



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes Landlord: MND, MNSD, MNDC, FF
Tenant: MNDC, MNSD, FF

Introduction

This was the reconvened hearing dealing with the cross applications of the parties and should be read in conjunction with my Interim Decision of October 4, 2010.

The parties appeared, gave further affirmed testimony and were further provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions to me.

The Landlord had concluded her presentation of claim at the previous hearing and this hearing was reconvened for the presentation of the Tenants' claim.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Preliminary Matters

Preliminary Matter #1

At the first hearing on this matter, I had not received a copy of a portion of the Landlord's evidence; however I have since received a copy and have given the evidence careful consideration and review. Further I note that in this evidence the Landlord stated she amended her Application with a handwritten change, which does not comply with the service requirements of s. 89 of the Act for Amended Applications. Therefore I will make a Decision based upon the original Application.

Issue(s) to be Decided

Have the Tenants breached the Act or tenancy agreement, entitling the Landlord to an Order for monetary relief?

Has the Landlord breached the Act or tenancy agreement, entitling the Tenants to an Order for monetary relief?

Background and Evidence

Landlord's Evidence considered:

1. Evidence list A-L, containing a "To Whom It May Concern" letter dated August 26, 2010 and addressed to the Dispute Resolution Officer, with a list of changes to the claimed amount and a synopsis of claimed damage and events of the tenancy;
2. A 4 page Condition Inspection Report, both Move-In and Move-Out, for the rental unit;
3. A signed Addendum to the Residential Tenancy Agreement, stating the Tenants were to maintain the yards/gardens in a manner befitting the neighbourhood and as delivered to the Tenants upon move-in and to follow the City of Surrey's bylaws regarding garbage and lawn clipping placement and removal;
4. A quotation dated August 26, 2010, from a contracting firm for demolition and removal of existing tub and toilet tiles, vanity cabinet and mirror, including specific proposed work;
5. An undated handwritten quote for carpet replacement/repair;
6. An emailed statement dated August 25, 2010, from a cleaning service for cleaning of the rental unit;
7. An email dated August 25, 2010, from a real estate agent concerning the first half of 2009, when he had the house listed for sale. The agent said the house showed well during this time;
8. An email dated August 25 from the same cleaning service concerning the condition of the house prior to the start of the tenancy;
9. A purported receipt from a rooting company;
10. An email train between the Landlord and Tenant LB, beginning August 17, 2009 and ending October 29, 2009, referencing paint colours, work on the shower stall and painting around the repaired shower stall;
11. Landlord's bank statement;
12. Photos of the condition of the rental unit and of the Tenants' housekeeping taken during the tenancy;
13. Evidence List M-R, containing an email showing the original showerhead sent by the Tenants' daughter;
14. Email showing the dates the photos of the showerhead were sent to the Landlord;
15. An email from the Landlord's realtor, dated June 21, 2010, stating that the front yard looks very different from the other day and looked good. Further the realtor stated the rental unit was very tidy and was actually pretty good;
16. An email from the realtor stating Tenant JB and his children were home on that date;
17. An email from the realtor noting that Tenant LB said they were not to be home on the day of the alleged trespass;
18. Original photos showing alleged damage to the rental unit, and

19. Summation addressed to Dispute Resolution Officer after the date of the first hearing.

Landlord's Testimony:

The Landlord completed her testimony at the original hearing.

Tenants' Evidence considered:

1. A Book of Documents containing the Affidavits of the two Tenants, the tenancy agreement, Addendum to the Residential Tenancy Agreement, letter dated June 13, 2010, from the Tenants to the Landlord of intent to move out on August 14, 2010, with forwarding address, a photo of the backyard taken with the Tenants' daughter's camera apparently on August 9, 2010, a bank transaction record, statement of Tenant LB's work absence due to a daughter's illness and a printout from Handyman USA and About.com;
2. The Affidavits of the Tenants stated summarizing their claim, and
3. A Property Disclosure Statement concerning the rental unit, dated July 26, 2010, signed by the Landlord for a potential buyer. The Statement purportedly disclosed the condition of the rental unit as of July 26, 2010.

Tenants' Testimony:

The Tenants are seeking a monetary order for \$2,350.00 for the following:

1. Invasion of Privacy--\$250.00
2. Trespass to Land-- \$250.00
3. Violation of s. 23 and 35 of the Act--\$1,800.00
4. The filing fee--\$50.00

In addition to the evidence and Affidavits provided, Tenant LB's relevant testimony included her stating that she did not receive a copy of the condition inspection report after move out and that the comments of the Landlord were not there when the Tenants signed it on August 14, 2010. Tenant LB stated that they had only 15 minutes for the walk through.

Tenant LB testified the first time she took a shower in the master suite, it leaked to the den below. The Tenants testified and gave affidavits that the work on the shower stall at the beginning of the tenancy was substandard and that the problems arose again in the spring of 2010. The Affidavit indicated it took three weeks to replace the shower.

Tenant LB stated that at a later date, when the technician turned the tap off and then back on, he noticed the carpet was wet and mushy, which caused the Tenant to have the carpet cleaned to draw out the water.

Tenant LB testified that the soap dish did come off, that Tenant JB had tried to recaulk the soap dish but it would not stay on due to the soft walls behind the shower tiles.

Tenant LB stated that on one occasion the Landlord arrived to inspect the work of the repairman and made the Tenants' bed and instructed the children to make their bed. On another occasion, Tenant LB testified that when the Landlord accompanied someone to install the hot water tank, she took pictures of the Tenants' home without permission and showed them to her realtor, with the intent of embarrassing the Tenants and depriving them of their privacy.

Tenant LB testified that on another occasion, she gave permission to the Landlord to come over to work on the front yard, but she did not give permission for the Landlord to come through the house and work on the back yard. Tenant LB testified that when Tenant JB and children came home, they discovered the Landlord in the backyard, which was accessible only by going through the house.

The Tenants testified that they maintained the yard by cutting and watering the lawn and by pruning the trees and edging the grass.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act or tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard. In this case **both** parties bear the burden of proof.

To prove a loss and have one party pay for the loss requires the other party to prove four different elements:

First proof that the damage or loss exists, secondly, that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement, thirdly, to establish the actual amount required to compensate for the claimed loss or to repair the damage, and lastly proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Landlord's Application:

Section 35 (3) and (4) of the Act requires a landlord complete a condition inspection report in accordance with the regulations and give the tenant a copy of that report in accordance with the regulations. A failure of this requirement results in the application of section 36(c), which extinguishes the right of a landlord to claim against the deposit for damages. I find that the Landlord has not properly completed the inspection report by leaving blank Boxes Z and 1. Further, the Landlord testified that she dropped off the inspection report with the Tenants' daughter, which does not comply with the service of

documents requirements of section 88 (e) of the Act. Therefore I find that the right of the Landlord to claim against the deposit for damages is extinguished. However, the Landlord is still entitled to claim for damages allegedly caused by the Tenants.

Main Bath/Ensuite Repair-I am convinced by a balance of probabilities the Landlord completed the move out inspection report after the Tenants had a walk through and left that day. I do not find the testimony credible that these Tenants would sign a document which notated extensive tile work needed in the main bath and extensive use of terms such as filthy, dirty and greasy. Further to that, the Landlord left blank Box Z, which was for the purpose of stating what damage for which the tenants were responsible and the Tenants did not sign Box 1, agreeing or disagreeing to the representations in the report. The corresponding Box X and Y were completed and signed after the move-in inspection. The inspection report was also incorrectly dated.

As the Landlord did not drop off the inspection report until 2-3 days later, I find by a balance of probabilities that the Tenants did a walk through, wrote and initialed some items about the condition, and signed the documents. I further believe with the same standard that it appears likely the Landlord either had a professional home inspector inspect the premises at a later time, as was testified to, or performed one herself and then complete the inspection report.

The Landlord did not obtain an estimate for repairs until after filing the Application, which suggests no urgency to the situation. I have no evidence before me to indicate whether or not the repairs have ever been done. Further, the quote from the contractor was for some work other than in question, such as to remove the toilet, vanity cabinet and mirror, making it impossible to determine the real value of the claimed damage. Therefore I find this evidence insufficient.

The Landlord stated the main bathroom shower had not been used from 2003 until the tenancy began in July 2009, so it appears to me any latent defects would not have been known to the Landlord. It appears from the evidence and testimony of all parties, that major work was done on the shower stall shortly after the tenancy began and the evidence suggests that there were problems to some extent throughout the tenancy.

The Landlord stated that work was done on the shower prior to the tenancy, but there was insufficient evidence to prove this.

The Landlord testified that Tenant JB incorrectly installed a shower head. However, the Landlord under cross examination stated that when you live in a home, it is your responsibility to fix something. I find the Tenant to have repaired the problem, but I do not believe the Tenant should be held to professional standards. However, Tenant JB disputed the incorrect installation.

There was conflicting testimony and evidence concerning the soap dish falling off, which led to disputed further damage. RTB guidelines provide a chart which lists the number of years fixtures and improvements in a rental unit retain any useful life, or value.

Masonry has a repair value of 15 years and I find that the soap dish was 17 years old and had reached its useful life. I find the tenant did attempt to reattach the soap dish, and he testified that it would not stay in place due to the soft walls.

The Landlord signed a Property Disclosure statement for potential buyers on July 26, 2010, stating that she was not aware of any moisture and/or water problems in the walls, basement or crawl space. I note that the Landlord testified that she only provided this statement as a courtesy to the potential buyers, but there was a space for her to state she did not know, which was not chosen. I find this contradictory statement to make the Landlord's testimony and evidence lack credibility.

Due to the lack of proof and the above, I am simply unable to determine with a balance of probabilities whether there were latent defects with the shower stall and plumbing from the beginning of the tenancy which were never properly corrected leading to the problems, or if any of the alleged damage was caused by the Tenants. Based on insufficient evidence, I find that the Landlord has not proven the test for damage and loss and I hereby **dismiss** her claim in the amount of \$5,000.00.

Cleaning- The Landlord submitted a receipt from a cleaning service for \$300.00 for 15 hours of cleaning. However I find that the receipt generic, insufficient and does not show what was cleaned or if the cleaning was due to the Tenants' fault. Based on a lack of evidence, I find that the Landlord has not proven the test for damage and loss and I hereby **dismiss** her claim in the amount of \$300.00.

Yard Cleanup – The Landlord has claimed \$300.00 for yard clean up, but has provided no receipts. I further find that a provision to maintain the yards/garden in a manner befitting the neighbourhood to be so vague as to be unenforceable. RTB Guidelines state that the tenant is responsible for routine yard work such as cutting the grass and routine weeding if the tenancy agreement provides for it. The Tenants supplied a photo of the yard near the end of the tenancy, showing the yard to be in good shape, and the Landlord supplied a photo from 2004. Based on a lack of evidence, I find that the Landlord has not proven the test for damage and loss and I hereby **dismiss** her claim in the amount of \$300.00.

Income Loss- The Landlord stated she is not able to re-rent the rental unit due to the condition, but has not supplied any evidence of lost income, such as repairs to the rental unit which she claimed were necessary to re-rent or attempts to advertise the rental unit. The Landlord did not testify or supply evidence as to whether or not the rental unit is now occupied. Based on a lack of evidence and failure to mitigate her damages, I find that the Landlord has not proven the test for damage and loss and I hereby **dismiss** her claim in the amount of \$1,800.00.

Tenant's Application:

Violation of RTA s 23 and 35--The Landlord made application to retain the security deposit within 15 days of the end of the tenancy, therefore the Tenants are not entitled

to double the amount of the security deposit. However I find that the Landlord failed to comply with Section 35 (3) and (4) and has not proven her claim for damages. Therefore I hereby **approve** a portion of their claim in the amount of **\$900.00** representing their original security deposit.

Invasion of Privacy and Trespass to Land- In addressing the Tenants' claim for monetary compensation, I find I am unable to award the Tenants any compensation under RTB section 16 Claims in Damages.

There is no substantiation, or proof, that the Tenants have suffered any damage or loss.

A claim in Tort is a personal wrong caused either intentionally or unintentionally and in all cases, the applicant must show that the respondent breached the care owed to him or her and that the loss claim was a foreseeable result of the wrong. I do not find this claim to rise to that requirement.

I do not find that the Tenants have met the requirement for a claim for aggravated damages, if such is the claim, and the requirement is that the aggravated damages must be specifically sought.

Based on a lack of evidence, I find that the Tenants have not proven the test for damage and loss and I hereby **dismiss** their claim in the amount of \$500.00.

Filing fee-I find the Tenants are partially successful and as such I award them a portion of the filing fee of **\$25.00**.

Pursuant to Section 67 of the Act, the Tenants are hereby granted a monetary Order in the amount of **\$925.00**. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The Landlord's claims in her Application are dismissed.

The Tenants are granted a monetary Order for \$925.00.

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: October 29, 2010.

Dispute Resolution Officer