



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF, SS

Introduction

This hearing was convened by way of conference call in response to an application made by the landlord for a monetary order for damage to the unit, site or property; for a monetary order for unpaid rent or utilities; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenants for the cost of this application.

The hearing did not conclude on the first day of testimony and was adjourned for continuation. The tenant did not attend the hearing on the first day, and the landlord was successful in receiving an order permitting the landlord to serve the tenant in another way than specified in the *Residential Tenancy Act*. The tenant attended the hearing on the second scheduled date after the landlord was provided with the opportunity to call the tenant and ask the tenant to join the conference call. The parties both provided affirmed testimony, and the landlord was given the opportunity to cross examine the tenant. The tenant was not given the opportunity to cross examine the landlord because the tenant was not present for the landlord's testimony.

The landlord also submitted evidence prior to the hearing, however the tenant testified that not all pages were received.

During the first date of the hearing, the landlord testified that the second named tenant in the Landlord's Application for Dispute Resolution moved from the rental unit without the landlord's knowledge about a month after the 12 month tenancy began, and the landlord's application with respect to that tenant was dismissed without leave to reapply in the Decision written for the first day of the hearing.

Issue(s) to be Decided

- Is the landlord entitled to a monetary order for damage to the unit, site or property?
- Is the landlord entitled to a monetary order for unpaid rent or utilities?

- Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?
- Is the landlord 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

The parties agree that this tenancy began on September 1, 2010. Rent in the amount of \$800.00 per month was payable in advance on the 1st day of each month. At the outset of the tenancy the landlord collected a security deposit in the amount of \$400.00, which is still held in trust by the landlord, and no pet damage deposit was collected. The tenant did not provide the landlord with a forwarding address in writing after the end of the tenancy. The rental unit is an apartment within a strata condominium complex.

The landlord testified that the tenancy was a month-to-month tenancy and the tenant left the rental unit sometime in September, 2011 without any notice to the landlord. The landlord discovered that the tenant had moved from the rental unit after the landlord ran out of post-dated cheques for rent. The landlord called the tenant's parent who advised that the rental unit was empty; the tenant had already moved out. The landlord claims unpaid rent for the month of October, 2011 in the amount of \$800.00.

The landlord further testified that upon speaking to the tenant, the tenant agreed to return the keys and remote control for the rental unit, but didn't do so. The landlord claims \$88.00 for replacing those keys and stated that the strata council advised that the remote control replacement cost was \$78.00, and the landlord claims an additional \$5.00 for each of the mail and apartment keys, although no receipts were provided.

The landlord also testified that during the tenancy the smoke alarm in the rental unit sounded when the tenant was not at home. The building manager went into the rental unit with a locksmith to turn off the stove and deactivate the smoke alarm. The tenant had left the stove on and left the rental unit, and the landlord was charged \$117.00 for the locksmith.

The landlord provided a list entitled "Damages/Costs" and testified that a number of the items on the list are included in an invoice which was also provided. The invoice states, "Supply labour, materials & management to carry out repairs/restoration as per estimate," and is in the amount of \$3,044.00 plus \$365.28 for HST, for a total of \$3,409.28. The landlord testified that that amount was paid for:

- Flooring (carpet) replacement – materials \$993.00
- delivery and installation for carpeting \$578.00

- Kitchen faucet repair – found disassembled and parts missing \$154.00
- Window blind replacement – missing \$128.00
- Installation of new blinds \$28.00
- Replace living room ceiling light (parts missing) \$31.00
- Labour for heavy cleaning, filling wall holes and painting \$440.00
- Dispose of old mattresses (3), 1 couch, 2 chairs, garbage \$198.00
- Garburator is unrepairable due to ingestion of nails, coins, fork, misc. metal
Supply and install replacement \$494.00

The landlord claims \$4,049.00 for those items, the unpaid rent, the key and remote control replacement and the call-out from the locksmith, less the \$400.00 damage deposit, for a total claim of \$3,649.00. The landlord stated that the rental unit was brand new, having only been lived in for a couple of months before the tenant moved in, although the tenancy agreement has a note that there were some stains on the carpet before the tenant moved in. A copy of the tenancy agreement was not provided for this hearing, however the landlord testified that the carpet was not repairable after the tenant moved out. The landlord also provided photographs of the unwanted items left in the rental unit, and when asked about the kitchen faucet, the landlord stated that it appeared that the tenant had tried to make repairs but was not able to finish the job.

The rental unit was re-rented on November 1, 2011.

The tenant testified that when the tenancy agreement was signed by the parties, it was noted that the carpets were a mess and the landlord had agreed at that time that they needed to be replaced. Further, the oven was “gross” and during cleaning, the smoke alarm went off.

The tenant does not agree with costs for repair to the garburator. It didn't work right from the beginning and the tenant did not have a phone number for the landlord and the landlord never contacted the tenant at all during the tenancy.

The tenant further testified that the tenancy was a fixed-term tenancy to expire at the end of August. The tenant moved out in mid-August and paid rent for September, 2011. The tenant does not feel that the landlord is entitled to any more rent.

The tenant also disputes painting the rental unit; a few tack holes were left in the walls, but no damage was done.

Analysis

In the absence of a copy of the tenancy agreement, it is not possible for me to determine whether this tenancy was a fixed term requiring the tenant to move out at the end of that term or a month-to-month tenancy. The tenant testified that the fixed term had expired. The onus is on the landlord to prove such a claim, and I find that the landlord has failed to establish that the tenant was required to give notice to vacate the rental unit, and therefore, the landlord's application for a monetary order for unpaid rent is dismissed.

With respect to the landlord's claim for damages, I am not satisfied that the landlord has established the tenant's responsibility to pay for such damages. In order to be successful in a claim for damages, the onus is on the claiming party to satisfy 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.

In this case, the landlord did not cause a move-in condition inspection report to take place. If one existed, it would assist the landlord in proving that the tenant was responsible for the damages claimed. Further, the *Residential Tenancy Act* states that if a landlord fails to complete the inspections in writing, the landlord's right to claim against the security deposit for damages is extinguished. Therefore, the landlord's application to keep the security deposit must be dismissed. This is also very significant to a landlord because if the tenant had provided the landlord with a forwarding address in writing, I would be required under the *Act* to order the landlord to return double the amount of the security deposit to the tenant. If a landlord's right to claim against a security deposit for damages is extinguished, the landlord must return it to the tenant in full within 15 days of receiving the forwarding address in writing, and filing a claim against the deposit within that 15 day period would not assist because of the extinguishment caused by the landlord's failure to complete the move-in condition inspection report.

With respect to the landlord's claim for carpet replacement, both parties agreed that there were stains on the carpet at move-in, and I find that the landlord has failed to establish that the carpet was in any worse condition when the tenant moved out than it was when the tenant moved in.

The landlord did not provide any evidence of the cost paid for call out from the lock company for \$117.00 or replacement of keys and remote control for the parking gate for \$88.00, and has therefore not established element 3 of the test for damages.

The *Act* also requires a landlord to post in a conspicuous place within a rental unit the name and phone number of the landlord or another person appointed by the landlord that the tenant is to contact for emergency repairs. The landlord did not testify that any such notes were left for the tenant, and I accept the testimony of the tenant that the tenant did not know how to get ahold of the landlord and the landlord did not contact the tenant at all during the 12 month tenancy. Therefore, I find that the landlord is not entitled to recovery of the costs for the kitchen faucet repair, living room light or garburator repair.

With respect to painting the rental unit, I find that the landlord has failed to establish that the rental unit required painting and has not satisfied any of the elements in the test for damages. I am also not satisfied that the tenant is responsible for replacement blinds. The invoice provided by the landlord does not specify the work completed. The landlord provided a breakdown but provided no evidence of how that list was completed by the landlord, and I find that the landlord has failed to satisfy element 3 of the test for damages with respect to removal of the tenants' unwanted items.

Finally, with respect to service, the landlord testified that the tenant was served substitutionally according to my substitutional service order by addressing an envelope to the tenant's mother and mailing it to the tenant's mother's place of employment by registered mail. My order stated as follows:

"I hereby order the landlord to serve the Landlord's Application for Dispute Resolution, the attached notice of hearing, a copy of this Decision, and all evidence that the landlord intends to rely on upon the tenant, LAJ by serving the tenant by **registered mail addressed to the tenant at the address of the tenant's mother, and by sending a copy by regular mail addressed to the tenant at the address of the tenant's mother, within 3 days of receiving a copy of this Decision.** Proof of service of the registered mail will provide sufficient evidence that the tenant has been served in accordance with the *Residential Tenancy Act*."

The bold lettering is not added for today's purposes, but was in the Decision to provide the landlord with a clear order of how the tenant was to be served. Further, the *Residential Tenancy Act* permits an application for substituted service, but states specifically as follows:

71(1) The director may order that a notice, order, process or other document may be served by substituted service in accordance with the order.

In this case, the landlord did not serve the documents in accordance with the order, and therefore, the landlord has not complied with the *Residential Tenancy Act*, and the landlord's application must be dismissed in its entirety without leave to reapply.

Conclusion

For the reasons set out above, the landlord's application is hereby dismissed in its entirety without leave to reapply. The tenant provided a mailing address during the course of the hearing and I order the landlord to return the security deposit to the tenant forthwith.

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: March 08, 2012.

Residential Tenancy Branch