Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNSD FF
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Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking a Monetary Order for damage to the unit, site or property, to keep all or part of the security deposit, and to recover the cost of the filing fee from the Tenant for their application.

The Tenant filed seeking a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, for the return of all or part of her security deposit, for other reasons, and to recover the cost of the filing fee from the Landlord for her application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

This hearing convened on March 22, 2012 at 9:30 for eighty minutes, reconvened at 11:00 a.m. for sixty minutes, and again at 2:00 p.m. for ninety minutes.

Issue(s) to be Decided

1. Has the Landlord breached the *Residential Tenancy Act* (the Act), regulation and/or tenancy agreement?
2. If so, has the Tenant met the burden of proof to obtain a Monetary Order as a result of that breach, pursuant to sections 7 and 67 of the Act?
3. Has the Tenant breached the *Residential Tenancy Act* (the Act), regulation and/or tenancy agreement?
4. If so, has the Landlord met the burden of proof to obtain a Monetary Order as a result of that breach, pursuant to sections 7 and 67 of the Act?

Background and Evidence

Upon review of each application for Dispute Resolution the parties clarified the amounts being claimed as follows:

> The Tenant is seeking $3,100.00 for costs incurred to move, to purchase medication, for having to live in a unit that has mould and stress and suffering for having to deal with numerous illegal entries into her unit. She determined the amount of her claim by the total amount of rent she paid for the four months she lived there plus her security deposit.
>
> The Landlord has reduced his claim to $1,122.88 and is now seeking the following for damages:
>
> $849.48 to replace the living room carpet
> $134.40 for cleaning the carpet in the entire unit
> $50.00 for cleaning the rental unit (Behind appliances, walls, bathroom)
> $84.00 for touch up painting
> $5.00 to repair Fridge – purchase of clamp

The Landlord confirmed the unit was built sometime in the 1970's and is a three level townhouse located in a complex that has two rows of townhouses; ten in one row and eleven in another. The top floor of the unit has three bedrooms and a bathroom, the main floor has the kitchen and living room, and the basement was where the hot water tank and washer and dryer were located.

The owner purchased these units approximately five years ago and the Landlord has been employed as the resident caretaker/manager since the spring of 2008. As per the owner's affidavit provided in evidence, he has conducted several renovations to the interior of these units which included, but is not limited to, replacement of carpets, painting, kitchen cabinet repairs, drywall repairs, and some of the windows have been replaced. The Landlord is not aware of any other work that may have been performed to the building envelope or roof; he only has knowledge of the work that is listed in the owner's affidavit.

The Tenant affirmed that she and the male Tenant attended the rental unit on September 8, 2011 to sign their tenancy agreement and pay the security deposit of $362.50. They did not begin to occupy the rental unit until October 1, 2011, the start date of the tenancy agreement, and rent was payable on the first of each month in the amount of $725.00 for a month to month tenancy. The male Tenant vacated the

property as of November 1, 2011 and the Tenant and her three children continued to occupy the unit until January 31, 2012. Written notice to end tenancy was delivered to the Landlord January 11, 2012 and the Tenant provided her forwarding address at the move out inspection which was conducted on February 1, 2012.

The Landlord affirmed that he could not recall when the Tenants began to occupy the unit and when asked when the tenancy began he stated the tenancy agreement was signed September 8, 2011.

The Tenant confirmed she signed the move in condition inspection report however she stated she did not attend a move-in inspection. She argued that the Landlord appeared at her door the evening of October 5, 2011, when the male Tenant was out of town, and he had a completed condition inspection report and requested that she sign it. She signed it under “good faith” that the Landlord had completed it in accordance with the condition of the unit and has since learned that it was not done correctly. The male Tenant affirmed that they did not attend an inspection of the unit prior to or during their move into the unit.

The Landlord referenced his evidence and initially stated the condition inspection was completed on September 6, 2011, the date it was signed. Upon further clarification the Landlord advised his normal process is to have prospective tenants complete an application for tenancy and after he does the local background check he faxes the application to his head office for approval. If approved his head office faxes back a tenancy agreement for the parties to enter into. He normally does the condition inspection on the day they move into the unit.

The Landlord stated he could not recall if these Tenants completed the application for tenancy and the tenancy agreement on the same day or not. He does however recall conducting the move in inspection in the presence of the Tenant on the day they were moving into the unit. He stated he recalls that they had moved in a lot of their furniture when he attended the unit to complete the inspection and that during the walk through he recalls the Tenant leaving, at times, he thinks to move in more of her possessions. The Landlord could not explain why the condition inspection report was dated September 6, 2011, two days prior to the date the tenancy agreement was signed and 24 days before the Tenants occupied the rental unit.

The Tenant disputes the Landlord’s testimony and noted that on October 1, 2011, when they called to pick up the keys to gain access to the unit the Landlord was stalling them until later in the day. They later found out that the Landlord had been attending a funeral that day and he only came to provide the keys when they had their movers call the

Landlord directly as they were personal friends of the Landlord. The Landlord left right away to go back to the funeral services and did not return to do any business with them that day.

The following facts were not in dispute:

a) The parties attended a move out condition inspection on February 1, 2012; and
b) The Tenant refused to sign the move out condition inspection report;
c) The Tenant provided her forwarding address February 1, 2012; and
d) In October 2011 the Tenant informed the Landlord she was concerned that someone was entering her unit during her absence; and
e) Upon the start of new tenancies and when tenants request their locks to be changed the Landlord changes the locks with locks that had been previously used in this twenty one unit complex; and
f) The Landlord does not have lock sets rekeyed prior to reusing them; and
g) The Tenant had her own locks installed and offered the Landlord keys however the Landlord refused the key and changed the locks back to a set owned by the Landlord and which had been used during a prior tenancy in this complex; and
h) In October 2011 the Tenant informed the Landlord of the presence of mould on the ceiling of one of the bedrooms; and
i) The Landlord attended to the mould by using some form of bleach compound to wash the ceiling and then repainted the ceiling; and
j) The Landlord conducted an inspection of the attic in the presence of the Tenant's witness and his father during which the photographs which were provided in the Tenant's evidence were taken.

The male Tenant testified that he was still residing in the rental unit when they first noticed the mould in the upstairs bedroom. The mould was in a few locations on the ceiling, at the edge of the ceiling and about 12 -14 inches away from the edge of the wall. He requested the Landlord inspect the attic at that time but he refused. When the mould returned after the initial treatment the Landlord refused their verbal requests to deal with the mould so they put their request in writing which he personally delivered and placed in the Landlord's mailbox.

The Witness confirmed that he was in attendance, along with his father, when the Landlord went up into the attic and he referenced both of their written statements that were submitted into evidence. He noted that during this inspection when his father and

the Landlord kneeled onto the ceiling their knees became wet from the moisture in the insulation. He confirmed he was the person who took the photographs.

The Tenant confirmed she had a building inspection completed on the rental unit and provided a copy of the report into evidence. She advised that her doctor would not provide a medical note until after he saw the inspection report which indicated the presence of mould. She stated that since moving into this unit her three children and she have been prescribed inhalers to treat respiratory issues. She said she informed the Landlord that her oldest daughter had open heart surgery when she was a baby and her middle child had been previously prescribed an inhaler so the Landlord needed to ensure he dealt with these matters properly. She said the Landlord responded by saying the mould issues would be dealt with as cheaply as possible.

The Tenants noted that the inspector informed them that given the extent of the mould it had to have been there for a few years and that it was beyond the inspector's expertise so she suggested that we move. They argue that the Landlord has known for years that there was mould in that unit, as supported by their audio tape recording, provided in evidence, and that he should have told them before they moved into the unit.

The parties agreed that the photographs submitted into evidence were an accurate representation of the condition of the rental unit at the end of the tenancy. The witness however argued that the Landlord's photos had to have been taken a few days prior to the inspection, during the time the Tenant still had possession of the unit, and without proper notice given to the Tenant. He states this because the photos do not display holes in the corner of the wall where he had mounted his tree camera on approximately January 30, 2012 and the photos of the carpet do not represent a carpet after it has been cleaned.

The witness confirmed they moved the Tenant's possessions out over the course of four or five days and they had suspected someone was still entering the unit in their absence because they would leave the lights on and the curtains closed but when they returned the lights were turned off and the curtains were opened. This is why he screwed his camera to the wall. The camera had a motion sensor and time delay and therefore they did not get photos of the person entering the unit but it did catch the door opening and closing.

The Landlord advised he has never entered the Tenants unit without prior permission.

The parties agreed there was new carpet at the onset of this tenancy and that most of the rental unit had been cleaned by the Tenant at the end of the tenancy except for

underneath the appliances, the wall leading downstairs, and the carpets were not steamed cleaned.

The Landlord referenced his evidence which included a letter from the carpet cleaners which indicates the carpet has been damaged beyond repair and needs to be replaced. The Landlord confirmed the carpet has not yet been replaced.

The Tenant confirmed she forgot to clean out the cubicle underneath the built in bench and that the marks were left on the wall going downstairs but argued it was just water based paint that could be washed off. She advised the fridge was broken at the outset of the tenancy and that the duct tape was there the first time she opened the fridge. She has no argument that the carpet required cleaning but she is of the opinion that it should have come clean and was not ruined.

A discussion followed the oral submissions whereby the parties were given the opportunity to settle these matters. The parties were not able to settle these matters at which time I asked each participant if they felt they needed more time to submit additional testimony. Each party stated that no additional time was required and the hearing was concluded at 2:33 p.m.

Analysis

Section 1 of the Act defines a landlord, in relation to a rental unit, includes any of the following:

(a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,

(i) permits occupation of the rental unit under a tenancy agreement, or

(ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;

(b) the heirs, assigns, personal representatives and successors

(c) in title to a person referred to in paragraph (a); a person, other than a tenant occupying the rental unit, who

(i) is entitled to possession of the rental unit, and

(ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;

(d) a former landlord, when the context requires this.

Applying the above definition, I find that the resident caretaker/manager to this proceeding meets the definition of landlord and not witness as first indicated by the Landlord's Counsel. There was ample evidence that the residence caretaker/manager took action to permit occupation of rental units and exercised powers while performing duties under the Act which related to the tenancies in the rental property. My finding does not require piercing the corporate veil but rather the application of the definition of landlord contained in the Act.

The Landlord's Counsel has requested that the audio recordings and written transcripts of the recorded conversations, submitted into evidence by the Tenant, not be considered for reasons of reliability and fairness as identified in a previous dispute resolution decision dated December 14, 2010.

Section 57(2) of the Act provides that the each decision or order of the Director is based on the merits of the case as disclosed by evidence admitted and that the Director is not bound to follow other decisions. As each dispute resolution proceeding turns on the facts of each particular case that are presented by the parties, the decisions referred to by Counsel in support of his position are not precedent setting and do not form a basis for me to exclude the audio tape as evidence.

The *Residential Tenancy Branch Rules of Procedures* defines evidence as any type of proof presented by the parties at a dispute resolution proceeding in support of the case, including:

- Written documents, such as the tenancy agreement, letters, printed copies of emails, receipts, pictures and the sworn or unsworn statements of the witnesses;
- Photographs, videotape, audiotape, and other physical evidence;
- Oral statements of the parties or witnesses given under oath or affirmation.

Therefore I have accepted the audio c.d. and transcripts as evidence and have given them consideration in reaching my decision.

I have carefully considered the aforementioned testimony and the volumes of evidence submitted by both parties which included, among other things, photographs of the rental unit, a building inspection that was conducted January 27, 2012, written statements

from parties and witnesses to the dispute, a copy of the tenancy agreement, and a copy of the move-in and move-out condition inspection report.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Tenant's Application

In considering the matters before me I favor the evidence of the Tenants, who stated they did not attend a move-in walk through inspection, and that they had brought the issues of mould and someone entering their unit during their absences to the Landlord's attention as early as the third week into their tenancy (October 2011), as supported by their witness statements; over the evidence of the Landlord who stated he could not remember when the Tenants were given possession of the unit; that he could remember the Tenants were moving in during the time he conducted the inspection, and that he could not explain why the move in inspection report was dated September 6, 2011, two days prior to the date the tenancy agreement was signed and was several weeks before the Tenants moved into the rental unit.

I favored the evidence of the Tenants over the Landlord, in part, because the Tenants' evidence was forthright and credible. The Tenants readily acknowledged that they changed the locks without the Landlord's written permissions to do so, that they did not clean the wall leading into the basement or behind the appliances, and that they did not have the carpets cleaned at the end of the tenancy. In my view the Tenants willingness to admit fault when they could easily have stated they did do the cleaning and did not change the locks lends credibility to all of their evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find that the Landlord's explanation that he simply cannot remember when the Tenants took occupation of the rental unit, that he cannot explain why the move-in inspection report is dated September 6, 2011, and yet he clearly recalls the inspection being conducted on the date the Tenants were moving in after they had already moved most of their possessions in, to be improbable, not to mention does not meet the requirement under section 14 of the regulations for completing the move-in inspection when the unit is empty of possessions. Rather, I find the Tenant's explanation that the Landlord attended the rental unit on October 5, 2011 with a completed condition inspection report for her to sign, and that someone was entering the unit with a key, to be plausible given the circumstances presented to me during the hearing.

For all the aforementioned reasons, I find the move-in condition inspection report does not meet the requirements of section 23 of the Act and section 14 of the regulation and therefore the Landlord has failed to meet his obligations under section 23 of the Act. When a landlord fails to properly complete a condition inspection report, the landlord's claim against the security deposit for damage to the property is extinguished, pursuant to section 24 of the Act.

In this case, the landlord was required to return the security deposit to the tenant within 15 days of the later of the two: of the tenancy ending and having received the tenant's forwarding address in writing. The landlord received the tenant's forwarding address on February 1, 2012 but did not return the security deposit within 15 days of that date.

Because the landlord's right to claim against the security deposit for damage to the property was extinguished, and they failed to return the tenant's security deposit within 15 days of having received the forwarding address, section 38 of the Act requires that the landlord pay the tenant double the amount of the deposit **$725.00**. (2 x $362.50)

Section 32 of the *Act* requires a landlord to maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards

required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

In many respects the covenant of quiet enjoyment is similar to the requirement on the landlord to make the rental units suitable for occupation which warrants that the landlord keep the premises in good repair. For example, failure of the landlord to make suitable repairs could be seen as a breach of the covenant of quiet enjoyment because the continuous breakdown of the building envelop would deteriorate occupant comfort and the long term condition of the building.

I accept the evidence before me that the Tenants alerted the Landlord to the presence of mould and of their concerns of someone entering their unit, only a few weeks after the onset of their tenancy, and that the Landlord did not take action in a manner that resolved the issues.

Section 25 (1) of the Act provides that at the request of a tenant at the start of a new tenancy, the landlord must

> (a) rekey or otherwise alter the locks so that keys or other means of access given to the previous tenant do not give access to the rental unit, and
>
> (b) pay all costs associated with the changes under paragraph (a).

Based on the aforementioned I find the Landlord's actions of reusing locks from previous tenancies without having the locks rekeyed does not meet the requirements set out in section 25 of the Act as previous tenants or guests who had access to keys from previous tenancies may still gain access to the unit.

I accept the Tenant's evidence that they took action to mitigate their loss by first requesting the Landlord change the locks and when the entries continued and they found out the Landlord was re-using locks from other units they continued to mitigate by changing the locks and offering the Landlord a copy of the keys. Therefore I find the

Tenant has met the burden of proof for aggravated damages as a result of the loss of quiet enjoyment in the amount of **$800.00** (4 months x $200.00 per month).

The Tenant seeks compensation for the reimbursement for medication and medical costs which she alleges are the result of being exposed to mould inside her rental unit. Upon careful consideration of the evidence before me I find there to be insufficient evidence to support the Tenant was prescribed and/or purchased medication for her and her three children or that it was in direct relation to exposure to mould in her rental unit. Accordingly, the claim for medication and medical costs is dismissed.

I find that at the time the evidence was gathered, in December 2011 and January 2012, there was the presence of moisture in the attic and that there was the presence of mould in the attic and inside the living area of the rental unit. Therefore, the Landlord has the requirement under section 32 of the Act to repair and maintain the unit in a manner that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, to make it suitable for occupation by a tenant.

I accept the Tenant's evidence that they informed the Landlord of their concerns relating to the presence of mould and later requested proper remediation of the mould. That being said, I find the Tenant did not mitigate her loss of having to incur future moving costs as the Tenant made no attempt to apply for dispute resolution to seek Orders to have the Landlord repair and maintain the rental unit in accordance with the act; rather she filed her application six days after providing notice to end her tenancy seeking reimbursement for moving costs; costs which she had not yet incurred. Accordingly I find the Tenant has not met the burden of proof and I dismiss her claim for moving costs.

The Tenant has been partially successful with her application; therefore I award her full recovery of her **$50.00** filing fee.

Landlord's Application

Section 21 of the regulation stipulates that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

Having found the move in condition report to be invalid I find there to be insufficient evidence to support the condition of the rental unit at the onset of the tenancy. I did however accept the party's testimony whereby they agreed there was new carpet in the rental unit at the beginning of the tenancy. Furthermore, I accept the agreed upon testimony that the photographs submitted into evidence primarily provided an accurate representation of the condition of the rental unit at the end of the tenancy.

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

The Landlord claims for the cost to purchase the refrigerator part and the Tenant argues that the refrigerator was broken at the beginning of the tenancy.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails. In this case, the Landlord has the burden to prove damages occurred during the course of the tenancy and in the absence of a valid move in condition inspection report I must rely on the verbal testimony. Accordingly, the only evidence before me was disputed verbal testimony which I find insufficient to meet the Landlord's burden of proof and their claim for the cost of the refrigerator part is dismissed.

The Landlord has relied on a letter from the carpet cleaning company which indicates they were not able to remove the living room carpet stains and the carpet needs to be replaced. The Tenant agreed that the carpet needed cleaning and argued that it should have come clean and that it would not need replacing. The Landlord confirmed the carpet has not yet been replaced and that they did not provide photos of the carpet since it has been cleaned.

Residential Tenancy Policy Guideline #16 states that a Dispute Resolution Officer may award "nominal damages" which are a minimal award. These damages may be awarded where a significant loss has not yet been suffered and are an affirmation that there has been an infraction of a legal right.

In this case in the absence of photographic evidence to prove the condition of the carpet after it had been cleaned, and in the presence of the letter from the carpet cleaning company indicating the stains were not removed, I find the Landlord is entitled to nominal damages in the amount of **$500.00**.

Based on the aforementioned I find the Tenants have breached sections 32(3) and 37(2) of the Act, leaving some areas of the rental unit unclean and with some damage at the end of the tenancy. Therefore, in accordance with section 67 of the Act, I award the Landlord **$268.40** which is comprised of the following monetary amounts:

$134.40	for cleaning the carpet in the entire unit
$50.00	for cleaning the rental unit (Behind appliances, walls, bathroom)
$84.00	for touch up painting

The Landlord has been partially successful with their application; therefore I award recovery of the **$50.00** filing fee.

Offset Awards

Tenant's Monetary Award ($800.00 + $50.00)	$ 850.00
Double Tenant's security Deposit plus Interest of $0.00	$ 725.00
SUBTOTAL DUE TO THE TENANT	$1,575.00
LESS: Landlord's award ($500.00 + $268.40 + $50.00)	- 818.40
Offset amount due to the Tenant	**$ 756.60**

Conclusion

The Tenant's decision will be accompanied by a Monetary Order in the amount of **$756.60**. This Order is legally binding and must be served upon the Landlord.

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: April 3, 2012.

Residential Tenancy Branch