Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNMSD, MND, FF

Introduction

This hearing was convened by way of conference call in repose to the landlords' application for a Monetary Order for damage to the unit, site or property; for an Order permitting the landlord to keep all or part of the tenants' security deposit; and to recover the filing fee from the tenants for the cost of this application.

The tenants and their lawyer and one of the landlords attended the conference call hearing. The parties gave sworn testimony and were given the opportunity to cross exam each other on their evidence. The landlords and tenants provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are 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 the security deposit?

Background and Evidence

Both parties agree that this fixed term tenancy started on March 01, 2011 and ended on February 29, 2012. A written tenancy agreement is in place which confirms that rent for this unit was $3,000.00 per month due on the first day of each month. The tenants paid a security deposit of $1,500.00 on March 01, 2011.

The landlord testifies that the tenants drained the hottub at the property on February 24, 2012. The landlord states she contacted a hottub company who sent a letter concerning winterisation of hot tubs and how, if it is not done correctly can result in fracture of plumbing lines which may or may not be repairable. The estimated cost for a repair under those circumstances could range from $200.00 to $2,500.00 depending on the labour required and where the cracks lie.

The landlord testifies that a company came to look at the hottub on March 03 but they could not do any work at that time. They returned on March 07, 2012 but as the hottub was frozen the company said they could not do any work and the hottub must thaw out naturally before they can determine if there is any damage. The landlord testifies that this company returned on April 08, 2012. The hottub was filled at this time by the landlord and registered an error code. The company did not do any work on this date but returned on April 18, 2012 and said they could not see any cracks or leaks with the visual inspection but the pump was making a loud noise and the error code remained. The landlord testifies that the technicians that attended on this visit believed the pump had been damaged because the hot tub had been run while dry and in freezing temperatures. The technicians removed the pump on April 30, 2012 a report was provided to the landlord concerning the repairs and an invoice for $893.00 was presented on May 04, 2012 for the repair to the pump. The landlord has not provided the report or invoice in evidence.

The landlord seeks permission to keep part of the security deposit to cover the cost of this repair.

The tenants dispute the landlords' claims and question the letter sent out from the hottub company dated March 07, 2012. The tenants lawyer states this letter does not indicate that the hottub was inspected on March 03, 2012 and does not indicate that there is any damage to the hottub but is rather more a generic letter concerning possible damage. The tenants' lawyer states the inspections and consequent repair to the pump was done by another hottub company and the invoice from that company shows the first inspection of the hottub was carried out on April 17, 2012 over six weeks after the landlord and tenant inspected the property. The report also indicates that there are no leaks but noisy bearings.

The tenants lawyer states the tenants did drain the hottub down to three to six inches of water as the landlord had informed the tenants that the property would be vacant and the tenants did not what to leave an unattended hottub in a vacant property.

The tenants' lawyer states the tenants' asked the landlord on four occasions for permission to attend the property with their own hottub technician to determine if any damage was caused to the hottub. The tenants' lawyer states the landlord denied the tenants access and said they must wait for the landlords' technician to inspect the hottub.

The tenants' lawyer states that at the end of the tenancy the hottub was not frozen and they have provided a sworn affidavit from a witness to this effect in evidence. The tenants lawyer states the landlord has failed to show the hottub was damaged, has failed to show that any damage was caused as a result of the actions or neglect of the tenants that went beyond normal wear and tear, the landlord failed to act to mitigate their loss by taking prompt action to protect the hottub after the tenants vacated the property when the landlords had care and control of the hottub and did nothing to protect it for the following six weeks.

The tenants lawyer states the tenants were never provided with a copy of a move in inspection report during their tenancy. The tenants were not provided with a copy of the move out inspection report within 15 days of vacating the rental unit. The tenants made requests to the landlord to forward them a copy of this report on March 31 and again on April 11, 2012. The tenants' lawyer states the tenants finally received a copy of this report which was posted on April 12, 2012 by regular mail and was received by the tenants on April 17, 2012. The tenants have provided copies of the e-mail correspondence between them and the landlord and of the postmarked envelope containing the move out inspection report.

The tenants' lawyer states as the landlords did not comply with the *Act* with regard to providing copies of the inspection reports within 15 days the landlords have extinguished their right to file a claim against the security deposit and according to s. 38 of the *Act* the tenants are entitled to recover double the security deposit.

The landlord testifies that a move in condition inspection was completed with the tenants and a copy of the report was given to the tenants at the start of the tenancy. The landlord testifies that the tenants were sent a copy of the move out condition inspection report on March 05, 2012 however the tenants informed the landlord that they had not received this report so the landlord sent another copy on either April 02 or April 03, 2012.

The landlord testifies that when the tenant requested permission to access the property for their technician to inspect the hottub the landlord was not comfortable with allowing the tenant access to the property.

The landlord agrees that the addendum to the tenancy agreement only informs the tenants that they are responsible for maintaining the operation of the hottub and to drain and fill the hottub seasonally. The landlord agrees it does not inform the tenant that they must winterize the hottub.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties. With regard to the landlords reduced claim for damage to the hottub; I have applied a test used for damage or loss claims to determine if the claimant has met the burden of proof in this matter:

- Proof that the damage or loss exists
- Proof that this damage of loss happened solely because of the actions or neglect of the respondent in violation of the Act or agreement
- Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
- Proof that the claimant followed S. 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance the burden of proof is on the claimant to prove the existence of the damage or loss and that it stemmed directly from a violation of the agreement or contravention of the

Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

It is my decision that the landlord has failed to meet the burden of proof in this matter. The landlord has provided no evidence to show that there was damage to the pump or if there was damage that this was caused by the actions or neglect of the tenants. There is no evidence before me of the actual cost for the repair of the alleged damage and although the landlord has sent the tenants an invoice showing the cost for the pump repair the landlord has failed to provide this evidence to the Dispute Resolution Officer.

I further find the landlords did not take the appropriate steps to mitigate any loss of damage to the hottub. The landlords did not refill the hottub or indicate to the tenants that they must refill it at the end of the tenancy. The landlords did not take appropriate steps to determine the damage until six weeks after the tenancy ended and have not therefore shown that the damage was caused as a result of the tenants actions and that this damage was nothing more than normal wear and tear. The landlord also denied the tenants' access to the unit with their own technician to determine if there was any damage caused before the landlord had the hottub inspected and the landlord did not inform the tenants on the addendum what the tenants responsibilities were regarding the winterization of the hottub. Consequently, the landlords' application for damages cannot succeed and is dismissed.

With regard to the landlords claim to keep the tenants security deposit; I refer the parties to s. 23(5) and s.35(4) of the Act which state that the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations. The regulations state the landlord must give the tenant a copy of the signed condition inspection report for an an inspection made under section 23 of the Act, promptly and in any event within 7 days after the condition inspection is completed, and of an inspection made under section 35 of the Act, promptly and in any event within 15 days after the later of the date the condition inspection is completed, and the date the landlord receives the tenant's forwarding address in writing.

Section 24(2)(c) and 36(2)(c) of the Act states if the landlord does not give the tenant a copy of the inspection reports in accordance with the regulations then the landlords right to make a claim against the security deposit for damage to the rental unit is extinguished. The landlord argues that they did give the tenants a copy of the move in inspection report and did send the tenant a copy of the move out inspection report by regular mail which the tenants did not receive so it was eventually posted again on either April 2nd or 3rd. The tenants argue that the landlord failed to provide a copy of the move in inspection report and they did not get the move out inspection report until April 17, 2012.

When one party's evidence is contradicted by that of the other party the person making the claim must meet the burden of proof by providing corroborating evidence to satisfy that burden of proof. It is my decision that the landlords have failed to provide any corroborating evidence to show the tenants were given a copy of the move in inspection report within seven days of the start of the tenancy and the tenants did not get a copy of the move out inspection report within 15 days of the end of the tenancy. The tenants gave the landlord there forwarding address on March 01, 2012. Therefore, I find the landlord has extinguished their right to file an application to keep the security deposit.

The tenants have orally requested that the landlord returns double their security deposit as the landlord breached s. 24(2)(c) and 36(2)(c) of the Act. Section 38(5) of the *Act* states:

> The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

Consequently as the landlord has breached the *Act* with regard to providing copies of the inspection reports to the tenants I find the landlord is not entitled to file a claim against the security deposit for damages and the tenants are therefore entitled to recover double their security deposit to the sum of **$3,000.00** pursuant to s. 38(6)(b) of the *Act*.

Conclusion

The landlords' application for a Monetary Order for damages and to keep the tenants security deposit is hereby dismissed without leave to reapply.

A copy of the tenants' decision will be accompanied by a Monetary Order for **$3,000.00**. The order must be served on the landlord and is enforceable through the Provincial Court 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: May 15, 2012.

Residential Tenancy Branch