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Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

FINAL DECISION

Dispute Codes

MNDC, MNR, MND, MNSD

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the landlord for damages for cleaning, repairs, replacement of property and loss of rent.

At the initial hearing held on August 11, 2011, the applicant landlord requested an adjournment due to health issues . In addition, there was an issue with respect to the submission of the landlord's evidence to the Residential Tenancy Branch .

It is the responsibility of the applicant to submit the evidence, upon which she intends to rely, to both the Residential Tenancy Branch and serve the same evidence on the respondent. It was revealed at the outset that the landlord's evidence which had apparently been served to the respondent tenants, was missing from the dispute resolution file. The landlord argued that the evidence had been submitted to the Residential Tenancy Branch and must have been misplaced. A search of the records logging all evidentiary submissions that came into the Residential Tenancy Branch indicated that no evidence was ever submitted by the landlord to the file since the application was made on April 20, 2011. However, in the interest of ensuring fairness, I granted the landlord's request for an adjournment to allow the landlord to re-submit the same evidence already served on the tenant. The hearing was reconvened to be heard on August 23, 2011.

Both parties appeared and gave testimony.

Issue(s) to be Decided

The issue to be determined, based on the testimony and evidence, is whether or not the landlord is entitled to monetary compensation for damages.

Preliminary Matter

The landlord had originally made the application in April 2011 and it was scheduled to be heard approximately four months later on August 11, 2011. On August 11, 2011, the landlord requested and was granted an adjournment . Prior to the reconvene date, the landlord was permitted to submit all of the same evidence that had already been properly served on the tenants. The landlord was advised that no new evidence would be accepted and that only the previously-served evidence would be considered., along with the landlord's rebuttal to the tenant's evidence. All of the landlord's evidence was finally received by Residential Tenancy Branch on the day of the reconvened hearing.

When the final hearing commenced, the landlord expressed her dissatisfaction that she was not permitted to submit additional evidence and serve additional evidence on the tenant to support her claims beyond the evidence that was already served. The landlord stated that she felt it was unfair to restrict the submission of additional evidence, as she wanted to add documents such as receipts and invoices in support of her monetary claim. The landlord testified that this evidence had been, and still was, in her possession. According to the landlord, this evidence had not been accessible due to her personal circumstances and health problems she suffered over the past 4 months. The landlord stated that she was not able to find the paperwork in time to submit this evidence prior to August 11, 2011, the original hearing date.

I note that the *Landlord and Tenant Fact Sheet* contained in the hearing package clearly states that "*copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible*". The Residential Tenancy Rules of Procedure, Rule 3, requires that the applicant must submit evidence to the Residential Tenancy Office and serve all evidence being relied upon to the respondent at the same time as the application is filed if possible or at least (5) days before the dispute resolution proceeding.

Given the above, the landlord was advised that no additional evidence would be accepted as this was not compliant with the rules of procedure and the Act. Furthermore, I found that a second adjournment would be prejudicial to the respondents who hoped to have their security deposit and pet damage deposit finally returned or at least be provided with a valid reason for these funds to be legally withheld.

Background and Evidence

The tenancy began on June 27, 2010, but the tenants moved in early. Rent was $1,200.00 and a security deposit of $600.00 and pet damage deposit of $600.00 were paid. A document dated February 26, 2011, shows that the tenants gave written notice to vacate effective March 31, 2011. The landlord testified that the notice was posted on her door on February 26, 2011. The landlord pointed out that the Act states that a posted document is deemed to be served in 3 days. According to the landlord , this would mean that the tenant gave late notice to end the tenancy and would be held liable for damages stemming from the late Notice. The landlord testified that the tenant did not vacate until April 4, 2011 and she suffered a loss of rent for April 2011 as a result..

The application indicated that the landlord was claiming $6,800.00 for loss of rent, mail box keys, cleaning, and a long list of damages to furnishings and equipment, as well as to the residential property and the grounds. Submitted into evidence was written testimony, a copy of the tenancy agreement, photos from both parties, copies of communications, a move-in condition inspection report and move-out condition inspection report signed only by the landlord.

The landlord testified that the tenant was supposed to vacate at the end of March, but over-held the unit into April. In one part of the application the landlord claimed $1,200.00 in lost rent due to the tenant's late Notice to vacate and the down time spent to prepare the unit for re-rental, but a subsequent document in evidence showed that the landlord was claiming $1,500.00 in lost rent. The landlord also took the position that the tenant's security and pet damage deposits had already been repaid and submitted a written claim requesting that the funds, in the amount of $1,500.00 be returned to the landlord.

The tenants disputed this claim, stating that the landlord had acknowledged that she retrieved the posted Notice on February 26, 2011. The tenants did not agree that they were responsible for any loss of rent by the landlord. The tenants stated that the bank was in charge of collecting rent at the end of their tenancy and the home was for sale, not for rent.

The tenants disputed the landlord's allegation that their security and pet damage deposits were ever returned by the landlord or the mortgage company on the landlord's behalf. The tenant testified that they had given their written forwarding address on February 26 and the deposits were never returned. The tenants also disputed the landlord's allegation that they over-stayed until March 4, 2011.

The landlord testified that she incurred costs of $100.00 to replace the mailbox key and $120.00 to replace the house keys and locks, because the tenant did not surrender all of the keys for the locks.

The tenants disputed the above claim stating that the landlord changed the mailbox prior to the end of the tenancy and this impeded the tenant's ability to collect their mail during their tenancy. According to the tenant, all keys were returned to the company that had seized the right to sell the property. the tenant submitted a copy of correspondence from the bank stating that, effective as of December 1, 2010, all rents were to be paid to the institution.

The landlord stated that the tenants had damaged furnishings and property including the refrigerator, dryer, dishwasher, pool table, a statue, a football table, a windshield belonging to the landlord that was stored on the premises and lawn chairs.

The landlord stated that, although the property did have some previous damage, she is only making claims on new damage caused by these tenants. According to the landlord, the tenants damaged the wood flooring in the house, wall paper, carpet in the basement, a cement floor in the basement , the garage floor, shelving in the garage, blacktop on the driveway, the back gate and fencing, exterior stairs, water spouts, the kitchen ceiling, shelving in the horse barn, flooring in the barn, the riding ring, the fencing around the riding ring, countertops, some light fixtures and the barn doors. In addition to the above, the landlord alleged that there were numerous things missing from the property, including a dolly, a barbeque, smoke alarms, barn stall mats, light fixtures and light bulbs.

The landlord testified that the tenants had left a mess when they moved out leaving an the premises not reasonably clean, a dirty fireplace, stained carpeting, garbage to be removed and a flea infestation to address.

The landlord testified that the tenants had conducted a business on the property. According to the landlord, tenants had been repairing and storing vehicles on the property and had been storing automotive equipment on the property. The landlord testified that the tenants had been “slandering” her property to perspective buyers and denying access to the realtor.

The landlord had submitted photographs into evidence showing damage allegedly caused by the tenants and was permitted during the hearing to describe the damage shown in each photo. The landlord also provided a list showing over forty items damaged, and indicating the monetary value or loss incurred for each specific claim.

The landlord submitted copies of move-in and move-out inspection reports with a large number of notations written in the spaces provided. The move-in portion was signed by both parties. However, the tenant had not signed the move-out portion. According to the landlord, the tenant had refused to participate in the move-out inspection, so the landlord did not attend on the date she had proposed and did the inspection without the tenants at a later date.

The tenant disputed all of the above claims and stated that nothing was ever taken nor damaged, with the exception of the landlord’s windshield that had been stored on the premises. The tenant stated that the landlord had agreed to accept $150.00 in compensation for this item. The tenant testified that many of the alleged deficiencies pre-dated their tenancy as indicated on the move-in inspection report. The tenant testified that no garbage of any kind was left behind.

The tenant testified that it was the landlord who failed to show up on the appointed date that for the move-out inspection. The tenant pointed out that it was the landlord herself who set the date and time via an email communication. The tenant testified that they attended on the date specified but the landlord did not and the landlord then refused to respond to the tenant's phone calls thereafter. The tenant testified that some of the purported damage alleged by the landlord did not exist at all. The tenant stated that the landlord's alleged monetary losses were not properly verified with any evidence such as receipts or invoices.

The tenants had submitted photographic evidence showing the condition of the property at the beginning and the end of the tenancy.

Analysis

Security Deposit

With respect to the landlord's allegation that the tenant's security deposit was already returned to the tenants by a third party, I find that insufficient evidence was presented to prove that this occurred. In fact, I find that, despite the fact that the tenant gave a written forwarding address in the letter of February 26, 2011, the landlord failed to return the $600.00 security deposit and the $600.00 pet damage deposit.

Section 38 of the Act deals with the rights and obligations of landlords and tenants with respect to the return of security deposit and the pet damage deposit. Section 38(1) states that, within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either: repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations; or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The landlord was in possession of the tenant's security deposit held in trust on behalf of the tenant at the time that the tenancy ended. I find that because the tenancy was ended and the forwarding address was given to the landlord shortly thereafter, under the Act the landlord should either have returned the deposit or made an application for dispute resolution within the following 15 days. However, the landlord failed to return the deposits in accordance with the Act and did not make application to keep the deposits within the deadline

Section 38(6) states: If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Section 38(6)(b) imposes a compulsory requirement that the landlord must pay double the ***amount of the deposit*** under these circumstances. . I find that the total amount of the deposits being held at the end of the tenancy was $1,200.00 and the tenant would therefore be entitled to double this amount, which would equal $2,400.00.

Loss of Rent

With respect to an applicant's right to claim damages from another party, section 7 of the Act provides that if a party fails to comply with the Act or agreement, the non-complying party must compensate the other for any damage or loss that results. 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 reasonable steps to mitigate or minimize the loss or damage

I find that the tenant gave Notice to vacate in a document dated February 26, 2011, that was posted on the landlord's door. I find that deemed service would be three days in accordance with the Act and therefore, the tenant did not provide adequate Notice of one month effective the day-before-the-day rent was due as required under the Act. In this respect, I find that the tenant did violate the Act.

In order to meet all elements of the test for damages to prove that the landlord is entitled to be compensated for loss of rent, I find that it is incumbent upon the landlord to prove that this violation of the Act by the tenant was solely responsible for causing the loss being claimed.

In this instance, I find that the landlord did not satisfy element 4 of the test for damages by providing evidentiary support to confirm that she had made a reasonable attempt to minimize loss by attempting to re-rent the unit for the month of April 2011. I find the evidence verified that the unit had pre-existing condition issues not related to this tenancy which would likely have needed to be rectified in any case, in order to attract a new tenant. In addition to the above, I find that the home was actually being marketed for sale, not re-rental and that the landlord's mortgage company had taken over some of the obligations of the owner/landlord. For this reason, I find that the landlord's loss of one month rent was attributable partially to other factors not related to this tenancy. Accordingly, I find that the portion of the landlord's application seeking compensation for loss of rent must be dismissed.

Keys

With respect to the landlord's claim for the cost of $100.00 to replace the mailbox key, I accept the tenant's testimony that the lock on the mailbox had been changed during the tenancy and that the tenant surrendered the keys to the company managing the property at the end of the tenancy. This testimony was supported with copies of dated communications to the landlord and from the mortgage company. With respect to the landlord's claim for $120.00 to replace the house keys and locks, I find that section 37 requires that the tenant return the keys to the landlord, and according to the tenant, all keys were given to the mortgage company at the end of the tenancy. However, whether or not the tenant had failed to comply with section 37 of the Act by returning the keys at the end of the tenancy, I find that section 25 of the Act places the responsibility on the landlord at the start of the next tenancy, to rekey or otherwise alter the locks so that keys or other means of access given to the previous tenant do not give access to the rental unit, and the landlord must pay all costs associated with the changes. Accordingly, I find that the landlord's evidence has failed to satisfy element 1 of the test for damages in that the cost would have been incurred for re-renting the unit regardless of any action by the tenant. Therefore, I find that this portion of the landlord's application must be dismissed.

Cleaning and Damage

In regard to the claimed costs for cleaning and damages, I find that section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

In establishing whether or not the tenant had complied with this requirement, I find that this can best be established with a comparison of the unit's condition when the tenancy began, with the final condition of the unit after the tenancy ended. In other words, through the submission of move-in and move-out condition inspection reports containing both party's signatures.

Section 23(3) of the Act covering move-in inspections and section 35 of the Act for the move-out inspections places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and both the landlord and tenant must sign the condition inspection report after which the landlord must give the tenant a copy of that report in accordance with the regulations.

In this instance, I find that the parties had conducted a move-in condition inspection and signed the report. However, according to the tenant, the move-in inspection occurred months after the tenancy had started. In any case, I find that that the evidence fully supports the tenant's contention that there were already pre-existing condition issues with the rental property at the time the tenancy began as this is clearly shown on the report.

With respect to the information contained on the move-out condition inspection report, which was completed in the tenant's absence, I find that the landlord's failure to attend the residence to conduct the move-out inspection on the date she had initially set up in writing in an email communication to the tenant, would serve to extinguish the landlord's right to claim against the deposit, pursuant to sections 24 and 36 of the Act.

With respect to the remaining damages being claimed by the landlord, I do accept that the condition of the rental property was deficient at the termination of the tenancy. However, I find it impossible to determine what damage pre-existed or was caused due to normal wear and what damage, if any, was actually perpetrated by the tenants in violation of the Act. Moreover, in the absence of supportive evidence with respect to the costs or losses, such as invoices, receipts or estimates, I find that the claimed amounts put forth by the landlord were not sufficiently proven to satisfy element three of the test for damages. Therefore, I find that the portion of the landlord's claim pertaining to cleaning and damages must be dismissed.

Based on the evidence, I find that the landlord has established a total monetary claim of $150.00 for the damage to the windshield that was consented to by the tenant.. I order that the landlord retain this amount from the $2,400.00 owed to the tenant under section 38 of the Act, leaving a balance of $2,250.00 still owed to the tenant .

Conclusion

I hereby order the landlord to retain $150.00 from the security and pet damage deposits held on behalf of the tenant.

I hereby grant a monetary order to the tenant in the amount of $2,250.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The remainder of the landlord's application, including the request for reimbursement of cost of filing the application, is hereby dismissed without leave to reapply.

This decision is final and binding and made on the authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: September 12, 2011.

Residential Tenancy Branch