they responded to. The tenants determined $160.00 was the equivalent to a gym membership for two people for two months. The tenant claimed that when she viewed the unit she was told the gym was out of order by the manager and they were not shown the gym. The tenant alleged that she later learned the gym had been out of order for approximately 1.5 years. The landlord refuted the tenant's position by stating that the gym has only four pieces of equipment and that one piece has been out of order and another piece of equipment is still functional in a limited capacity. The landlord stated the gym room has never been off limits and is unsure why the tenants would not be shown the gym upon request. The landlord further argued that the tenancy agreement does not provide for a gym.

The tenants are claiming $810.00 for the landlord's failure to repair the window locks. The rental unit is a ground floor unit and the windows would not lock; rather, the window frames were bolted together. This made the unit very unsafe in the case of an emergency and the windows could not be left unbolted for fear of a break in. The tenant claims the landlord knew of the issues with the windows as noted on the move-in inspection report. Lack of security was also cited on the tenant's notice to vacate. The tenant calculated this claim as the equivalent to 30% of the rent paid. The landlord stated that a patio door was still fully functional.

The tenants are claiming $405 for the landlord's failure to repair and maintain the property with respect to "contaminated" water coming from the bathroom taps. The

tenant claims to have talked to the manager about brown water coming from the taps on two occasions. The tenant acknowledged that the subject was brought up in casual conversation with the manager and that the first time the manager dismissed the issue as attributable to the unit being vacant for some time and the second time the issue was attributed to the unit being in an older building. The tenant calculated this claim as $15% of the rent paid. The landlord responded by stated he had no knowledge of brown water until he received the tenants' Application for Dispute Resolution and immediately investigated the allegation. The landlord claims he did not detect brown water when he investigated and the current tenant has not made a complaint about brown water.

Finally, the tenants are claiming $360.00 in moving expenses on the basis the tenant feels the landlord's misrepresented or failed to inform the tenants of the condition of the unit and the building facilities, previous mice infestations, and plans to redevelop the property. The tenant claims that had the tenants been made aware of these issues the tenants would not have likely moved in. The landlord responded to the tenant's assertions by stating that the tenants were notified of the redevelopment plans as soon as he became aware of these plans. The landlord submitted that the tenants moved because they were successful in obtaining a different unit that they had wanted prior tot moving into the rental unit.

As evidence, the tenants provided a copy of the tenancy agreement, photographs of the rental unit, the condition inspection report, the tenant's notice to vacate, a moving invoice and a letter from the landlord dated September 14, 2009 with respect to redeveloping the property.

Analysis

Upon deliberation of all of the evidence before me, I make the following findings with respect to the applications filed by each party.

Landlord's Application

It is upon the landlord to prepare a tenancy agreement that complies with the Act and to ensure terms are expressed in a manner that clearly communicates the rights and obligations under it. Upon review of the tenancy agreement, I find that the term that provides for ending the fixed term early obligates a tenant to pay the liquidated damages and give one calendar month of notice in order to terminate the lease. The term, or any other term in the tenancy agreement, does not provide for payment of any other amount or loss associated to terminating the fixed term. I find the tenants made a reasonable interpretation of the term in concluding that the tenants had fulfilled their obligations, as required by the landlord, with respect to ending the fixed term early. Further, I do not find the tenancy agreement places the tenants on notice that they would continue to remain responsible for loss of rent in the event they ended their fixed term early.

The landlord pointed to the Act and Residential Tenancy Policy Guideline 30. *Fixed Term Tenancies* in an effort to establish an entitlement to recover loss of rent from the tenants. In the policy guideline 30 it states a tenant may not give a one month notice to end a fixed term tenancy. Yet, the landlord's tenancy agreement provides that a tenancy may do just that and pay to the landlord the amount of the liquidated damages amount. Therefore, I find the wording of the landlord's tenancy agreement effectively gives the tenant the right to give one month of notice to end a fixed term tenancy.

The landlord is also referred to Residential Tenancy Policy Guideline 3. *Claims for Rent and Damages for Loss of Rent* which provides that a tenant should be put on notice that the landlord intends to claim for damages for loss of rent if the tenant ends the tenancy early. Further, notice of the intent to claim for damages should be done at the time the tenant gives notice. I find that there is a lack of evidence that the tenants were put on notice that the landlord intended to make a claim for loss of rent upon receiving the tenant's notice to vacate and authorization to deduct liquidated damages from the security deposit.

Finally, in the absence of evidence to the contrary, I do not find the landlord sufficiently refuted the tenant's position that the manager verbally told the tenants they could end their tenancy with one month's notice and payment of liquidated damages.

In light of the above, I find the tenants complied with the obligations under the tenancy agreement and I do not find the landlord entitled to recover unpaid loss of rent from the tenants.

I am satisfied the tenants have already authorized the landlord to deduct $300.00 from the security deposit for liquidated damages. I also found the tenant quite agreeable to the landlord's claim for carpet cleaning. Therefore, I award the landlord $300.00 for liquidated damages and $80.00 carpet cleaning but I do not award the landlord recovery of the filing fee.

Tenants' application

Return of security deposit and pet deposit

I am satisfied the landlord made an application to retain the tenants' security deposit and pet deposit within 15 days of the tenancy ending and complied with the requirement to do so under section 38(1) of the Act. I do not find the landlord's claims were frivolous. Therefore, the tenants' application for the deposits to be doubled is denied as I do not find a violation by the landlord with respect to handling the deposits. The tenants are entitled to return of the single amount of the deposits less a deduction of $380.00 for liquidated damages and carpet cleaning.

Loss of use – mouse infestation

From the testimony of both parties, I accept that there was a severe mouse infestation in the rental unit and that the tenant did not occupy the rental unit for six days. I also accept that the landlord's exterminator was very busy during this time; however, I also find the landlord has the obligation to respond to the infestation in a timely manner,

even if that means using a different exterminator. I am uncertain as to whether any other exterminator would have been able to respond in a more timely manner.

A landlord is obligated to repair and maintain a rental unit so that it complies with health, safety and building laws and so that it is suitable for occupation. As stated in Residential Tenancy Policy Guideline 6. *Right to Quiet Enjoyment* "a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs..."
Upon consideration of the evidence before me, I am reasonably satisfied that the rental unit was not suitable for occupation during these six days. Since the tenants' possessions remained in the unit, I do not award the full cost of the rental amount; rather, I find it reasonable to award the tenants 75% of their claim or $202.50.

Gym equipment

In the absence of the evidence to the contrary, I accept that the tenants asked to see the gym when they viewed the rental unit and were told it was out of order. However, I also find it is upon a prospective tenant to exercise due diligence with respect to the type and amount of equipment in the gym if the gym facilities were important to the tenants. Having heard the gym facilities only had four pieces of equipment I do not find the gym in the residential property was similar to the facilities offered at a fitness club. Nor did the tenants establish that they entered into fitness club memberships because of a lack of gym equipment at the residential property. Therefore, I find the tenants' claim for recovery of $40.00 per month to be unreasonably high.

I accept that the provision of gym equipment is not specifically provided in the tenancy agreement but that the equipment was advertised and find that it forms part of the common property and facilities of the residential property. Therefore, I find the tenants had a reasonable expectation that gym equipment would be provided to them as tenants of the property.

I find the gym facility, if fully functioning, to have a value of approximately $20.00 per month and that the condition of the gym equipment during the tenancy meant only one-half of the equipment was useable. Therefore, I award the tenants $20.00 ($10.00 x 2 months) for lack of gym equipment.

Window locks

Upon review of the condition inspection report I note that “frame damage” appears next to the space provided for the living room windows.

Section 20(1) of the Residential Tenancy Regulation provides for the information that must be included in a condition inspection report. A condition inspection report must provide for

(i) A statement identifying any damage or items in need of maintenance or repair

I note that the “Tenant’s Suite Inspection, Key and Security Deposit Form” used by the landlord does not provide a specific space for a statement to identify any damage or items in need of maintenance. Therefore, in the absence of an area for such statements I find it reasonable that a comment that there is damage next to a specific item constitutes a statement that this item requires repair or maintenance.

Having found the landlord identified the window frame as a damaged item in need of repair or maintenance I find the landlord failed to fulfill this obligation in a timely manner. I further find that the inability to use the windows without having to unscrew and screw the frames together resulted in a loss of use and enjoyment of the rental unit and made it unsafe for occupation in the event of a fire or other similar emergency.

I find it the tenants’ claim for 30% of the rent as compensation for the broken window locks to be excessive. I award the tenants 10% of their rent paid or $135.00 per month.

Contaminated water

I found there to be a lack of evidence to conclude the water coming from the bathroom taps was contaminated. I do not find evidence that even if the water was tinted brown that this precluded the tenants from using the water from the bathroom taps. While brown water warrants further investigation on part of the landlord, I also find the tenants had a responsibility to request action by the landlord. I do not find the tenant's casual conversations with the manager were requests for action. Therefore, I dismiss the tenants claim for compensation for contaminated water.

Moving costs

Upon review of the tenant's notice to vacate I note the tenants cited two reasons for ending the tenancy: one being security issues and the other being that the unit was dark. I do not find sufficient evidence the tenants ended the tenancy for reasons associated to the mouse infestation, redevelopment plans or lack of gym equipment. I find the security issue related to the lack of properly working window locks and the tenants decided to move before exhausting all options available to them when repairs are not completed by a landlord. I also find the other reason, that the unit as dark, is a characteristic the tenants should have satisfied themselves of when they viewed the unit.

In light of these findings, I do not award the tenants the cost of moving out of the rental unit.

Summary

The landlord entitled to recover a total of $380.00 from the tenants for liquidated damages and carpet cleaning. Since the landlord holds $875.00 in deposits, the landlord must return the balance of $495.00 to the tenants.

As the tenants were partially successful in their application, I award one-half of the filing fee to the tenants. The tenants have been awarded the following amounts:

Loss of quiet enjoyment – mouse infestation	$ 202.50
Loss of use of gym facilities	20.00
Failure to repair windows ($135.00 x 2 months)	270.00
Filing fee (one half)	25.00
Total	$ 517.50

The landlord is hereby ordered to pay to the tenants the sum of $1,012.50 being the balance of the security deposit owed to the tenants in the amount of $495.00 plus the amount awarded to the tenants of $517.50 for damage or loss under the Act, regulations and tenancy agreement.

The tenants have been provided a Monetary Order in the amount of $1,012.50 to serve upon the landlord. The Monetary Order may be enforced by filing it in Provincial Court (Small Claims) and enforced as an Order of that court.

Conclusion

The landlord has been ordered to pay the tenants a total of $1,012.50. The tenants are provided a Monetary Order in the amount of $1,012.50 to serve upon the landlord.

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 09, 2010.

Dispute Resolution Officer