



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNDC, MNSD, FF

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 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 tenant for the cost of this application.

An agent for the landlord attended the conference call hearing, gave affirmed testimony and provided evidence in advance of the hearing. Both tenants also attended, gave affirmed testimony and provided evidence in advance of the hearing. The parties were given the opportunity to cross examine each other on the evidence and testimony, all of which has been reviewed and is considered in this Decision.

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 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

This fixed term tenancy began on June 1, 2005 and expired on November 30, 2005 and then reverted to a month-to-month tenancy. The landlord's agent testified that rent in the amount of \$825.00 was originally payable monthly, but was increased to \$855.00 per month by mutual agreement in November, 2005. Rent is payable in advance on the 1st day of each month, and there are no rental arrears. On May 5, 2005 the landlord

collected a security deposit from the tenant in the amount of \$410.00 which is still held in trust by the landlord.

The landlord's agent testified that a move-in condition inspection report had been completed by the parties at the outset of the tenancy, but the landlord did not contact the tenant to arrange a move-out condition inspection report. The tenants had been served with a 1 Month Notice to End Tenancy for Cause before mid-February, 2012, and the tenants moved out assumingly in accordance with that notice. The landlord's agent completed the move-out condition inspection report in the absence of the tenants. A copy of the move-in/move-out condition inspection report was provided in advance of this hearing.

The landlord's agent further testified that the tenancy agreement prohibits smoking within the rental unit and the tenants had smoked in the rental unit, leaving it with nicotine residue which required the rental unit to be painted at a cost over and above what a standard painting would require. The landlord's agent testified that the standard painting would cost \$794.08, and the additional painting required brought the bill to \$1,892.52. The landlord claims the difference between the two costs as against the tenants as damages, or \$1,098.44, and provided copies of 2 invoices to illustrate the landlord's testimony of a standard painting and the painting required in this particular rental unit at the end of the tenancy. The rental unit had not been painted during the tenancy. The landlord also provided a copy of a letter from a person who states that he painted the rental unit and the other 2 bedroom suite at the same time. The letter states that the person is a former smoker and experienced painter, and confirms that the rental unit had definitely been smoked in, noting a smell of marijuana and cigarettes, and that the ceilings were yellowed. It states that this particular rental unit "required a special stain and odour blocker to cover up the yellowness and the smell." The letter also states: "There was much more work required in this unit to restore the walls and ceilings back to the standard condition. In addition, all the wood surfaces required washing down with vinegar in order to freshen up the suite. This was not required in the other unit where no one was smoking."

The landlord's agent also testified that a door had been damaged in the rental unit and provided evidence of having paid \$112.00 for that repair, however, during the course of the hearing, the landlord stated that the landlord is not pursuing that claim.

The tenants did not provide the landlord with a forwarding address in writing.

The first tenant testified that they were good tenants; paid rent on time and tried to adhere to all rules of the complex. The tenant also testified that rent was not raised by mutual agreement; the landlord told the tenant that the tenant had to sign the mutual agreement once the second tenant moved in.

The tenant also testified that the tenants did not smoke inside the rental unit, but several tenants below, above and beside this rental unit smoked. The tenants cooked a lot and the rental unit had no hood fan causing the cooking oils, smoke and odours to rise. Further, the cupboard above the oven would get hot and the bottom of the doors are charred. The rental unit has a wall oven and a counter-top range.

The tenant further testified that the landlord generally left the tenant feeling uncomfortable by always nagging at and observing the tenants. Eventually, it was the furnace that made the tenants move; it was loud, not maintained by the landlord, and didn't work properly. Rather than dispute the notice to end tenancy issued by the landlord, the tenants decided they had had enough. The tenants' older children had moved out prior because they felt uncomfortable. The tenant further testified that the landlord's agents are angry and being vindictive and intimidating. On one occasion, the tenant asked the landlord's agent's spouse to shovel the sidewalk but refused even though others were shovelled. The spouse would also use the laundry room in that complex even though their complex has their own. The complex of the tenants only has one washer and the tenants in that building had a schedule that worked, but the tenant had to wait to do laundry on the scheduled day because the landlord's agent's spouse was using it. The landlord's agents threatened the tenants with rules and never spoke reasonably to the tenants. The tenants didn't move sooner because the location was close to work, close to shops and the tenants' child lived close by.

The other tenant testified that neither tenant ever smoked in the rental unit.

Analysis

Firstly, the *Residential Tenancy Act* states that a landlord must provide a tenant with at least 2 opportunities to conduct a move-out condition inspection report unless the tenant has abandoned the rental unit. In this case, I cannot find that the tenants abandoned the rental unit; the landlord served the tenants with a notice to end tenancy, so the landlord knew the date the tenants were expected to move from the rental unit. The landlord had in excess of 30 days to provide the tenants with a date to conduct the move-out condition inspection report but declined to do so. The *Act* further states that if a landlord fails to complete the report, the landlord's right to claim against the security

deposit for damages is extinguished. Therefore, I must find that the landlord's right to claim against the security deposit is extinguished.

In the normal course of a tenancy, the landlord is permitted to keep the security deposit until such time as the tenancy ends. At that point the landlord has 2 options: return the security deposit or apply for dispute resolution claiming against the security deposit. If the landlord's right to claim against the security deposit for damages is extinguished, that leaves only one option for the landlord: to return the security deposit in full to the tenant within 15 days of the later of the date the tenancy ends or the date the landlord receives a forwarding address in writing. If the landlord fails to do so, the landlord must be ordered to return double the amount of such security deposit to the tenant. In this case, the tenant has not provided the landlord with a forwarding address in writing, and therefore, the 15 day period has not commenced. If the tenant had provided a forwarding address in writing, the landlord would be ordered to return double.

With respect to the tenancy agreement and the rules, the *Act* prohibits a landlord from changing a tenancy agreement without the written consent of the tenant. In this case, the tenancy agreement does not prohibit smoking on the balconies, however the landlord changed that rule during the tenancy without the written consent of the tenants.

The landlord's right to claim damages against the tenants is not extinguished. However, in order to be successful in a claim for damages, the onus is on the landlord 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 tenants' failure to comply with the *Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. What efforts the landlord made to mitigate, or reduce such damage or loss.

In this case, the landlord claims the difference between a standard painting of the rental unit and the painting required due to the tenants smoking inside the rental unit. The tenants deny that they ever smoked inside the rental unit. The landlord provided a copy of a warning letter provided to the tenants dated February 11, 2012 stating that the smoking privileges on the balconies and patios were removed. Having found that the landlord cannot change a tenancy agreement without the written consent of the tenants, I find that that warning letter is of no effect in determining whether or not the landlord has met the test for damages; the letter states the landlord's agent saw the tenants smoking on the balconies. However, the landlord has also provided copies of other letters warning the tenants that a notice to end tenancy might be issued if smoking continued. The tenants claim that the rental unit did not have a hood fan over the range

in the kitchen, and I accept that, however, I am not convinced that the stains and odours left in the rental unit had anything to do with the kitchen range and lack of a hood fan. In the circumstances, I find that the tenants did smoke inside the rental unit contrary to the tenancy agreement.

I have also reviewed the invoices provided by the landlord and compared them with respect to what the landlord considers to be a standard painting and the painting required in this rental unit. The invoices show that the landlord is claiming 5 hours of repairs for \$150.00 that have not been claimed by the landlord. Further, the landlord's agent testified that cleaning the rental unit is not claimed by the landlord, however the invoice provided by the painter includes \$200.00 for washing down all wood surfaces.

I have recalculated the invoice provided by removing the \$350.00 for cleaning and repairs, and have recalculated the HST, and I find that the tenants are responsible for the difference between a standard painting of \$794.08 and the painting required in this rental unit at \$1,339.75, plus HST in the amount of \$160.77, or \$1,339.75, and I find that the landlord has established a claim in the amount of \$706.44.

Since the landlord has been successful with the application, the landlord is also entitled to recovery of the \$50.00 filing fee for the cost of this application.

The landlord currently holds a security deposit in the amount of \$410.00, which I find should be set off from the amount owed by the tenants, and I hereby grant a monetary order in favour of the landlord for the difference in the mount of \$346.44.

The landlord has provided evidence of having served only one of the tenants. The *Act* requires that both tenants be served, and I find that the landlord has failed to serve one of the tenants, and therefore, the monetary order shall be for the tenant that was served only.

Conclusion

For the reasons set out above, I hereby order the landlord to keep the security deposit in the amount of \$410.00 and I grant the landlord a monetary order pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$346.44 as against the tenant who was served with notice of this hearing only.

This order is final and binding on the parties and may be enforced.

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: June 21, 2012.

Residential Tenancy Branch