Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes Landlord: MND, MNSD, MNDC, MNR, FF
Tenant: 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 November 2, 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.

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.

Issue(s) to be Decided

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

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

Background and Evidence

Tenant HS completed her testimony at the first hearing and in conclusion of the Tenant's presentation, Tenant LR gave affirmed testimony on relevant point, in short summary form, that the Tenants were not given an opportunity for a move-out inspection and never received a copy of the inspection report until receiving a copy of the Landlord's Application, which was sent only to Tenant HS.

The Landlord gave relevant testimony which included affirmed testimony that she never informed the Tenants that the home was being repossessed, but that rather a lien was

placed on the home by Canada Revenue, which she explained means only that the lien would have to be paid off when selling the home. She further explained that when she called her mortgage company to find out where she stood with the selling price of the home, this caused the representative from the mortgage company to come to the home.

The Landlord disputed the Tenants' testimony regarding the representative stating the bank was repossessing the house, stating that this representative would not disclose private information. Upon inquiry, the Landlord stated that she did not know if the inspector/appraiser was from the mortgage company or Revenue Canada.

The Landlord testified that she was uncertain if she would have to sell her home, so she informed the Tenants in May 2010 she would not renew the lease, which expired at the end of September 2010. The Landlord testified that she told the Tenants on numerous occasions that there was no rush to find another place to move as they had until the end of September to move out.

The Landlord acknowledged that the Tenants informed her five to six days before the end of July 2010 they would be moving at the end of the month, to which she replied that was not enough notice and that she required a month's notice.

The Landlord testified that Tenant HS asked if they could have a few extra days to move out, and by August 9 when she had not heard from them, she went over and saw the Tenants' belongings still in the rental unit.

The Landlord testified that she went to the rental unit on August 10 to take the pictures and that the Tenants moved out on August 10, 11, or 12. She testified that she did try to arrange a move out inspection time with the Tenants, but was unable to arrange an agreeable time and performed the inspection in their absence.

The Landlord testified that she learned of the Tenants' forwarding address on August 28, 2010, when she picked up her mail and has not refunded the security deposit.

The Landlord testified that she has made no attempts to re-rent the rental unit so that no one else would be said to have caused the damage and it is due to be sold in December 2010.

As to the amount claimed for damages and monetary compensation for lost rent, when queried, the Landlord stated the $400.00 for carpet damage was from her estimate received from Home Depot, that the $600.00 was for yard maintenance based on her son-in-law doing the work at $25.00 per hour, that the $3,600.00 was for lost rent in

August and September and that the $100.00 was for 2 gallons of paint, at $50.00 per can.

In rebuttal of the Landlord's testimony, Tenant PS stated that the appraiser/inspector did come to their rental unit, she directed him downstairs where the Landlord lived and that she heard them arguing. Tenant PS reiterated that the appraiser/inspector told them, the Tenants, they should move.

Tenant PS denied receiving a phone call or voice mail from the Landlord regarding a move out inspection date.

Analysis

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

Awards for compensation are provided under sections 7 and 67 of the Act. In order to be successful in obtaining an award for compensation, it is not enough to allege a violation of the Act, regulations or tenancy agreement by the other party. Rather, the applicant, in this case ***both*** parties, must establish all of the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation of the other party has caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

In addressing the Tenant's Application as follows:

Security Deposit, doubled:

The Tenants' claim is for $2,580.00 which is the amount paid for a security deposit, $900.00, and utility deposit, $390.00, doubled.

In this case the testimony of the Tenants is that they provided the Landlord a forwarding address by regular mail on August 12, 2010, however, the evidence supports that the Tenants provided the Landlord with their forwarding address by regular mail on August 14, 2010, to the address at which the Landlord resides. Sec. 90 of the Act deems documents delivered in this manner are served five days later, making the effective

service date August 19, 2010, irrespective of the Landlord's testimony that she did not pick up her mail until August 28, 2010.

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 deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit. In this case the Landlord was required to return the Tenants' security deposit in full or file for dispute resolution no later than September 3, 2010.

Based on the above, I find that the Landlord 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 Tenants have succeeded in proving the test for damage or loss as listed above and I approve their claim for the return of their security deposit.

In addressing the Tenants' claim for double the utility deposit, I find the Landlord's collecting of a utility deposit at the beginning of the tenancy to contravene Sec. 17 and 20 of the Act as to allowable deposits. Therefore I am not allowed under the Act to double the utility deposit of $390.00. Further, I find that the Landlord's expectation that a tenant be responsible for splitting the cost of hydro, phone, internet and natural gas consumed in a separate self contained suite with other tenants of the premises to be an unconscionable term. Nonetheless I find that the Tenants were obligated to pay for 2/3 of the utility bills by the terms of the agreement.

The Landlord submitted documentary proof of phone, hydro and natural gas bills for July and a portion of August, totalling $399.88, of which the Tenants were responsible for 2/3, or $266.32. I find the Tenants are entitled to a return of **$123.68** from the security deposit of $390.00. I find the Landlord submitted insufficient proof of the internet bill and have disallowed her claim for $39.20.

I find that the Tenants have succeeded in part with their application; therefore I award recovery of a portion of the filing fee in the amount of **$25.00**.

I find the Tenants established a monetary claim for **$1,948.68**, comprised of $1,800.00 for double the security deposit, $123.68 for the unused portion of the utility deposit and $25.00 filing fee.

Landlord's Application:

Section 35 (3) and (4) of the Act requires a landlord complete a move-out 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 did not give the Tenants a copy of the Condition Inspection Report when she learned of the Tenants' forwarding address. 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 compensation or damages allegedly caused by the Tenants.

Damage to carpet in the den-The Landlord testified that she arrived at this figure by checking at a Home Depot for a replacement. The Landlord did not submit a receipt or invoice for carpet repair. Therefore I find the Landlord submitted insufficient proof to meet steps 2 and 3 of the required elements for proving a claim for monetary compensation and I **dismiss** her claim for $400.00.

Yard Maintenance – The Landlord supplied some photos of the yard, but submitted no documentary proof of the costs of rehabilitating the yard in support of this claim. I find the Landlord submitted insufficient proof to meet steps 2 and 3 of the required elements for proving a claim for monetary compensation and I **dismiss** her claim for $600.00.

Paint Touch-up- The Landlord testified that she arrived at the amount claimed by doubling the cost of one can of paint, but submitted no documentary proof in support of this claim. I find the Landlord submitted insufficient proof to meet steps 2 and 3 of the required elements for proving a claim for monetary compensation and I **dismiss** her claim for $100.00.

Rent for August and September- There was disputed verbal testimony as to when the Tenants vacated the rental unit, but with a balance of probabilities I find that the Tenants vacated by August 10, 2010, the date the Landlord performed a move out inspection. I make no finding as to whether or not the Landlord offered the Tenants at least 2 opportunities for a move out inspection as this was not a factor in my decision.

The Landlord's claim for the remaining two months of the fixed term tenancy is for $3,600.00 and I find the Landlord did not take any steps to mitigate her loss by attempting to re-rent the rental unit when she learned the Tenants were ending the tenancy early. The Landlord testified that as of the day of the hearing she had made no attempts to re-rent and that the home was being sold in December 2010. Based on the

Landlord's failure to mitigate her damages as required in step 4, I find that the Landlord has not proven the test for damage and loss and I hereby **dismiss** her claim in the amount of $3,600.00.

Over holding- I find the Tenants vacated the rental unit on or before August 10, 2010, ten days beyond the date told to the Landlord and were therefore over holding in the rental unit. I find the Landlord is entitled to unpaid, prorated rent for days of occupancy in the amount of **$600.00.** ($1,800.00 rent ÷ 30 day month=$60.00 per day x 10 days).

I find that the Landlord succeeded in part with her application; therefore I award recovery of a portion of the filing fee in the amount of **$25.00**.

I find the Landlord established a monetary claim for **$625.00**, comprised of $600.00 for over holding and $25.00 filing fee.

The Landlord may deduct **$625.00** from the **$1,948.68 of the Tenants' monetary claim awarded**, and must return the balance of **$1,323.68** to the Tenants. Pursuant to the policy guideline, I have provided the Tenants with a monetary order in these terms. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion:

The Landlord has established a monetary claim of $625.00.

The Tenants have established a monetary claim of $1,948.68 and are granted a monetary order for the balance after Landlord's deduction in the amount of $1,323.68.

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 6, 2010.

Dispute Resolution Officer