

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenant confirmed that he received a copy of the landlord's dispute resolution hearing package and written evidence (including photographs) sent by the landlord by registered mail on November 30, 2011. I am satisfied that the landlord served these documents to the tenant in accordance with the *Act*.

At the hearing, it became apparent that the landlord was relying partially on one page of written evidence received by the tenant but not forwarded to the Residential Tenancy Branch (RTB). I asked the landlord to fax a copy of the missing page of written evidence that the RTB had not received by 4:00 p.m. on the day of the hearing. The landlord complied with this request.

Issues(s) to be Decided

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, letters, invoices, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around each are set out below.

This tenancy commenced as a one-year fixed term tenancy on September 1, 2009. Once the initial term expired the tenancy converted to a periodic tenancy. Monthly rent

was set at \$1,200.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$600.00 security deposit paid on September 1, 2009.

The parties agreed that no joint move-in or move-out condition inspection was conducted for this tenancy, nor did the landlord produce any condition inspection report for any inspection conducted by the landlord.

The parties agreed that the tenant decided to end this tenancy. The parties agreed that the tenant vacated the rental unit and gave the landlord's wife the key for the rental unit by 9:00 p.m. on November 1, 2011. The landlord gave undisputed oral testimony that the tenant handed the landlord or his wife the shed key on November 2, 2011. The parties agreed that the tenant paid \$72.33 in rent for November 1 and 2, 2011, the days when the tenant overheld the tenancy. The parties agreed that the landlord did not receive the tenant's complete forwarding address in writing from the tenant until November 13, 2011.

Within 15 days of receiving the tenant's forwarding address in writing, the landlord applied for authorization to retain \$461.30 from the tenant's security deposit. This amount included the landlord's return of \$72.33 to the new tenant for November 1 and November 2 as he was anticipating moving into the rental unit on November 1, 2011. The landlord also applied for a monetary award of \$307.40 in reduced rent to the new tenant for the period from November 3, 2011 until November 10, 2011. He said that this reduction in rent of 8 ½ days occurred because the tenant's cleaning of the carpets left those carpets so wet that the new tenant could not move into the rental unit until they had dried sufficiently to enable him to move his furniture into the rental unit. The landlord said that the new tenant did not move into the rental unit until November 13th and had asked for a reduction in rent until that date. However, since the new tenant's work schedule did not allow him to move into the rental unit when the carpets were dry on November 10th, the landlord limited his losses to the period ending on November 10, 2011.

The landlord also applied for a monetary award of \$75.00 to cover three hours of cleaning that the landlord's wife spent cleaning the rental unit after the tenant vacated the rental unit. The landlord and his wife testified that the actual time spent cleaning the rental unit and the repairs and painting required after the tenant vacated seriously exceeded the \$75.00 claimed for these items by the landlord.

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. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

On a balance of probabilities, I dismiss the landlord's claim for recovery of losses arising out of having to return \$72.33 of the new tenant's rent to the new tenant for the tenant's overholding of the rental unit until November 2, 2011. The landlord testified that he received a rental payment of this amount from the tenant for the extra two days that he stayed in the rental unit with the landlord's permission. Although the landlord had to return \$72.33 of the new tenant's monthly rental payment to the new tenant, this was in essence an overpayment of the new tenant's rent for November 2011 when the landlord was receiving rent for those same two days from the tenant. Based on the oral evidence presented, the landlord received two rental payments for the first two days of November 2011, one from the tenant and another from the new tenant. The landlord is only entitled to one rental payment for the first two days of November and he received that from the tenant. I find that the landlord correctly rebated rent to the new tenant for the first two days of November 2011, days when he did not have occupancy of the rental premises. With the landlord's rebate of \$72.33 to the new tenant, the landlord still received \$72.33 in rent from the tenant for the first two days of November.

Based on the oral and written evidence submitted by the parties, I find that the landlord did suffer losses arising out of the tenant's cleaning of the carpets when he ended this tenancy. The landlord entered undisputed written evidence that the landlord had to reduce the new tenant's rent by \$307.40 for the period from November 3, 2011 until November 10, 2011. The tenant testified that the landlord should not be eligible for this claim for wet carpets because he was not alerted to this problem from the time he vacated the rental unit until November 18, 2011, when the landlord told him he planned to retain this amount from his security deposit. The tenant said that he did not believe that he left the carpet wet; the landlord testified that the underpad was very wet which made it impossible for the new tenant to place furniture on the carpet and occupy the rental unit.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy. Although the landlord said that the rental unit was “brand new” when the tenancy began, the landlord did not comply with the *Act* by failing to conduct a move-in or move-out condition inspection of the premises.

Section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

36 (2) *Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord*

(a) does not comply with section 35 (2) [2 opportunities for inspection],

(b) having complied with section 35 (2), does not participate on either occasion, or

(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...

Similar provisions are in place in section 24 with respect to move-in inspections.

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-in and move-out condition inspections and inspection reports, I find that the landlord’s eligibility to claim against the security deposit for damage arising out of the tenancy is limited. However, section 37(2) of the *Act* requires a tenant to “leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.” The parties entered conflicting evidence regarding the condition of the rental unit when this tenancy ended. The tenant said that he thought that he had done a good job of cleaning the rental unit and questioned whether the wet carpets truly prevented the new tenant from moving into the rental unit until November 10 or 13, 2011.

Based on the oral, written and photographic evidence of the parties, I find on a balance of probabilities that the tenant did not comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit “reasonably clean and undamaged” as the

tenant's actions likely did result in the landlord's loss of rent from the new tenant. For that reason, I find that the landlord is entitled to retain \$200.00 from the tenant's security deposit for losses arising out of this tenancy, particularly those caused by leaving the carpets wet and thus preventing the new tenants from fully moving into the rental unit before November 10, 2011. In the absence of move-in and move-out inspections and inspection reports, I find that this \$200.00 monetary award covers all cleaning and losses the landlord incurred during this tenancy.

In coming to this determination, I am satisfied that the landlord did attempt to fulfill the requirement under section 7(1) of the *Act* requiring him to mitigate the tenant's losses. The landlord did visit the rental premises a number of times in early November to ensure that the carpets were too wet to allow the new tenant to occupy the rental unit. The landlord also negotiated an agreement with the new tenant to limit the new tenant's rent reduction to the period ending on November 10, 2011, although the tenant had not yet occupied the rental unit by that date. I am satisfied that these efforts discharged the landlord's responsibilities under section 7(1) of the *Act* to try to mitigate the tenant's losses to an extent that was reasonable.

As the landlord has been only partially successful in this application, I allow the landlord to recover \$25.00 of his filing fee for this application from the tenant.

Conclusion

I allow the landlord to retain \$225.00 from the tenant's security deposit, an amount which includes recovery of \$25.00 of the landlord's filing fee for this application. I issue a monetary Order in the tenant's favour in the amount of \$375.00, the remaining portion of the tenant's security deposit plus applicable interest. No interest is payable over this period. 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 13, 2011

Residential Tenancy Branch