Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MND, MNDC, FF, SS
Tenants: MNSD, MNDC, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution. Both the landlord and the tenants sought monetary orders. The landlord also sought to serve documents and evidence in a different way than required by the *Residential Tenancy Act (Act)*.

Both hearings were conducted via teleconference. Due to time constraints the original hearing had to be adjourned to a future date. The hearing on December 13, 2011 was attended by the landlord, the tenants, and their legal counsel and the hearing on January 17, 2012 was attended by the landlord, the tenant, and his counsel.

While the landlord had applied for compensation in the amount of $25,000.00 her written submission indicated the loss she intended to present totalled well over $45,000.00. The landlord testified she is seeking the total amount for damage to the rental unit and only a portion of the lost rental income up to the maximum limit of $25,000.00.

Section 58(2)(a) of the *Act* stipulates the director cannot determine a dispute where the claim is for an amount that is more than the monetary limit for claims under the *Small Claims Act*. Under the *Small Claims Act*, the Monetary Limit Regulation specifies the prescribed limit is $25,000.00. Section 58(4) of the *Act* states the Supreme Court may hear a dispute referred to in Section 58(2)(a).

Based on the landlord's testimony clarifying she seeks total damages in the amount of $25,000.00 using the breakdown described above in total satisfaction of all claims against this tenancy, I accept jurisdiction over the matters in the landlord's Application.

As there are three tenancy agreements related to this case, for simplicity and consistency, I will refer to the tenancy agreements as follows:

Tenancy 1 – fixed term September 30, 2010 to March 31, 2011 tenants identified as MD and RD;
Tenancy 2 – fixed term April 1, 2011 to September 30, 2011 tenants identified as MD and GP; and
Tenancy 3 – fixed term October 1, 2011 to September 30, 2012 tenant identified as MD only.

In addition, the tenants' legal counsel raised a preliminary matter relating to the named respondents in the landlord's Application. The landlord named as respondents both of the tenants who had signed the tenancy agreement Tenancy 2.

In the tenancy agreement for Tenancy 3 only tenant MD signed the agreement on August 29, 2011; tenant GP signed the agreement, at the landlord's insistence, on September 17, 2011, two days after both tenants had vacated the rental unit.

The landlord testified she had the tenant GP sign this agreement on September 17, 2011 because tenant MD was not available at the time of the move out inspection to discuss the terms of how the lease was going to end when the landlord found new tenants, by way of assignment or subletting.

The landlord testified that the tenant GP did not have any documentation from tenant MD indicating that GP had authority to act as an agent for GP to discuss matters related to Tenancy 3. The landlord provided no testimony or evidence as to why she had any reason to believe tenant GP did not have authority to act on the tenant MD's behalf.

I accept, the tenant's position, that tenant GP was not a party to the signing of the tenancy agreement for Tenancy 3 and the landlord only obtained tenant GP's signature on a day after both tenants had vacated the rental unit and the landlord was fully aware of their intention to not continue the tenancy under the new tenancy agreement.

Further, because the tenancy ended prior to the end date of Tenancy 2 any liability for that tenancy that may be awarded to the landlord is the responsibility of both tenants from that tenancy as the tenants are jointly and severely liable. As such, by naming only the tenant who was a party to both tenancies I find the landlord is not prejudiced in any of the matters before me in this claim.

I therefore amend the landlord's Application for Dispute Resolution to exclude the tenant GP as a respondent.

The tenants' legal counsel had submitted to the Residential Tenancy Branch (RTB) a document entitled "Memorandum of Argument" on December 9, 2011. Counsel states that it is not evidence but rather a convenience copy of his intended arguments and testimony. He confirmed this document was not served on the landlord. As such, I advised both parties I would not consider the document but that the tenants and counsel could use the document to provide their testimony.

Tenants' legal counsel indicated he had submitted a photograph of a termination agreement signed by tenant MD and the landlord by fax on December 8, 2011 to the RTB but not to the landlord. I allowed counsel to read the agreement into evidence. Once it was determined the hearing needed to be adjourned I ordered the tenants could now submit this document and serve it on the landlord prior to the next hearing.

At the start of the reconvened hearing I confirmed with both parties that they had received all evidence served by the other party, with the exception of a copy of a document entitled “Termination of lease”. The tenant’s legal counsel testified the document was served by registered mail on December 15, 2011. The landlord testified that she had not received this document.

During the hearing the landlord provided testimony that she had entered into a written agreement with the tenant about assigning and subletting at the tenant’s insistence that she scribbled down when they were discussing the terms of the agreement. As such, I accept that the landlord is sufficiently aware of the terms in the document; and I have considered this evidence submitted by the tenant in this decision.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order allowing her to serve documents in a different way than required by the *Act*; a monetary order for lost rental income; for damage to the rental unit; for all or part of the security deposit and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 44, 67, and 72 of the *Act.*

It must also be decided if the tenants are entitled to a monetary order for double the amount of the security deposit and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 67, and 72 of the *Act.*

Background and Evidence

The landlord provided copies of the following three fixed term tenancy agreements in which one of the named respondents has been a party to each of the agreements:

- Tenancy 1 - A fixed term tenancy agreement signed by the landlord and tenants MD and RD by October 13, 2010 for a term beginning on October 1, 2010 and ending on March 31, 2011for monthly rent of $2,500.00 due on the 1st of each month. This tenancy agreement indicates 7 pages of addendums and the landlord has provided Addendums “A”, “B”, and “C”. The landlord has also attached a copy of a receipt in the amount of $2,500.00 for deposits listed as a furniture deposit; security deposit; and pool deposit;
- Tenancy 2 - A fixed term tenancy agreement signed by the landlord and tenants MD and GP by March 25, 2011 for a term beginning on April 1, 2011 and ending on September 30, 2011 for monthly rent of $3,000.00 due on the 1st of each month. This tenancy agreement indicates there are 6 pages of addendums, but no addendums are attached; and
- Tenancy 3 - A fixed term tenancy agreement signed by the landlord and tenant MD on August 29, 2011 and by tenant GP by September 17, 2011 for a term beginning on October 1, 2011 and ending on September 30, 2012. This tenancy agreement indicates there are 5 “B” pages of addendum and 1 “C” term in the

addendum, no addendums are attached, the landlord has written reference to the same terms in “October 1, 2010 lease”.

The parties confirmed the tenants had vacated the rental unit and the parties had completed a move out condition inspection by September 17, 2011.

The landlord also provided a copy of a Condition Inspection Report completed prior to the start of Tenancy 1 on September 30, 2010 and at the end of Tenancy 2 on September 17, 2011. In addition, the landlord provided a document entitled “Addendum B” that lists a number of household items and notes their condition on September 30, 2010 and on September 17, 2011.

The landlord confirmed in her testimony she did not complete an end of tenancy or start of tenancy condition inspection in between any of the above noted three tenancies and she relies upon the Report completed on September 30, 2010 to record the condition of the unit at the start of Tenancy 2.

With the exception of the glass table top the landlord was unable to provide testimony as to when any of the damage occurred in the rental unit. The landlord stated that between September 14 and 17, 2011 the table top was broken. Tenant MD confirmed he broke the table top while moving. The landlord seeks compensation for the following damage to the rental unit:

Description	Amount
Front Entrance Way paint removal	$1,236.87
Carpet Cleaning	$237.44
Broken glass table top	$39.20
Broken barbecue	$364.00
Blinds	$71.76
Mop/Pail/Ironing Board Replacement	$14.57
Scratches on Floor (replacement)	$3,613.39
Pool Cleaning	$163.20
Weeding, etc/Dead tree removal replacement/ garbage removal	$870.84
Carpet Replacement	$6,971.14
Utilities - hydro	$172.73
Total	$13,755.14

The tenants assert the landlord has failed to provide any evidence that the cause of damage, with the exception of the table top, was anything more than wear and tear. The tenant also acknowledges that they could have cleaned the carpets and they did not, so they don’t dispute carpet cleaning.

Further tenant MD testified that the start of tenancy inspection was a very quick walk through, which did not include any of the exterior or yard of the residential property.

Tenant MD also noted that since the rental unit was furnished some of the things the landlord is now claiming as damage was covered up by furniture when they did do the quick walk through at the start of Tenancy 1.

The landlord also seeks compensation in the amount of lost rental income resulting from the tenant vacating the rental unit prior to the end and in fact prior to the start of Tenancy 3. While the landlord has calculated the lost income to be $36,000.00 as noted above she seeks only compensation in the amount equal to $25,000.00 less the amount of compensation sought for damage to the rental unit of $13,755.14 or a total lost rent of $11,244.86.

The landlord testified, in the first hearing, that despite issuing a receipt to tenant GP on September 17, 2011 in the amount of $3,500.00 "for partial payment for termination of lease" that was the tenants' payment of rent for the month of October 2011 and partial payment for rent for the month of November 2011. The landlord testified that she did not have any agreement written or verbal with the tenant agreeing to end the tenancy under any terms.

The tenants' legal counsel read into evidence the terms that he noted as a termination agreement in the landlord's handwriting and dated September 15, 2011 as follows:

The landlord agrees to terminate the lease if:

1. The tenants vacate no later than 9:00 a.m. on September 19, 2011 and all keys are returned;
2. The premises including all contents are in good condition and nothing is missing;
3. The tenants agree the landlord can keep the full security deposit; and
4. If these conditions are not met, the mutual agreement to end the tenancy is null and void.

In the reconvened hearing the landlord testified that the $3,500.00 was for October 2011 rent and to contribute to the payment of hiring a landscaper to complete weeding and removal of dead plants. The landlord, in the reconvened hearing, acknowledged a written agreement made between her and tenant MD that if the tenants returned the unit in the same condition as the start of the tenancy and that none of the items supplied at the start of the tenancy were missing that she would allow them to sublet or assign the tenancy.

As noted above a copy of the written agreement dated September 15, 2011 was provided into evidence by the tenant, I reproduce the content, at least in part, below:

"Re: Termination of lease
October 1/2011 – September 30, 2012
[Rental unit address]

The landlord, JC, agrees to terminate the lease if:

1. The tenants have vacated the property no later than 9 a.m. Monday, Sept. 19, 2011 and all keys have been returned;
2. The premises, as well as all goods and contents are left in good condition and nothing is missing
    a. See “Condition Report”
    b. See “Addendum B”;
3. The tenants agree that the landlord is to keep the full security deposit in lieu of partial rent;
4. If the above conditions are not met, this mutual agreement to end the tenancy is null and void.”

The document is signed by tenant MD and the landlord.

The tenant submits that it was the landlord who had prepared this document prior to meeting with him to discuss the end of the tenancy. He submits that in addition to agreeing to allow the landlord to keep the security deposit, which he thought to include the security deposit; pool deposit, and furniture deposit, he later agreed to pay her $3,500.00 for a total of $6,000.00 in compensation for ending the tenancy agreement prior to the end of the fixed term.

The tenant submits that he is entitled to return of double the security deposit because the tenancy agreement states that if the landlord should charge anything more than the equivalent of ½ month’s rent for a security deposit, the landlord must return to the tenant double the amount. The tenancy agreement format is that available online from the RTB website.

Analysis

For an applicant to be successful in a claim for damages or loss the applicant has the burden to provide sufficient evidence to establish all of the following 4 points:

1. That a loss or damage exists;
2. That the loss or damage results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

In relation to the landlord’s claim for damage to the rental unit, I accept the tenant has acknowledged that he is responsible for the replacement of the glass table top and carpet cleaning. In relation to the landlord’s additional claims for front entry paint removal; blinds; broken barbecue; scratches on the vinyl flooring; weeding and dead tree/plant removal; and carpet stains I find the landlord has established she has suffered a loss.

However, as noted above, there were 3 fixed term tenancies to consider in this Application and in all three tenancies there were a different mix of tenants. MD was a

party to all tenancies, while RD was a party to only Tenancy 1 and GP was a party only to Tenancy 2, there were no other tenants in any of the tenancies.

While only tenant MD is named in this decision, as per my finding above, I find that both tenants MD and GP are the responsible parties in these matters as they are the tenants who most recently occupied the rental unit. As such, to establish if the landlord has suffered a loss or damage resulting from this tenancy, the landlord must provide evidence as to the condition of the rental unit at the start of Tenancy 2.

From the landlord's testimony, I find the landlord failed to complete an end of tenancy condition inspection at the end of Tenancy 1 and a start of tenancy condition inspection at the start of Tenancy 2. Further from the landlord's testimony, she does not know when any of the damages occurred.

For these reasons, in regard to any of the damages she has suffered I found above, I find the landlord has failed to establish that damage or loss results from a violation of the *Act*, regulation, or tenancy agreement during Tenancy 2. I therefore dismiss these items from the landlord's Application.

In relation to the landlord's claim for pool cleaning I accept that the parties agreed to additional terms in the tenancy agreement, including the following:

- The pool was cleaned just prior to possession date and will be kept in good order during the tenancy. i.e. clean proper ph level; and

I find nothing in the agreement that stipulates any requirements specific to the end of the tenancy as such I must rely on the requirements set forth in Section 37 of the *Act*. Section 37 states that when a tenant vacates a rental unit at the end of a tenancy they must leave the rental reasonably clean, and undamaged except for reasonable wear and tear.

While I accept that pools may have many maintenance requirements, I find the landlord has failed to establish that the condition of the pool was not *reasonably* clean. I note that while the photographs submitted show there is some sediment in the pool, I find that the pool is relatively clean. I dismiss this portion of the landlord's Application.

As the tenant did not dispute that they may have taken a mop, a pail and an ironing board, I accept these items may have been removed and find the landlord is entitled to reimbursement for them.

Regarding the tenant's claim to entitlement to double the security deposit in the amount of $5,000.00, I accept from the testimony of both parties that the landlord charged the tenant a security deposit of $1,500.00; a pool deposit of $500.00; and a furniture deposit of $500.00. A security deposit is defined in Section 1 of the *Act* as money paid, or value

or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property.

As all of the deposits are related to obligations or liabilities related to specific components of the residential property (i.e. the pool and furnishings), I find that the total sum of $2,500.00 is a security deposit under the *Act*.

Section 19(1) of the *Act* stipulates that a landlord may not accept a security deposit in excess of the equivalent of ½ month's rent. Section 19(2) states that if a landlord does charge over this maximum the tenant may deduct the overage from a rental payment or recover it otherwise. As I have found the security deposit was $2,500.00 and rent was $3,000.00 I find the landlord overcharged the tenant by $1,000.00 for a security deposit.

Section 38 speaks to how and when a security deposit is returned at the end of a tenancy and imposes a doubling of the amount returned to the tenant **only** if the landlord fails to meet their obligations to either return the deposit to the tenant or file an Application for Dispute Resolution within 15 days of the end of the tenancy and receipt, by the landlord, of the tenant's forwarding address in writing.

I accept that the tenancy agreement used by the parties is the standard Residential Tenancy Agreement published by the RTB that states:

The landlord agrees

1) a) that the security deposit and pet damage deposit must each not exceed one half of the monthly rent payable for the residential property,
   b) to keep the security deposit and pet damage deposit during the tenancy and pay interest on it in accordance with the regulation, and
   c) to repay the security deposit and pet damage deposit and interest to the tenant within 15 days of the end of the tenancy agreement, unless
      i) the tenant agrees in writing to allow the landlord to keep an amount as payment for unpaid rent or damage, or
      ii) the landlord applies for dispute resolution under the *Residential Tenancy Act* within 15 days of the end of the tenancy agreement to claim some or all of the security deposit or pet damage deposit.
2) The 15 day period starts on the later of
   a) the date the tenancy ends, or
   b) the date the landlord receives the tenant's forwarding address in writing.
3) If a landlord does not comply with subsection (1), the landlord
   a) may not make a claim against the security deposit or pet damage deposit, and
   b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both.

However, the RTB published agreement also provides the following disclaimer:

> The Residential Tenancy Branch (RTB) is of the opinion that this Residential Tenancy Agreement accurately reflects the Residential Tenancy Act (RTA)

> and accompanying regulations. The RTB makes no representations or warranties regarding the use of this Agreement. A landlord and tenant may wish to obtain independent advice regarding whether this agreement satisfies their own personal or business needs.

Section 5 of the *Act* states that parties to a tenancy agreement cannot contract outside of the *Act* and any contract that is formed outside of the *Act* has no effect. I find that a contract that imposes a penalty on the landlord that is not consistent with the *Act* is in fact contracting outside of the *Act* and I therefore find the landlord is not obliged to double the amount of the security deposit returned to the tenant because she charged over the allowable amount.

In addition, I note the tenant signed the agreement noted below to forfeit the security deposit. For these reasons, I dismiss the tenant's Application.

Section 44 of the *Act* allows parties to end a fixed term tenancy by mutual agreement, if the agreement is in writing. From the documentary evidence provided and the landlord's contradictory testimony as to her receipt issued to tenant GP in the amount of $3,500.00 and the existence of the agreement, I find the parties entered into a mutual agreement to end tenancy for Tenancy 3 in accordance with Section 44.

I find that by the tenant forfeiting the security deposit and from the landlord's receipt that the tenant compensated the landlord with $6,000.00, and amount greater than required by the written agreement.

In regard to the 2nd condition of the agreement, I find the statement "The premises, as well as all goods and contents are left in *good condition*" to be too vague and sufficiently ambiguous to render it unenforceable.

As to the missing mop, pail and iron board, I find that these are items that could have easily been taken by error, of such minor significance as to have no effect on the agreement; and that the landlord was more than compensated for the value of the items by the additional $3,500.00 paid by the tenant.

As the end of tenancy Condition Inspection Report was completed on September 17, 2011 after the tenants vacated the rental unit, I accept the tenant met the condition of vacating the unit by September 19, 2011.

As such, I find the tenant has fulfilled his obligations under the mutual agreement to end tenancy for Tenancy 3 and he has no further financial obligations to the landlord. I, therefore, dismiss the portion of the landlord's Application seeking compensation for hydro charges and lost rental income after September 30, 2011.

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **$291.21** comprised of $237.44 carpet cleaning; $39.20 replacement glass table top; and $14.57 to replace the mop, pail, and ironing board.

This order must be served on the tenant. I accept that the tenant's legal counsel has provided his address as an address for service for the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

As the tenant was unsuccessful in his Application and as the landlord was mostly unsuccessful in her Application I dismiss both parties claim to recover the filing fee for their Applications.

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 19, 2012.

Residential Tenancy Branch