Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, FF

Introduction

This hearing was convened by way of conference call in response to and application made by the landlords for a monetary order for damage to the unit, site or property; for an order permitting the landlords to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of this application.

The landlords and an agent for the tenant attended the conference call hearing, gave affirmed testimony and the landlord called a witness. The parties provided evidence in advance of the hearing to each other and to the Residential Tenancy Branch and were given the opportunity to cross examine each other and the witness on the testimony and evidence provided. All evidence and testimony has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Are the landlords entitled to a monetary order for damage to the unit, site or property?
- Are the landlords entitled to keep all or part of the pet damage deposit or security deposit in full or partial satisfaction of the claim?

Background and Evidence

This fixed term tenancy began on March 1, 2011 and expired on September 30, 2011. Rent in the amount of $1,100.00 per month was payable in advance on the 1st day of each month and there are no rental arrears. At the outset of the tenancy the landlords collected a security deposit from the tenant in the amount of $550.00 and no pet damage deposit was collected. A move-in condition inspection report was completed at the beginning of the tenancy however none was completed at the end of the tenancy. The first landlord testified that the tenant called the landlord stating that the tenants would be moving at the beginning of September and would pay September's rent. The

tenant also provided notice in writing. The landlord called the tenants at move-out time and arranged for a move-out condition inspection report to be completed by the parties on September 30, 2011 at 1:15 p.m. The tenant advised the landlord that no one would likely show because it would involve a ferry trip, and the tenant did not show. A second opportunity was not provided to the tenant.

After the tenant had moved, the landlord went into the rental unit and could not believe the cigarette smell. Paragraph 13 of the Tenancy Agreement, a copy of which was provided prior to the hearing states no smoking. The tenant had mentioned returning to the rental unit to clean, and the landlord met the tenant at the unit and advised that the security deposit wouldn't be returned. The tenant became too irate to do the move-out condition inspection report and it was not mentioned during the conversation.

The landlord also testified that as a result of the smoke residue the family room, half bathroom, hallway, and three bedrooms of the rental unit had to be painted. The cost was $690.78 for labor and $394.16 for materials, which was completed in October. The landlord also rented an air purifier for $125.00 on September 20, 2011 which didn't work. The rental unit had been painted in the kitchen, living room, hallway and bathroom in February, 2011. The landlords claim $550.00 against the security deposit, not the full cost paid.

The landlords also provided estimates and invoices for the painting required. One of the estimates is for a cost of $3,070.54 for: wiping all hard surfaces using deodorizing and degreasing solutions in an effort to eliminate tobacco odor; priming and painting the ceiling tiles in the main entrance/laundry area; to steam clean and deodorize carpet in 3 bedrooms, hallway and living room to eliminate tobacco odor; to set up an monitor industrial o-zone generator for 2 days following the cleaning and painting; and then contains a note: "This estimate is based on a "best case scenario" and does not guarantee the complete elimination of the tobacco odor present. To guarantee complete elimination of the tobacco odor elimination would require completely painting all hard surfaces in the structure and replacing all floor coverings. This would obviously be substantially more money and is presumed not necessary in order to return the structure to free of tobacco odor."

The landlords received the tenant's forwarding address in writing in a letter dated September 27, 2011, but the landlord does not recall the date it was received.
When asked why the landlord did not mention a smoke smell in the rental unit when the parties spoke on September 17, 2011, the landlord testified that the parties were meeting soon in person and chose to wait until then. When questioned about having the report available to be completed on September 19, 2011, the landlord responded that the report was in the car.

The second landlord testified that the ceilings in the rental unit are acoustic tile and cannot be washed; they had to be painted. The walls and ceilings in other rooms were washed and not painted.

The witness for the landlord testified that the witness painted the unit as a result of a strong odor of tobacco. The witness is also a smoker and could smell it easily. The witness painted the bathroom, bedroom, and front room, but not the kitchen. The witness does not recall the date and paints houses for a living but did not check the invoice for the date of this particular job prior to the hearing.

The tenant's agent is the spouse of the tenant named in the application, who testified that on September 2, 2011 arrangements were made for the landlords to bring a rehabilitation person to the rental unit as a possible renter. They spent over 40 minutes going room to room and no mention of a smoke smell was made. The tenant's mother was there, and both landlords who told the tenant that they were the best tenants they ever had and were sorry to lose them.

The tenants moved out by 9:30 a.m. on September 6, 2011, and the landlords had full access to the rental unit from that time on. If they couldn't smell smoke on September 2, 2011 then 3 days later the unit could not have required painting from a smell of smoke. On September 17, 2011 the tenant contacted the landlord to arrange the move-out condition inspection report, and when the tenant arrived on September 19, 2011 one of the landlords was outside smoking something. The tenant finished conducting a very thorough cleaning, and one landlord said there was no smell of smoke but the other did and got irate. Further, the landlords did not have a condition inspection report with them and could not have had any intention of completing it, but told the tenant that the security deposit would not be returned. The landlord then asked the tenant to return on September 30, 2011 to complete it but the tenant advised that the cost to return again was prohibitive. The tenant's agent feels that the landlords knew it was cost prohibitive for them to return, but asked for a second opportunity and sent emails and registered mail to the tenant because they knew they were in violation of the *Act.* One of the letters was received by the tenant on October 15, 2011 by registered mail and is dated September 21, 2011 requesting access to the rental unit to show it to a perspective renter. As a result, the landlords entered the rental unit still subject to this tenancy without the notice required under the *Act,* and then sent a registered letter, back dated it, and entered the rental unit prior to the tenant receiving the notice.

The tenant also testified that one of the landlords was smoking in the kitchen of the rental unit when the tenant viewed it prior to entering into the tenancy agreement. The tenant was told at that time that it was not a cigarette.

The tenant provided the landlord with a forwarding address in writing on September 27, 2011, a copy of which was provided for this hearing.

The tenant's agent also testified that the landlord had two opportunities to conduct a move-out condition inspection report; once on September 2, 2011 and again on September 19, 2011.

The tenant's agent also testified to being a very active advocate for autism and has invested countless hours in advocating for autistic children. The tenant has an autistic child and would not jeopardize all of that by smoking in the home, and did not smoke inside the rental unit. The tenant further testified to being in remission from cancer, has emphysema and fibromyalgia and possibly MS.

Analysis

The *Residential Tenancy Act* places the onus on the landlord to give the tenant at least 2 opportunities to complete a move-out condition inspection report, and the regulations go into detail about how to do so:

> **17**(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
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> (2) If the tenant is not available at a time offered under subsection (1),
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> > (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
> >
> > (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.
>
> (3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

The *Act* also states that a landlord may complete a move-out condition inspection report without the tenant present if the landlord has provided the tenant with at least 2 opportunities, the tenant does not attend on either opportunity, does not participate in the inspection, or the tenant has abandoned the rental unit.

In this case, the parties had arranged September 19, 2011, the parties attended, and the tenant had to travel, which included a ferry trip. But the parties did not complete the

report. Instead, the landlords told the tenant the security deposit wouldn't be returned and the conversation became somewhat heated. I find that the tenant's agent and spouse did attend on that date for the purposes of participating in the inspection but the landlord failed in the obligation of completing it. The landlord subsequently offered another date, but obviously did not take into account that it was cost prohibitive for the tenant to re-attend and I find that it was unreasonable that the landlord did not cause the report to be completed on September 19, 2011. The tenant testified that the landlord didn't have the report available to be completed, which is disputed by the landlord. However, the landlord has not provided any evidence that a final opportunity was given in the approved form, and the report was not completed at all with or without the tenant present. Therefore, I find that the landlord has failed to comply with Section 35 of the *Residential Tenancy Act.*

The consequences for failing to comply with the inspection requirements is the extinguishment of the landlord's right to claim against the security deposit for damages, and I find that the landlord's right has been extinguished. The tenant vacated the rental unit on September 6, 2011 and provided a forwarding address in writing in a letter dated September 27, 2011. The landlords applied for dispute resolution on October 7, 2011, which is within the 15 days required under the *Act,* but the landlords' failure to complete the report with the tenant extinguishes the landlords' right to claim against the security deposit, and therefore the landlords' application must be dismissed.

The *Act* also states that if a landlord does not comply with subsection 38(1) of the *Act,* the landlord may not make a claim against the security deposit and must pay the tenant double the amount of the security deposit collected from the tenant. Having found that the landlord has failed to comply with subsection 38(1), I must find that the tenant is entitled to double recovery of the security deposit.

The landlords, however, are not barred from making an application for damages. In order to be successful in a claim for damages, the onus is on the claiming party to pass the 4-part test for damages:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the opposing party's failure to comply with the *Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. What efforts the claiming party made to mitigate, or reduce such damage or loss.

Further, any award for damages must not place the claiming party in a better financial position than the party would be had the damage or loss not existed. The parties both provided letters from other witnesses who were not called to testify and were not subject to cross examination. The painter of the rental unit testified to being a smoker and

noticed a smoke smell clearly in the rental unit. Further, the landlord testified that the rental unit had been painted, at least some rooms, about a month prior to the commencement of this tenancy. No one has testified about whether or not previous tenants had smoked in the rental unit, and the tenant's agent testified that one of the landlords smoked something on more than one occasion. I also note the estimate provided by the landlord that states that complete elimination of the odor is not guaranteed but would require completely painting all hard surfaces and replacing all floor coverings. The landlords did not testify that all floor coverings were replaced or that painting the few rooms that were painted eliminated the odor. Also, only one of the landlords even noticed the smell.

I also question why the landlord would not claim the full amount of the painting cost, and only claims $550.00 which is the full amount of the security deposit. I find that the landlords have failed to satisfy me that the tenants are responsible for any cost associated with damage to the rental unit.

Conclusion

For the reasons set out above, the landlords' application is hereby dismissed without leave to reapply.

I further order the landlords to return double the amount of the security deposit to the tenant. If the landlords fail to do so, the tenant will be at liberty to apply for a monetary order.

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: January 09, 2012.

Residential Tenancy Branch