



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MND, MNR, MNSD, FF

Introduction

This hearing was convened by way of conference call to deal with the landlord's application for a monetary order for unpaid rent or utilities; for a monetary order for damage to the unit, site or property; for an order permitting the landlord to retain the security deposit in partial satisfaction of the claim and to recover the filing fee from the tenant for the cost of this application.

The landlord attended the conference call hearing, and one of the tenants attended. Both parties gave affirmed evidence and were given the opportunity to cross examine each other on their evidence. Each party called a witness and the witnesses were also subject to cross examination.

The landlord provided an evidence package in advance of the hearing, however that evidence was not provided prior to the deadlines provided for in the *Residential Tenancy Act*. With the consent of the tenant, that evidence is considered in this Decision. The tenant also provided an evidence package, however the photographs provided to the Residential Tenancy Branch were not provided to the landlord. With the consent of the parties, all evidence provided by the tenant except the photographs are considered in this Decision.

Issues(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent or utilities?

Is the landlord entitled to a monetary order for damage to the unit, site or property?

Is the landlord entitled to retain the security deposit in partial satisfaction of the claim?

Background and Evidence

This fixed-term tenancy began on December 1, 2009 and was to expire on December 1, 2010, although the evidence of the parties is that the tenants moved into the unit on November 29, 2009. Rent in the amount of \$900.00 was payable in advance on the 1st day of each month. On December 31, 2009 the landlord collected a security deposit from the tenants in the amount of \$450.00.

The landlord testified that the rental unit was new before the tenants moved in, however also testified that the move-in condition inspection report was the same as the move-out condition inspection report of the previous tenants. The landlord further testified that on November 28, 2009 she completed the move-in inspection report without the tenant present and left the original with the tenant, along with a copy of the Tenancy Agreement for the tenant to sign and return to her. She stated that the tenant brought her the signed Tenancy Agreement when the security deposit was paid. She does not recall how or when she received back the condition inspection report, but she did get back the original.

The landlord further testified that on May 12, 2010 she received a notice from the tenants stating that they were moving on May 31, 2010. A copy of that notice was provided in advance of the hearing. She stated that she placed an advertisement on Craig's List by May 13, 2010 and the advertisement ran until she found a suitable tenant. The unit was advertised at \$1,000.00 per month, and a suitable tenant moved in on May 31, 2010 however the landlord only received \$500.00 until a roommate moved in on July 1, 2010. The landlord started to receive rental payments in the amount of \$1,000.00 per month on July 1, 2010 and is claiming one month of rent from the tenants.

The landlord also testified that the unit smelled like smoke, and the Tenancy Agreement Addendum stipulates that no smoking is permitted in the unit. She first noticed the smell on May 17, 2010 when she showed the unit to perspective renters.

The landlord is also claiming the cost of painting the unit, cleaning carpets, blinds, windows, the oven, fridge, caulking on the bathtub, cupboards that required cleaning and chipped paint. The landlord provided receipts dated May 27 and May 28, 2010 totalling \$184.85, however only \$170.32 of those receipts, including taxes, refers to this tenancy. She also claims "Cost of 1 days work lost due to having to clean and paint suite = 12 hrs X 29.35/hr = \$352.20 per day x 2 days to clean and repair suite = \$704.40."

The witness for the landlord testified that she observed the suite before it was ever lived in, and again at the end of the tenancy. She stated that she saw that the stove needed cleaning and noticed the smell of smoke. She was present during the time that the landlord painted the unit.

The tenant testified that it is not her signature that appears on the move-in condition inspection report. She further testified that the landlord did not do a move-in condition inspection report and that the first she's seen of the document was in the landlord's evidence package which she received prior to this hearing. The tenant also directed my attention to the Tenancy Agreement which shows her signature on pages 1, 2, and 3 and that it does not match the signature on the move-in condition inspection report.

The tenant further testified that the landlord had given the tenants keys to the garage when they viewed the suite and advised them they could use the garage for storage. Then the landlord informed them via text message on May 8, 2010 that they could no longer use it, and that her brother was going to store his items in that garage.

The tenant also testified that the landlord locked the emergency door exit and denied access to the stairs behind that door, making it a fire hazard. The stairs lead to the landlord's suite.

The tenants felt they could no longer live in a rental unit that posed a fire hazard with only one exit, and no storage space which had been provided at the beginning of the

tenancy. Further, the landlord had originally agreed for the tenants to use the internet connection, however placed a password protection on it, thereby eliminating their access well into the tenancy. The relationship of the parties had deteriorated, and the landlord would only converse by way of text messaging even though she lived upstairs.

The tenant also provided oral evidence that the landlord stated she would not do a move-out condition inspection report until the tenant paid the rent for the month of June. She stated that the landlord showed up unannounced to do a walk-through of the suite the day the tenants moved. The tenant stated she needed another half hour to complete the cleaning and moving, but the landlord refused to wait. The police were called, and in their presence and in the presence of the landlord, the tenant provided her forwarding address to the landlord via a police officer. She further testified that she does not smoke; her husband does smoke but never indoors because they have a small child. She stated that smoking in the residence is a total fabrication of evidence by the landlord.

The tenant's witness was the female tenant's mother who testified that the suite was not brand new prior to this tenancy. She pointed out that the advertisements on Craig's List provided by the landlord contain photographs with furniture in the unit, and none of the furniture belongs to the tenants.

The witness also testified that she was present and assisting the tenant during the move-out and she also asked the landlord for another half hour to complete the cleaning, and asked the landlord for a copy of the move-in condition inspection report. The landlord replied that it was none of her business.

The witness also testified that smoking in the unit was fabricated by the landlord; that no one smoked in the unit. She also stated that she personally cleaned the oven and the fridge. She also referred to the copy of the move-in condition inspection report and stated that the tenant's signature on the report is not her daughter's signature.

Analysis

In applying the *Residential Tenancy Act* to the facts in this matter, I find firstly that the tenants signed a fixed term tenancy agreement and moved out prior to the expiry of that fixed term. The tenants also are required under the *Act* to give one full month's notice before vacating a rental unit, which was not done. I find that the tenant has not established that the tenants were justified in breaking the agreement entered into by the parties. The landlord has provided evidence that she attempted to mitigate her loss by advertising the unit for rent immediately after receiving the tenants' notice, albeit for a higher amount of rent. The landlord was able to find a suitable tenant but only received \$500.00, being half of the advertised rent for the month of June, 2010. In the circumstances, I find that the tenant is obligated to pay \$400.00, which is the amount of loss that the landlord suffered.

With respect to the damages claimed by the landlord, I find that the landlord failed to comply with the *Residential Tenancy Act* by completing a move-in condition inspection report in the absence of the tenant. Whether or not the tenant is the person who actually signed the report is of little significance as it relates to the security deposit because the *Act* requires the tenant to be present, and in the landlord's own testimony, the tenant was not present when the report was completed.

Further, the landlord also has a responsibility to provide the tenant with at least 2 opportunities to conduct a move-out condition inspection report, and failing to do so will result in the landlord's right to claim against the security deposit being extinguished. I find that the landlord did not make any prior attempt to schedule a move-out condition inspection, did not complete a move-in condition inspection in accordance with the *Act*, and therefore, the landlord's right to claim against the security deposit is hereby extinguished.

With respect to the damages claimed by the landlord, I find that the tenant has established that the unit was not entirely new when she moved in. Contrary to the evidence of the landlord, the evidence in the advertisement clearly shows someone

else's furniture in the rental unit. Further, in order to be successful in a claim for damages, the onus is on the claiming party to satisfy a 4-part test for damages:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the opposing party's negligence or breach of the *Act* or the tenancy agreement;
3. The amount of the damage or loss;
4. What steps the claiming party took to mitigate, or reduce such damages or loss.

I find that the landlord has failed to establish that any steps were taken to mitigate the loss. If the tenants did smoke in the unit, the landlord ought to have noticed that well before May 17, 2010, which was her evidence. Further, I accept the evidence of the tenant and her witness that they did clean the rental unit, and the landlord would not provide them with the opportunity to complete the cleaning. The *Act* not only places the onus on the landlord to conduct the inspections, but the move-out condition inspection report is partially used to provide the tenant with a list of items that require attention prior to vacating in order to have the security deposit returned.

In regards to meeting element two of the test for damages, the landlord's position was that this damage was clearly committed by the tenants during the course of this tenancy. I find that this can only be established with clear 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. The landlord had submitted copy of the tenants' move-in inspection report. This document, according to the landlord, was left for the tenants' further comments and signature. However, I find that it was never signed nor returned by the tenant and as such the weight of this evidence is not consequential.

Conclusion

For the reasons set out above, the landlord's application for damage to the unit, site or property is hereby dismissed without leave to reapply.

The landlord's application for unpaid rent or utilities is hereby allowed at \$400.00.

The landlord's application to retain the security deposit has been extinguished however I order that the security deposit held by the landlord be off-set from the amount owed by the tenants. The landlord is also entitled to recovery of the \$50.00 filing fee, and I order that the landlord therefore retain the security deposit in the amount of \$450.00.

No further award for loss of rent or damages is awarded to 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: October 19, 2010.

Dispute Resolution Officer