Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNR, MNDC, MND, MNSD, FF

Introduction

This Dispute Resolution hearing was set to deal with an Application by the landlord for a monetary order for compensation for damages and cleaning and an order to keep the security deposit in partial satisfaction of the debt.

Both parties appeared and gave testimony.

Issue(s) to be Decided

The landlord was seeking a monetary order in compensation for cleaning and repairs to the suite. The issues to be determined based on the testimony and the evidence is whether the landlord is entitled to monetary compensation under section 67 of the *Act* for damages or loss of rent.

Background and Evidence

The landlord testified that the month-to-month tenancy began in October 2008 with rent set at $1,000.00 and a deposit of $500.00. No copy of the tenancy agreement was submitted into evidence and the landlord testified that no move-in inspection report was completed. The landlord testified that after receiving verbal notice to move from the tenant during April 2010, the landlord's insisted that the tenant submit written notice to vacate and this was done, with the end date effective May 31, 2010. The landlord stated that they both agreed that the landlord would try to re-rent the unit for mid-May if possible so that the tenant could avoid paying rent for the second half of the month of May. The landlord stated that it was evident through the tenant's actions and communications, that he had effectively vacated earlier than the date May 31, 2010 that was indicated in the written notice. The landlord stated that this presumption was based on the fact that the keys to the unit were surrendered and the tenant's furniture and possessions had already been removed. The landlord said that he also based this conclusion on the fact that the tenant had failed to show up for a pre-arranged meeting with the landlord to jointly clean and repair the unit. According to the landlord, during a telephone conversation the tenant implied that he was not going to return and stated

that they had cleaned as best they could. In addition to the above, because the landlord was unable to reach the tenant and there was no response to messages left, the landlord took this as a clear indication that the tenant had vacated the rental unit for good and had no plans to return to finish cleaning and restoring the unit. The landlord stated that this was the reason the landlord made the decision that he would embark on cleaning and repair work during the last two weeks of May 2010, instead of waiting until the end of the month, for the effective date of at which time the tenant's written Notice to End the tenancy would have been effective. The landlord believed that he was justified in holding the tenant liable for the cleaning and repair costs for damage left at the end of the tenancy.

The landlord testified that the tenant left the premises dirty with holes in the walls, smoke alarms removed, improperly installed racks, removed towel bars, paint splatter, evidence of smoking, cracked door frame and damaged doors, a ruined stove and a bucket of paint emptied in the middle of one rug. The landlord submitted a substantial amount of evidence to support the claims. The landlord testified that photos taken at the end of the tenancy show the serious damage caused by the tenant. These were submitted into evidence along with invoices for the labour and supplies.

The landlord was claiming a total of $3,548.37 for cleaning, painting, and repairs. This included installing a new carpet, a replacement stove, interior doors and frames, locksets and passage sets, paint purchased and cleaning supplies. Also included was a claim for compensation for filing, costs for preparing for the hearing, time and gas. As part of the above claim the landlord submitted an invoice for $898.49 for hydro, of which the tenant's portion was stated to be $449.25.

The landlord brought up the fact that he was accommodating enough to permit the tenant to share the unit with a second occupant, an allegation that was disputed by the tenant. However, the issue of whether or not the tenant had a partner living with him was a matter determined to be completely irrelevant to the tenancy agreement and to the proceedings before me.

The tenant's position was that his written Notice to End Tenancy was effective May 31, 2010 and therefore the tenant had until the end of May to clean and restore the rental unit. The tenant stated that he and a qualified tradesperson were in the process of doing minor repairs, painting and cleaning during the month of May 2010 in preparation for terminating the tenancy on May 31, 2010. However, according to the tenant, during this period the landlord began to bother and hound him by making repeated phone calls to his relatives and associates at their homes or places of employment. The tenant stated that early in June 2010, the landlord even appeared uninvited at the tenant's mother's home to drop off items that the tenant had allegedly left in the unit.

The tenant stated that, although he had freely given the landlord permission to show the unit to perspective renters during May 2010, it became evident that the landlord was entering the unit at will without notice for other purposes and had also allowed others, such as contractors, to access the unit as well.

In regards to the spilled paint, the tenant stated that during the process of repainting the unit, his helper had left a can of sealed paint, equipment and supplies in the locked unit and later the landlord had called to tell the tenant that the can of paint had been tipped over onto the rug. The tenant stated that this had apparently occurred in their absence. At the request of the landlord, the tenant had removed the damaged carpet and also removed the stove and discarded these items.

The tenant testified that when he and his helper returned closer to the end of May 2010 to complete the remainder of the move-out cleaning and repairs, they found that the landlord had apparently entered the unit without the tenant's permission and had completed cleaning and repairs without the tenant's knowledge or agreement. The tenant stated that at no time did he delegate these jobs to the landlord. The tenant stated that he also had never agreed to work jointly with the landlord on the clean-up and repairs, nor to compensate the landlord to do the work. The tenant's position was that he had intended to do the move-out restoration and he was unfairly deprived of that opportunity by the landlord. The tenant stated that the landlord's claim for compensation had no merit because the clean-up and repairs were done by the landlord without the tenant's agreement prior to the end of the tenancy.

The tenant testified that his objection to the utility bill of $449.25 for the period from March 4, 2010 to May 3, 2010 was based on the fact that this was a much higher bill than other utility charges in the past.

Analysis

In regards to the landlord's claim for payment of utilities, despite the lack of a written agreement, I find that both parties acknowledged that under the tenancy agreement the tenant would be responsible for 50% of the hydro and this has been the practice to date. The landlord's evidence verified that the utility company's invoice to the landlord was $898.49 from March 4 to May 3, 2010. Accordingly I find that the landlord is entitled to compensation of $449.25 for utilities.

Section 45 of the Act states that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that (a) is not earlier than one month after the date the landlord receives the notice, and (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement. I find that the evidence and testimony from both parties

verified that the tenant had ended the tenancy in a manner compliant with section 45 of the Act and had paid rent until the end of May 2010. I find that the tenant was legally entitled to possession until May 31, 2010.

While I have found that the tenant had a right to possession until the end of May 2010, the question is whether the tenant clearly willingly relinquished that right giving the landlord possession at an earlier date. I find it evident that the landlord's actions were based on a genuine belief that this had occurred.

However, I find that when ambiguity exists, then it is incumbent upon the landlord seeking to take possession to ensure that this is done only after being given clear and verifiable direction from the person who carries the legal right of possession at the time. Whether or not the tenant's actions seemingly implied that he was giving up possession, including surrendering the keys and failing to respond to the landlord, the tenant gave direct testimony at the hearing disputing that he had ever intended to relinquish his right of possession to the landlord.

I find that the landlord's presumption that the tenant had willingly relinquished possession earlier than the date specified in his written notice, was not supported by the evidence. I find that there was a valid written notice served to end the tenancy on May 31, 2010 and for that date to be revised, it would require agreement by both parties and be in writing not through implication. Based on the above, I find that the effective date for the termination of this tenancy was May 31, 2010.

Given the evidence before me, I find that the landlord had acted prematurely in completing the cleaning and repairs and is therefore not entitled to be compensated for the materials and labour for the work performed.

In regards to the claims by the landlord for the replacement of the paint-damaged carpet and the stove, section 7(a) of the Act permits one party to claim compensation from the other for costs that result from a failure to comply with this Act, the regulations or their tenancy agreement. Section 67 of the Act grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant. It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify 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

In the case before me, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally the landlord must prove that it did whatever was reasonable to mitigate the damage or loss that was incurred.

Section 32 of the Act requires that a tenant maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and other residential property to which the tenant has access and that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant, except for any damage from reasonable wear and tear. In this instance the landlord found it necessary to replace the carpet at a cost of $223.10 for materials plus $60.00 for installation and to purchase another used stove at a cost of $200.00.

I find that the carpet was clearly ruined by spilled paint and had to be replaced and I accept that the landlord incurred the expenses as claimed satisfying elements 1 and 3 of the test for damages. However, to satisfy element 2 of the test, it must be determined whether the landlord had sufficiently proven that this damage was perpetrated by the tenant, as being alleged. I find that the landlord's verbal testimony about the alleged cause was rebutted by the tenant, who denied any involvement in the paint spill. I find that both parties had accessed the unit during the period in question.

It is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party carries the added burden of proof. In other words, the applicant, in this case the landlord, has the onus of proving during these proceedings, that the compensation being claimed as damages is justified under the Act.

I find that each party offered verbal testimony that the other had likely caused the spill and neither could provide independent evidence to prove what had actually occurred.

I find it is not necessary to determine which side is more credible or which set of “facts” is more believable because the claimant in this case, that being the landlord, has not succeeded in sufficiently proving that all elements in the test for damages were satisfied by establishing that the tenant was responsible for the spill. Since the burden of proof has not been adequately met, I find that the landlord’s application and monetary claim for the replacement of the carpet must be dismissed.

In regards to the stove, I find that the responsibility to maintain and repair appliances falls to the landlord. That being said, under section 37 the tenant would be required to leave the appliance in a reasonably clean state at the end of the tenancy. In this case, I find that the landlord made a decision to discard the appliance without first attempting to mitigate the loss by exploring the possibility that it could possibly be repaired and allowing the tenant to clean it. In this respect I find that element 4 in the test for damages has not been sufficiently met by the landlord and the claim for the stove replacement must be dismissed.

Section 72 of the Act permits a dispute resolution officer to order reimbursement of the fee paid for filing an application. However the landlord also requested reimbursement for other costs involved in preparing and attending the hearing. I find that expenditures of this nature would be considered business costs and I dismiss this portion of the application as not falling under a provision of the Act.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to total monetary compensation in the amount of $499.25 comprised of $449.25 owed for utilities and the $50.00 fee paid by the landlord to file this application. I order that the landlord retain the tenant’s security deposit and interest of $504.41in full satisfaction of the claim leaving a balance due to the tenant of $5.16. Given that the amount is under ten dollars, I decline to issue a monetary order for this balance with the expectation that the landlord will refund this amount forthwith.

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: December 2010.

Dispute Resolution Officer