



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF, O

Introduction

This conference call hearing was convened in response to two applications for dispute resolution as follows:

By the tenant: as an application for a Monetary Order for the return of double the amount of the security deposit; and to recover the filing fee associated with this application.

By the landlord: as an application for a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; for unpaid rent; for damage to the unit; to keep the security and pet damage deposit; and to recover the filing fee associated with his application.

Both parties attended the hearing and provided affirmed testimony. They were given a full opportunity to be heard, to present evidence and to make submissions.

Issue(s) to be Decided

Is the landlord entitled to a Monetary Order, and if so for what amount?

Is the landlord entitled to keep all or part of the security deposit?

Is the landlord entitled to recover the filing fee?

Is the tenant entitled to the return of the security deposit as claimed?

Is the tenant entitled to recover the filing fee?

Background and Evidence

The rental unit consists of a single detached home. Pursuant to a written agreement, the fixed term tenancy started on February 1, 2011 and was to end on January 31, 2012. The rent was \$1850.00 per month and the tenant paid a security deposit of \$925.00.

It was not disputed that the landlord received notices to end tenancy from the tenant by electronic correspondence on November 16 and November 29, 2011. In the first notice, the tenant informed the landlord that the tenancy would end at the end of the fixed term on January 31, 2012, and in the second notice the tenant informed the landlord that the tenancy would end on December 31, 2011.

The landlord testified that the tenant broke a fixed term lease and moved out on December 29, 2011. He stated that the tenant declined to do a move-out inspection on January 7, 2012, and that he conducted one in the tenant's absence. He said that he received the tenant's forwarding address in writing on December 21, 2011, and that the tenant returned the keys on January 5, 2012.

The landlord said that he immediately started to advertise the unit for rent upon receiving the tenant's notice, starting November 15, 2011, and that he screened all potential renters. He said that several of the inquiries were referred by the tenant, but that for one reason or another they did not meet his requirements (no-shows, no reference checks, etc.). The landlord said that he found a new tenant and was able to secure a rental agreement effective February 1, 2012.

In his documentary evidence, the landlord provided 46 photographs taken on January 7, 2012, in support of his claim for damages and repairs to the unit, showing in part, but not limited to: dusty areas in certain rooms; dents, dirt behind the appliances, nail holes or scratches in the walls; and personal items left behind. The landlord stated that the tenant did some painting and staining of the fence without his permission.

The landlord submitted a claim of \$5640.55 as follows:

- Loss of rental income for January 2012: \$1850.00
- Utilities paid for that month: \$ 105.04
- Flight to BC, hotel accommodations, mailing costs, repairs, materials, garbage disposal: Balance of the claim.

The landlord provided various receipts for certain aspects of the last item of the claim that totalled \$656.17.

The landlord stated that he was not available to complete a move-out inspection on the tenant's date of December 29, 2011. He informed them in writing that he would do it on January 7, 2012. He stated that the tenants did not attend on that date and that he completed the inspection in their absence. He stated that he completed the report and sent it registered mail with his first application for dispute resolution package on January 16, 2012, and then again in March 2012. The tenant disputed that the report was not included in the first package, but that it was included in the package received on March 10, 2012.

The tenant testified that the landlord's claim was filed late. I confirmed however that the parties received the evidence package they served on one another, and I allowed the hearing to continue as I did not find it necessary to consider an adjournment to facilitate re-service of the same documents.

The tenant stated that the landlord's claim is inflated, and that if he adds the receipts attached in the landlord's evidence, he calculates a total of \$629.00. The tenant said that he took very good care of the home and disagreed with every aspect of the landlord's photographic evidence, with the exception of a microwave cabinet left behind. In his documentary evidence, the tenant provided a CD version of a move-out inspection dated January 1, 2012, conducted in the landlord's absence and in support of

the claim that the unit was cleaned thoroughly. However the peripheral tour, although showing a clean, undamaged unit as a whole, did not focus-in on some of the specific areas identified in the landlord's photographs. Nevertheless, the tenant called the photographs fraudulent. Concerning the paint, the tenant said that the touch up was done with the leftover paint provided by the landlord, and that he should not have to pay to repaint the whole wall. The tenant also said that the landlord had verbally agreed to stain the fence, as half of it was already stained.

The tenant also stated that he provided the landlord with several interested parties, and that some would have been qualified tenants. He stated that the landlord had a pre-arranged agreement with the current tenant to start a new lease on February 1st, 2012, which explains the reason why the landlord dismissed other potential renters that could have moved in January 2012.

The landlord stated that if the tenant's video is played frame by frame, the specs of crumbs in the corner of the kitchen counter can be seen and attest to the veracity of his photographs. He stated that the tenant's CD did not provide a view behind the appliances and other areas identified in his photographs. The tenant agreed that the video did not capture every corner, but that there were pre-existing conditions, to which the landlord admitted at the start of the tenancy concerning few nicks and scratches, and identified in the move-in inspection report.

Analysis

Before a Dispute Resolution Officer can make an order under section 67 of the *Residential Tenancy Act*, the applicant must first prove the existence of damage or loss; that it stemmed from the other party's violation of the Act, regulation, or tenancy agreement; that the monetary amount of the claim was verified; and that the applicant took steps to mitigate or minimize the loss or damage. When these requirements are not satisfied, and particularly when the parties' testimonies are at odds, in the absence

of other substantive independent evidence the burden of proof is not met. In this matter that burden was on the landlord to prove his claim against the tenant for damages.

The landlord's claim was supported by condition inspection reports completed at the start and the end of the tenancy; however they are of limited value since the move-in report confirmed the existence of damage. Since I must consider reasonable wear and tear as a factor in a tenancy, the reports do not allow me to determine the degree of difference between the condition of the unit when the tenant moved in and when he moved out, and to assess damages that are beyond reasonable wear and tear. The landlord's photographs show damage that may or may not have been pre-existent; however the landlord's monetary claim is vague and non-specific; and the receipts do not account for the quantum of a claim of \$5640.55 for damages.

The landlord testified that he sent the move out report with his first package on January 16, 2012. The regulations specify that the landlord must give the tenant a copy of the condition inspection report within 7 days after the inspection is completed or, in this case, by no later than January 14, 2012. I note that in his first package for dispute resolution sent to the Residential Tenancy Branch, the landlord included a list of attachments; that list did not identify the condition inspection report and it was not in the package received by the Branch. I prefer the tenant's testimony in this case, that it was not sent in the January package but rather in the March 10, 2012 package of evidence.

For these reasons I find that the landlord did not prove, on a balance of probabilities, the damages as claimed, with the exception of the microwave cabinet which the tenant conceded to. Therefore I award the landlord \$40.00 for the disposal of this item.

Concerning the mailing costs; other than the filing fee, there is no provision for a party to make a claim under the Act for litigation costs or costs related to an application for dispute resolution.

The landlord also claimed an unspecified amount for air travel, as well as gas, hotel accommodations and meals associated with his travel from his residence to the rental unit. The landlord stated that he has an agent who represents him locally only for emergencies, but that otherwise he manages the tenancy and travels every time he renews the tenancy agreement. Therefore the landlord would have travelled regardless, only a month later to deal with these issues and to start a new tenancy at the end of the fixed term. Accordingly I do not find that this aspect of the landlord's claim is justified.

Turning to the loss of rental income for January 2012; the tenant first provided a notice with a correct date to end the tenancy, then provided another one that ended the fixed term one month prematurely. The tenant feels that the landlord could have minimized his loss by accepting qualified candidates available sooner than the one the landlord accepted. Section 45(2) of the *Residential Tenancy Act* states in part that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than the date specified in the tenancy agreement as the end of the tenancy. I do not find that it is up to the tenant to determine who qualifies as suitable tenant. The landlord was caught off guard by a sudden change of events at a very difficult time of the year. This could have been avoided if the tenant had stayed one more month. The landlord advertised immediately and was able to secure a new tenant for February 1, 2012. I find that the landlord is entitled to recover the loss of rental income for January 2012.

Turning to the tenant's claim for the return of the security deposit; the tenant declined the landlord's date of January 7, 2012. If the tenant was not available that day, the tenant could have made arrangements to have an agent or a representative attend on his behalf. Section 36(1) of the Act states in part that the tenant's right to the return of the security deposit is extinguished if the tenant has not participated on either occasion. Since the tenant did not participate I find that the tenant extinguished his right to the return of the security deposit. In doing so, I find that the tenant is no longer in a position to make a claim under Sections 38(1) and 38(6).

Conclusion

The tenant's application is dismissed.

The landlord established a claim of \$1995.04; \$1850.00 for the loss of rental income, \$105.04 for utilities, and \$40.00 for a disposal fee. I authorize the landlord to retain the tenant's \$925.00 security deposit for a balance owing of \$1070.04. Since the landlord was partially successful, I award the landlord \$50.00 as partial recovery of the filing fee. Pursuant to Section 67 of the Act, I grant the landlord a Monetary Order totalling \$1120.04.

This Order may be registered in the Small Claims Court and enforced as an order of that Court.

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 20, 2012.

Residential Tenancy Branch