

DECISION

Dispute Codes MNDC, MNSD, MNR, FF

Introduction

This hearing dealt with applications from the landlord and the tenants pursuant to the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenants applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord testified that she handed a copy of her original dispute resolution hearing package to the tenants on October 19, 2010. She said that she sent an amended copy of this package to the tenants by registered mail on January 28, 2011. This amended package increased the amount of the monetary award she was seeking to \$2,300.00. The tenants confirmed that they received both of these packages from the landlord. The tenants testified that they sent the landlord a copy of their dispute resolution hearing package by registered mail on October 21, 2010. The landlord confirmed receiving this package. I am satisfied that the parties served one another with their dispute resolution hearing packages in accordance with the *Act*.

Both parties said that they submitted written evidence to the Residential Tenancy Branch (RTB) with their original applications. Other than their dispute resolution application forms, the only written evidence received from either party by the RTB was a three-page submission and photograph from the landlord. These included letters from those who witnessed the condition of the rental unit at various times before, during and after this tenancy. The tenants testified that they did not receive copies of any written evidence from the landlord. The landlord said that she had not sent any written evidence to the tenants because she attended the RTB offices and was told that the RTB would send copies of her evidence to the tenants. The Notice of a Dispute Resolution Hearing sent to both parties included the following information regarding the provision of evidence to one another.

...Before the hearing date, both the Applicant and Respondent must give each other, and the Residential Tenancy Branch, a copy of all their evidence. The deadlines for evidence are in the attached hearing package.

I find it highly unlikely that any RTB official would have told the landlord that the RTB would send a copy of the landlord's evidence to the tenants. At the hearing, I advised the parties that I would not be considering the three pages of written evidence and photograph submitted by the landlord in reaching my decision. However, I said that I was willing to consider oral testimony from either of the parties or their witnesses with respect to these letters and photograph. At the landlord's request, we were able to connect with one of the authors of the letters who provided his oral testimony regarding the condition of the rental unit shortly after this tenancy ended.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent or compensation for damage or loss arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenants? Are the tenants entitled to a monetary award for loss arising out of this tenancy or for a return of their security deposit?

Background and Evidence

The parties agreed that the tenants moved into the rental unit on or about July 21, 2010. The landlord testified that this was a six-month fixed term tenancy that was to expire on January 21, 2011. The tenants said that this was not a fixed term tenancy as they refused to sign a fixed term tenancy agreement when they realized that the premises were not as the landlord had advertised.

Monthly rent was set at \$1,200.00, normally payable on the first of the month. However, the tenants paid their first three month's rent in advance. The tenants vacated this rental unit and ended this tenancy by October 1, 2010. The landlord did not conduct a joint move-in condition inspection with the tenants when this tenancy began.

Although the tenants requested a joint move-out condition inspection and made arrangements with the landlord to do so on October 1, 2010, the landlord said that she and her husband both had other pressing matters they needed to attend to that day and could not conduct a joint move-out inspection with the tenants. The tenants said that they asked for this move-out inspection a number of times, but the landlord refused to participate in this joint inspection with them. The landlord said that she conducted her own inspection of the rental unit after the tenants left and advised them that there was considerable damage that needed repair. The landlord confirmed that she did not prepare a condition inspection report.

The landlord's amended application for a monetary award of \$2,300.00 included the following:

Item	Amount
Loss of Rent for ½ of October 2010	\$600.00
Damage to Oven Hood	450.00
Installation	100.00
Fixing (Painting) Cabinet	150.00
Painting Ceiling	1,000.00
Total Monetary Award Requested by Landlord	\$2,300.00

The landlord said that although she advertised the rental unit on Craigslist in September 2010, she was unable to find anyone who would rent the premises until October 15, 2010. She asked for reimbursement of her loss of one-half month's rent. The remainder of her application for a monetary award was for the estimated cost of repairing damage caused by the tenants to the kitchen. She said that there was a small fire in the tenant's kitchen which badly damaged the oven hood, the stove, a kitchen cabinet and the ceiling above the stove. She said that she and her husband cleaned this portion of the rental unit prior to the commencement of the new tenancy on October 15, 2010. She said that they have not repaired the damage to the rental unit.

The tenants testified that they gave written notice of their forwarding address to the landlord three days after they vacated the rental unit. They did not enter a copy of this notice into written evidence. The landlord said that she did not receive a written notice of the tenant's forwarding address. However, the male tenant noted that the forwarding address given to the landlord was the same address cited in the landlord's October 18, 2010 application for dispute resolution. The tenants applied for a monetary award of \$1,200.00 for the return of their security deposit and \$300.00 for interest and the inconvenience they had encountered in having to apply for dispute resolution in order to obtain a return of their security deposit.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must 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 other party.

Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

In addition to the manner and tone (demeanour) of the evidence provided by the parties and the landlord's witness, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

Both tenants' demeanour during the hearing has convinced me of their credibility. They presented their evidence clearly and consistently, answering all questions asked in a calm and candid manner, and never wavered in their version of what happened. The male tenant also made some important admissions, including the fact that the tenants refused to sign a tenancy agreement once they saw the condition of the rental unit.

The landlord's evidence, on the other hand, lacked credibility. She made a number of changes in her oral testimony regarding the circumstances surrounding the Residential Tenancy Agreement (the Agreement) she claimed to have entered into with the tenants and whether she had entered this Agreement into written evidence with the RTB. I also find her claim that RTB staff told her that the RTB would look after sending copies of written evidence to the tenants lacks credibility. During the course of the hearing, she kept adding details to her oral testimony which led to a different understanding of her claim. For example, it was not until relatively late in this hearing that she clarified that none of the work in her list of repairs had actually occurred. I also note that since she first completed her original monetary claim she increased the amount of her monetary claim from \$700.00 to \$1,300.00 and finally to \$2,300.00. Although her husband, who is a co-landlord and co-applicant in this matter, was present during the hearing, she said that he did not wish to present any oral testimony.

Landlord's Application – Damage to Rental Unit

The landlord's failure to conduct a joint move-in condition inspection as required under section 23 of the *Act* and to attend the scheduled joint move-out condition inspection pursuant to section 35 of the *Act* renders it difficult to assess whether the damage claimed by the landlord arose during this tenancy. Although the landlord's witness said that the oven hood and the areas of the kitchen around the stove "looked absolutely horrible," this witness would not be able to comment on whether this damage was caused by the tenants or pre-dated their tenancy. The tenants testified that the rental unit was in poor condition when they moved in except for the floor.

The landlord provided no receipts, invoices or written estimates to support this claim. The landlord's admission that she was able to rent the unit to someone else without any major repairs also affects my assessment of the credibility of the landlord's claim.

Subsections 24(2) and 36(2) of the *Act* extinguish the landlord's right to claim against the tenants' security deposit when the landlord has not complied with the requirements of sections 23 and 35 respectively. Without the required joint move-in condition inspection report and admissible evidence from anyone other than the landlord and her husband regarding the condition of the premises before this tenancy, I find that the landlord has not met the burden of proof required to entitle the landlord to a monetary award for damage to the rental unit.

I also find that even if the damage claimed by the landlords were accepted, the landlord has not provided evidence to verify that any money was spent by the landlord to repair the claimed damage. The landlord's only evidence in this regard was that she was able to rent the premises to another tenant within two weeks of the end of this tenancy, although at a reduced rent of \$1,000.00 per month. She provided nothing in writing to verify the circumstances of this new tenancy or her efforts to advertise for new tenants to mitigate the tenants' potential losses. Given that the tenants rented the premises without inspecting the rental unit because they lived abroad, I am not satisfied that the reduction in rent results from damage caused by the tenants. Rather, it seems more probable than not that the \$1,000.00 rental obtained by the landlords from their new tenants reflects market conditions for informed tenants who were able to inspect the premises beforehand.

Landlord's Application for Loss of Rent Arising from this Tenancy

No Residential Tenancy Agreement was entered into written evidence and the parties agreed that none was signed. The landlord initially testified that she had provided a copy of the fixed term tenancy agreement to the RTB as part of her initial application for dispute resolution. Later in the hearing, she said that the tenants refused to sign that

agreement. She also corrected her earlier testimony when she said that she had sent the RTB copies of the emails she exchanged with the tenants which proved that they rented the premises on the basis of a six-month fixed term tenancy. She referred to these emails as her fixed term tenancy agreement with the tenants.

As noted above, the RTB has no record of receiving any written evidence from the landlord except for three short letters and photograph referred to earlier in this decision. I find the landlord's changing testimony on this point again speaks to issues of credibility regarding the landlord's evidence. I find the sworn testimony of both tenants on this point was consistent and credible. They spoke plainly and did not vary from their assertion that this was not a fixed term tenancy. I am not satisfied that the landlord has demonstrated to the extent necessary that she had a six-month fixed term tenancy agreement with the tenants. I dismiss the landlord's claim for recovery of one half month's lost rent for October 2010.

Tenants' Application for Return of Security Deposit

I find that the tenants are entitled to a return of their \$1,200.00 security deposit plus interest. No interest is payable over this period.

During the hearing, the male tenant asked for consideration of return of twice the security deposit because the landlord has failed to return their security deposit within 15 days. Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the deposit (section 38(6) of the *Act*).

With respect to the return of the security deposit the triggering event is the provision by the tenant of the forwarding address. In this case, the tenants testified that they provided the landlord with their forwarding address in writing three days after they vacated the rental unit on October 1, 2010. The tenants provided no copy of their provision of their forwarding address in writing to the landlord. The landlord said that she never received this written notice of the tenants' forwarding address in writing. On this point, I find the evidence of the tenants more credible than that of the landlord given that the landlord correctly identified the tenants' forwarding address in the landlord's October 18, 2010 application for dispute resolution.

The landlord did submit an application for dispute resolution within 15 days of the tenants' provision of their forwarding address to the landlord in writing. The landlord's

application did not specifically apply for authorization to retain the tenants' security deposit. However, the landlord's application is not clear on this point as it appears that the landlord either attempted to add or remove an application for retention of the tenants' security deposit. The effect of the landlord's application for a monetary award for unpaid rent and damage or loss arising out of this tenancy would be to obtain a monetary award to be offset against the tenants' security deposit the landlord was holding. Most of the items listed in the Details of the Dispute in the landlord's application identify damage that the landlord claimed arose from this tenancy and would apply to the security deposit.

Under these circumstances, I find insufficient evidence to find that the tenant is entitled to a monetary award for double the security deposit pursuant to section 38(6) of the *Act*. I find that the landlord's application for dispute resolution was unclear to the extent that it appears that the landlord intended to recover the monetary award sought from the tenants' security deposit.

Conclusion

I dismiss all elements of the landlord's application for a monetary award. Since the landlord was not successful in this application, the landlord bears the costs of the filing fee for the landlord's application.

I issue a monetary Order in the tenants' favour in the amount of \$1,200.00 which requires the landlord to return the tenants' security deposit forthwith.

The tenant is provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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*.