Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR MNDC MNSD FF O

Introduction

This hearing dealt with applications by the tenant and the landlord. The tenant applied for monetary compensation and double recovery of the security deposit. The landlord applied for monetary compensation.

The teleconference hearing convened on two dates, May 18, 2011 and July 19, 2011. On both dates, the tenant, counsel for the tenant, the landlord, an agent for the landlord and counsel for landlord participated in the hearing. On May 18, 2011, one witness for the tenant appeared and gave testimony. On July 19, 2011 three further witnesses for the tenant and one witness for the landlord appeared and gave testimony. The evidence portion of the hearing was concluded on July 19, 2011.

The parties provided written submissions on July 26, 2011 and further written responses on August 4, 2011.

The landlord withdrew the portion of their claim regarding a $500 fee charged by the landlord's agent for the agent's involvement in this dispute resolution proceeding. I therefore dismiss that portion of the landlord's application.

Issue(s) to be Decided

Is the tenant entitled to monetary compensation as claimed?
Is the tenant entitled to double recovery of the security deposit?
Is the landlord entitled to monetary compensation as claimed?

Background and Evidence

The tenancy began on December 1, 2010 as a one-year fixed-term tenancy, with monthly rent in the amount of $1400. On November 5, 2010 the tenant paid the landlord a security deposit of $700.

On December 1, 2010, an agent for the tenant and an agent for the landlord carried out a move-in inspection and signed the condition inspection report. There is no reference on the inspection report to any odour in the rental unit.

On January 10, 2011 the tenant gave the landlord written notice that she had already moved out and was terminating her lease due to the unliveable condition of the unit. The tenant also provided a written forwarding address and requested return of her security deposit.

On January 31, 2011 the tenant returned the keys and fobs to the landlord. On February 3, 2011 the tenant and the landlord's agent TM carried out a move-out inspection and signed the condition inspection report. There is no reference on the move-out inspection report to any odour in the unit. There is a notation regarding "small holes from cabinets" in the living room.

The unit was re-rented to new tenants beginning February 14, 2011. The landlord applied for monetary compensation on February 17, 2011, but he did not apply to keep the security deposit in partial compensation of the monetary claim.

The evidence of the tenant was as follows.

The tenant's agent, VR, testified that when she attended at the rental unit on December 1, 2010 to carry out the move-in inspection, she noticed a "horrendous, foul, overpowering smell like a dead body or animal rotting." VR testified that she has specialized in rentals for the past 16 years and she never signs the reports because she is aware of their importance. VR acknowledged that she signed the move-in inspection report in this case but did not really know what was on the report, she only signed it so that she could receive the keys from the landlord's agent. The tenant testified that VR told her about the smell, but the tenant did not contact the landlord about it because she understood that there would be cleaning and painting done.

The tenant's friend, JH, testified that she attended at the rental unit on December 7, 2010 to let the movers into the condo. She was there for one hour, and she did not notice anything or turn on the heat. VR also attended the rental unit on that date, but

she did not provide testimony regarding an observation of any odour or absence of odour at that time.

The tenant first arrived at the rental unit on December 27, 2010, and she noticed a strange odour in the unit. The tenant returned to her hotel and did not return to the rental unit until December 29, 2010. The smell was still there at that time. The tenant returned to the unit again on December 30, 2010, with her friend PY. The tenant and PY noticed the odour in the rental unit, and it became more prominent when PY turned on the heat. The tenant and PY returned to the unit again on December 31, 2010 and put some cheese and beverages in the fridge. PY testified that the smell appeared to be the kitchen area and would come and go, and it was more noticeable and moved into the living room area when the heat was on. PY described the smell as an "unbearable odour" that he thought was "a dead animal." The tenant testified that she attempted to call the landlord that day to report the smell, but no one was there because of the holidays.

By January 2, 2011, the tenant began to feel ill and suffer headaches because of the odour. On January 4, 2011, a friend of the tenant, AB, attended at the rental unit to assist the tenant in assembling furniture. AB used an electric screwdriver to drill holes in the wall and insert drywall screws to attach some shelves. AB testified that there was a quite intense smell in the rental unit that was "damp, rotten, very intense, like a decaying smell," and that it was most intense in the kitchen/dining room area. AB thought the smell was not coming from the fridge, but rather from the middle of the kitchen, near the floor.

On January 4, 2011 the tenant provided the property manager with a list of deficiencies in the rental unit, including a "smell from fridge." On January 5, 2011 the landlord's agent TM attended at the rental unit and then an appliance technician inspected the fridge but could not locate the source of the smell.

On January 6, 2011 the police attended at the rental unit to investigate the odour. The tenant and her friend JH were present. JH testified that the smell on that date was "a nauseating smell that would give you a headache." The resulting police dispatch report indicates that the attending officers could not locate the source of the smell, but they observed an odour emanating from the refrigerator. Immediately after the police attended, the tenant advised the property manager that due to the ongoing odour and its negative effect on her health, she was going to move into a hotel. The tenant then moved into a hotel.

On January 7, 2011 the fridge technician returned to the rental unit to re-inspect the fridge and carry out an in-depth cleaning of the fridge.

On January 8, 2011 the landlord and the tenant met at the rental unit. The tenant noted that the odour persisted, and she verbally advised the landlord that she was moving out of the rental unit.

On January 10, 2011 the tenant gave the landlord written notice that she had already moved out and was terminating her lease due to the unliveable condition of the unit. The tenant also provided a written forwarding address and requested return of her security deposit.

On January 21, 2011 the tenant attended at the rental unit to have her personal belongings removed and put into storage. The tenant still smelled the odour in the condo.

The tenant left her car in the rental unit's parking until January 23, 2011, when it came to her attention that her car had been vandalized. The tenant then moved her car to the hotel parking for January 23 and 24, 2011.

The tenant returned her keys and fobs to the property manager on January 31, 2011. On February 3, 2011 the tenant and the landlord's agent TM attended at the rental unit to conduct the move-out inspection. The landlord had advised the tenant not to worry about the holes in the walls. The tenant did not agree that the landlord could keep any part of the security deposit.

The tenant's position was that she was not satisfied that the refrigerator was the cause of the odour, and she did not believe that the landlord was taking adequate steps to resolve the problem. The landlord did not maintain the rental unit in a liveable condition and by this failure he breached the Residential Tenancy Act and the tenancy agreement. Therefore the tenant was forced to move out and terminate the lease, and she has claimed compensation for her costs incurred as a result of the terminated tenancy.

The tenant has claimed the following monetary amounts:

1) $172.99 for 25 percent of meal expenses January 6, 2011 to February 1, 2011 – the tenant was forced to leave the rental unit because of the smell. The tenant's

insurance reimbursed the tenant for 75 percent of her meal costs, and she is claiming for the remaining 25 percent of those costs.

2) $2800 for return of rent for December 2010 and January 2011 – the tenant derived no benefit from the rental unit and seeks return of her rent for those months.
3) $99.25 for parking and transportation for January 23 and 24, 2011, when the tenant had to move her car to the hotel parking and she incurred this amount for parking and alternate transportation.
4) $789.87 for the replacement cost of a chaise – due to the odour in the rental unit, the tenant had to have her furniture professionally cleaned. When cleaners attempted to clean the tenant's chaise, it became irreparably damaged.
5) $200 for move-in and move-out fees that the tenant paid to the strata when moving into and out of the rental unit.
6) $500 for the insurance deductable that was deducted from the tenant's insurance claim for her total insurance claim for hotel, meals and cleaning costs.
7) $2,497.93 for the costs the tenant incurred to move and store her personal belongings while she sought new accommodations.
8) $1400 for double recovery of the security deposit – the tenant gave the landlord her written forwarding address and did not give the landlord permission to retain any of the security deposit. The landlord did not apply to keep the security deposit.

The evidence of the landlord was as follows.

On December 1, 2010, the tenant's agent VR and the landlord's agent TM met at the rental unit to carry out the move-in inspection. (TM's experience) TM testified that the move-in inspection was very thorough and took more than one hour to complete. VR checked everything, and TM marked it down on the inspection report. TM and VR notice a curry smell in the kitchen, but TM did not recall VR mentioning any other smell in the unit at that time. TM told VR that the suite would be painted and cleaned, and the tenant would have two weeks to report any deficiencies. TM and VR signed the move-in inspection report.

A painter, CR, testified that he painted the rental unit between December 3 and 5, 2010. He also would have attended the unit a few days before painting to view the unit. CR did not recall any smells or odours in the unit during any of the time he attended at the unit. He did not move or open the fridge while he was there, and he did not recall whether he turned the heat on.

On December 10, 2010 a cleaning crew attended at the rental unit to conduct cleaning. The landlord submitted an email from the cleaner dated January 25, 2011 in which the cleaner indicated that none of the cleaning crew detected any smell while they were cleaning on December 10, 2010, and if there was a smell they would have reported it to the property manager at that time.

The property manager did not receive any calls on the 24 hour emergency line that is available to tenants during the holidays.

The tenant first contacted the property manager about the smell on January 3, 2011. TM then arranged for the fridge technician to attend at the rental unit.

On January 5, 2011 TM attended at the rental unit. She noticed an unpleasant smell in the rental unit, which became more noticeable in the kitchen. The appliance technician inspected the fridge but was not convinced that the smell was coming from the fridge.

TM then contacted the police to confirm that no one had died in any of the surrounding units. On January 6, 2011 the police attended at the rental unit to investigate the odour.

On January 7, 2011 the landlord, TM and an appliance technician met at the rental unit. TM noticed a faint smell that got stronger when the fridge was opened. TM noticed there was some smelly cheese in the fridge. The landlord testified that there was an obvious smell of bad milk that was coming from the fridge. The technician took apart and cleaned the refrigerator, and TM put the cheese in packages.

On January 8, 2011 the landlord and the tenant met at the rental unit. The landlord's testimony was that the only smell he detected at first was the smell of cleaning products, but when the fridge was opened there was still the obvious smell of bad milk. The landlord offered to replace the fridge, but the tenant was convinced that the fridge was not the problem and thought that there was a dead animal in the walls. The tenant told the landlord that she couldn't stay in the rental unit, and she wanted out of the lease. The landlord replied that he could not commit to allowing the tenant out of the lease.

The landlord also testified that he did not ever see the holes that the tenant put in the walls for the cabinet, but he saw the brackets and screws. The landlord testified that he told the tenant she would be responsible for the costs if repairs were required for the holes in the wall.

On January 17, 2011 the landlord replaced the refrigerator. There was no further smell in the rental unit after the refrigerator was replaced. The tenant refused to move back in, and on January 21, 2011 the tenant removed her belongings from the unit.

On February 3, 2011 TM and the tenant conducted the move-out inspection. There was no odour in the rental unit on that date, and no odour was noted on the inspection report. The holes in the walls were noted on the inspection report. During the inspection, the tenant stated that she refused to pay for repair to the holes out of her security deposit. TM told the tenant that she would have to speak to the landlord. The holes in the walls were large and required repair.

The landlord re-rented the unit beginning February 14, 2011.

The landlord's position was that as the odour was not present until the tenant moved in, the tenant must be responsible for causing the odour. The tenant is therefore responsible for costs the landlord incurred to deal with the odour. Furthermore, the tenant chose to break the lease, and she is therefore responsible for all costs associated with breaking the lease.

The landlord has claimed the following monetary amounts:

1) $178.75 for the refrigerator technician's bill
2) $1136.17 for the replacement cost of the refrigerator
3) $280 for the cost of repairing the holes in the wall of the rental unit
4) $812 for the re-rental fee paid by the landlord to the property management company for re-renting the unit.
5) $700 for lost revenue for February 1 to 13, 2011.

Submissions

The tenant's submissions in response to the landlord's claim were as follows.

The tenant was not responsible for the odour and is therefore not responsible for the costs claimed for the servicing and replacement of the refrigerator. It is not possible for the groceries bought by the tenant on December 31, 2010 to have permanently damaged the refrigerator by January 6, 2011.

The landlord advised the tenant not to worry about the holes in the walls and therefore the tenant should not be responsible for repair of the holes in the walls.

The landlord was in breach of the tenancy agreement by failing to maintain the rental unit in a liveable condition, and therefore the landlord is not entitled to lost revenue or the re-rental fee. In the alternative, if the tenant breached the tenancy agreement by terminating it prior to the end of the lease, the landlord is only entitled to lost revenue for the first half of February 2011 and the costs incurred to re-let the apartment.

The landlord's submissions in response to the tenant's claim were as follows.

The tenant caused the odour in the rental unit and therefore she is not entitled to any monetary amounts she has claimed. In the alternative, if the odour was not caused by any actions or neglect of the tenant, then the landlord took immediate steps to address the odour as soon as they were aware of the problem. The tenant did not have cause to terminate the lease. The tenant chose not to call the property manager's emergency number to report the odour, which demonstrates that the tenant did not believe the odour was serious enough to warrant an emergency. Further, the tenant did not provide any medical evidence to support her claim that the odour was causing her to suffer headaches beginning on January 2, 2011.

The tenant was certainly not required to stay in a hotel and incur food and transportation expenses after January 17, 2011, once the refrigerator had been replaced. The tenant would have had to have paid for meals regardless of whether she was in the rental unit or not, so reimbursement of 25 percent of the tenant's meal costs would result in a windfall for the tenant.

The landlord is not liable for furniture destroyed by a third party cleaner, as this would ignore the legal principles of proximity and foreseeability.

The tenant is not entitled to move-in/move-out fees, as she would have incurred these amounts in any event.

The tenant's moving and storage fees resulted from the tenant's decision to terminate the lease and are not recoverable against the landlord.

The tenant is not entitled to recovery of her insurance deductible, as payment of the deductible would result in a windfall to the tenant. The tenant's insurer already paid for 100 percent of the tenant's hotel costs for January 6 to February 1, 2011, as well as reimbursement of 75 percent of her meals.

The tenant is not entitled to double recovery of her security deposit for the following reasons:

a) The tenant gave her written notice to end tenancy on January 10, 2011; therefore, under section 45 of the Act, the tenancy ended on February 28, 2011. The landlord applied for dispute resolution on February 17, 2011, and he therefore made his application well within the statutory deadline.
b) Although the landlord did not tick off the specific box on his application to indicate that he was claiming against the security deposit, the landlord clearly was, and is, claiming against the security deposit.
c) the tenant was aware at the time of the move-out inspection that the landlord was claiming for damages in regard to the holes in the walls, and that this claim was connected to the security deposit.
d) Section 38 of the Act does not state that a landlord must tick a box on an application form; rather, a landlord must claim against the deposit.
e) In the alternative, the failure to tick off the box on the application form is merely a procedural defect, and the application ought to be amended accordingly. Such amendment would not prejudice the tenant, as it was apparent to all parties that the landlord was claiming against the security deposit.

Analysis

In considering all of the documentary, photographic and testimonial evidence, as well as the written submissions of the parties, I find as follows.

I accept the evidence of the landlord and the tenant that a bad odour persisted in the rental unit for at least part of the tenancy.

In regard to whether the bad odour was present at the time of the move-in inspection, I find I prefer the evidence of the landlord's agent, TM, over that of the tenant's agent, VR. I do not find it likely that a professional such as VR, who has specialized in rentals for the past 16 years and is aware of the importance of condition inspection reports, would notice a "horrendous, foul, overpowering smell like a dead body or animal rotting" but would fail to have such an odour noted on the inspection report. I am therefore not satisfied that such an odour existed at the time of the move-in inspection.

No other parties noticed the bad odour until the tenant first arrived at the rental unit on December 27, 2010. I accept as credible the testimony of PY that the smell seemed to become more prominent when the heat was turned on.

I find that the tenant has provided insufficient evidence to establish that the bad odour was so overpowering and had such a negative impact on her health that she was forced to move into a hotel on January 6, 2011. The tenant did not feel that the odour amounted to an emergency situation that should have been brought to the attention of the property manager before regular business hours resumed on January 3, 2011. The tenant did not provide any evidence of the negative effects of the bad odour on her health. The tenant chose of her own accord to leave the rental unit on January 6, 2011 and incur hotel and meal costs, without any discussion or agreement with the landlord.

I find that the landlord acted promptly and reasonably to address the bad odour, first by calling the refrigerator technician, and finally by replacing the refrigerator. I do not find that the landlord acted contrary to the Act or breached the tenancy agreement. I accept the evidence of the landlord that the odour was completely eliminated when the refrigerator was replaced.

I find it very likely that the source of the odour was the refrigerator. However, I do not find it at all likely that the tenant's groceries caused the odour or irreparably damaged the refrigerator. The landlord has not provided evidence that any other action or inaction of the tenant necessitated the replacement of the refrigerator.

The tenant could have returned to the rental unit and allowed the tenancy to continue after the refrigerator was replaced and no odour remained, but the tenant chose to proceed with ending the tenancy. I find the tenancy ended when the tenant returned the keys to the landlord on January 31, 2011.

In regard to the holes in the wall, I find no evidence that the landlord unconditionally waived the tenant's responsibility for the cost of repairing the holes. The tenant clearly made the holes in the wall, and I accept the evidence of the landlord that the holes were large enough that they needed to be repaired.

In regard to the monetary claims of the tenant and the landlord, I find as follows.

The tenant is not entitled to any of the amounts claimed for return of her rent, meal costs, parking and alternate transportation, moving and storage costs or her insurance deductible. The tenant did not provide sufficient evidence to establish that the rental unit was unlivable for any of the period of time between December 1, 2010 and January 31, 2011, or to establish that the landlord breached the Act or the tenancy agreement.

The tenant would have incurred the move-in and move-out costs at the beginning and end of the tenancy in any case, and the landlord is not responsible for those amounts.

The landlord is not responsible for the cost of replacing the chaise, as it was damaged by the cleaner.

In regard to the security deposit, section 38 of the Act requires that 15 days after the later of the end of tenancy and the tenant providing the landlord with a written forwarding address, the landlord must repay the security deposit or make an application for dispute resolution. If the landlord fails to do so, then the tenant is entitled to recovery of double the base amount of the security deposit. In this case, the tenant provided her forwarding address in writing on January 10, 2011 and the tenancy ended on January 31, 2011. The landlord failed to repay the security deposit or make an application for dispute resolution within 15 days of the end of the tenancy. The tenant is therefore entitled to double recovery of the security deposit.

The landlord is not entitled to the amounts claimed for repairing and replacing the refrigerator, as I found that the tenant did not damage the refrigerator. The landlord incurred these costs in the course of maintaining the rental unit. The landlord is entitled to $280 for repairing the holes in the walls. As the tenant breached the fixed-term lease, the landlord is entitled to the re-rental fee of $812 and $700 in lost revenue for the first half of February 2011.

As the landlord and the tenant were both only partially successful in their claims, I decline to award either party recovery of the filing fee for their respective applications.

Conclusion

The tenant is entitled to a total claim of $1400. The landlord is entitled to a total claim of $1792. The remainder of both applications is dismissed.

I grant the landlord an order under section 67 for the balance due of $392. This order may be filed in the Small Claims Court and enforced as an order 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*.

Dated: August 15, 2011.

Residential Tenancy Branch