



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, 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 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 tenant for the cost of this application.

The landlord company was represented at the hearing by an agent who did not testify but provided evidence in advance of the hearing. The landlord's agent called 2 witnesses who gave affirmed testimony. The tenant also attended the hearing, gave affirmed testimony and had one witness to call, but that person did not testify.

The landlord's agent opposed the inclusion of an evidence package received by the tenant which was not received within the time provided for in the *Residential Tenancy Act* and the Residential Tenancy Branch Rules of Procedure. The landlord's agent was questioned as to whether or not an adjournment would provide the landlord with the opportunity to review such evidence, and the landlord's agent declined. The *Act* states:

75 The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be

- (a) necessary and appropriate, and
- (b) relevant to the dispute resolution proceeding.

The Rules of Procedure provide that if any evidence is not received within the time required, the Dispute Resolution Officer must apply Rules 11.5 or 11.6. Rule 11.5 states that a party may request the inclusion of the evidence and must satisfy the Dispute Resolution Officer that the evidence is relevant, that there was no wilful or recurring failure to comply, and that the acceptance of the evidence would not prejudice the other party or result in a breach of the principles of natural justice. If the Dispute

Resolution Officer decides to accept the evidence, the landlord will be given an opportunity to review the evidence and request the matter be adjourned.

The tenant's evidence package was received by the Residential Tenancy Branch on June 14, 2012, which I calculate to be 3 "clear" days, as defined, and the landlord's agent stated that an adjournment to review the evidence is not sought.

In the circumstances, I find the evidence package to be relevant and have heard no submissions by the landlord's agent that the inclusion of that evidence would be prejudicial to the landlord. Further, I can find no wilful or recurring failure to comply on behalf of the tenant or any reason to believe that the acceptance of the evidence would result in a breach of the principles of natural justice.

The parties were given the opportunity to cross examine each other and the witnesses on the evidence and testimony provided, 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 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

At the outset of the hearing, the landlord's agent stated that the landlord's claim includes outstanding utilities in the amount of \$281.35 which was paid by the tenant prior to the commencement of this hearing, and therefore, the landlord's claim is reduced by that amount.

The landlord's first witness is the property manager of the rental complex and testified that this month-to-month tenancy began on January 1, 2011 and ended on April 1, 2012. The tenancy agreement, a copy of which was provided for this hearing, indicates that the tenancy began on January 1, 2010 and was signed on December 23, 2010. However the landlord has also provided a copy of a letter dated May 4, 2011 from the landlord company to the tenant which corrects the occupancy date to January 1, 2011, which is acknowledged by a signature of the tenant.

Rent in the amount of \$780.00 per month was payable in advance on the 1st day of each month, however, during cross examination, the witness testified that the rent had been increased to \$813.00 per month during the tenancy. The landlord's agent testified that refrigerators and stoves are not included in the rent, and if a tenant required those appliances, the rental amount for the appliances was \$18.00 per month each, or \$36.00 per month for both appliances. Further, a \$25.00 late fee is provided for in the tenancy agreement for rents not paid by the 1st day of each month.

The witness testified that on February 22, 2012 the tenant called about a leaking ceiling and mould at the back door and wanted it fixed as soon as possible. The witness sent out a contractor on February 24, 2012 and the tenant asked the contractor to return on the following Monday. While there, the contractor found no leak or mould.

The witness also testified that the tenant told the landlord on March 22, 2012 that the tenant would be moving out of the rental unit on March 31, 2012. The witness told the tenant to fill out a vacate notice, but the tenant would still owe rent for another month. The tenant refused. The witness followed up that conversation on March 23, 2012 with a letter to the tenant explaining the procedure for vacating the rental unit.

On April 4, 2012 the tenant called the witness asking for return of the security deposit. The witness responded that the tenant was required to pay April's rent, and any outstanding rent, repairs or cleaning would come out of the security deposit. The rental unit is a 2 bedroom townhouse with a small office area that could be suitable for a small bedroom. The witness also testified that the refrigerator and stove were not included in the rent and the landlord charges \$18.00 each to rent them. Rarely do tenants have their own, but if they did, the rental charge for appliances would not apply.

The tenant refused to give a forwarding address or sign anything. On or about March 30, 2012 the witness told the tenant that the move-out procedures had to be done. Then, while the tenant was moving out on April 2, 2012 the witness told the tenant that the move-out condition inspection report had to be completed, the tenant had to provide a forwarding address in writing and sign the vacate notice. A move-in condition inspection report had been completed at the outset of the tenancy, but since the tenant refused to sign anything, and the move-out condition inspection report requires a tenant's signature, the witness completed the move-out condition inspection report in the absence of the tenant.

The witness further testified that at the end of the tenancy the witness noticed that a window frame and window were missing. The witness had them replaced at a cost of \$178.08 and provided a receipt for that repair.

The rental unit was not left generally clean at the end of the tenancy and floors, cabinets, counters, cabinet doors, marks on walls and the bathroom required cleaning, at a cost of \$272.00. A copy of the cleaning invoice has been provided. Also, the water was running continuously in the toilet tank.

A door-jam was also cracked as though the door had been forced open in the 2nd bedroom. The rollers on the closet doors in that bedroom also had to be replaced and new doors put on.

A hole was left in the door in the master bedroom, which was replaced and painted. The witness does not know if the doors had ever been replaced before, and appeared to be about 20 years old.

During cross examination, the landlord's witness admitted that the tenant provided the landlord with a forwarding address in writing on April 10, 2012, but the witness had not asked the tenant for a new phone number. The witness was also asked if the kitchen counter had been replaced prior to move-in but it bubbled and the tenant had asked for it to be repaired, which was not denied by the witness.

The witness also testified that the tenant was late paying rent in January, 2012 and a notice to end tenancy was issued at that time. A copy of the notice was provided for this hearing. The rent was paid, however the landlord claims a \$25.00 fee as provided for in the tenancy agreement.

The landlord's second witness testified to being present when the move-out condition inspection report was completed, and testified that the report reasonably set out the condition of the rental unit. The witness saw a hole in a door and cracked door frame which appeared to have been forced open. The doors in the rental unit were in good condition otherwise. The witness did not notice water damage or mould in the rental unit.

The landlord claims \$856.00 in unpaid rent and late fees, \$178.08 for replacing the window, \$272.00 for cleaning and \$452.35 for repairs and maintenance, less the security deposit of \$390.00, for a total of \$1,368.43.

The tenant testified that from December, 2011 to March, 2012 the ceiling leaked and the landlord was told of the problem. The tenant provided photographs of the rental unit

which show the leaks and a bucket that the tenant testified shows how much water was collected by the door.

The tenant further testified that her husband is in hospice and has 6 months to live. The tenant's husband was going to be visiting home on the day the contractor was coming to fix the leak. The tenant could not subject her husband to the respiratory problems that would be associated with the repairs, which is why the tenant asked the contractor to return after the weekend.

The tenant also testified that the move-in condition inspection report shows that the closet doors were missing at the commencement of the tenancy. Also, the door on the master bedroom had a patch on it when the tenant moved in. There were no broken or missing windows in the second bedroom, and if one was missing, it was missing at the commencement of the tenancy. The windows are made with 4 windows, and the tenant's 21 year old son occupied that room. The tenant heard nothing from her son about a missing or broken window and the tenant denies any responsibility for that because it didn't exist at the outset of the tenancy.

The tenant also pointed out that the invoice provided by the landlord in the amount of \$272.00 includes washing concrete floors, while the move-in condition inspection report shows that the rental unit had no concrete floors. The document states: "Initial cleaning April 3-2012 Clean Fridge and kitchen area, storage room and patio, pick all the garbage and wash concrete floors; April 4 Wash all the walls front entrance wash front door and outside clean and wash clean stairs wash walls second floor, clean washroom, disinfected. Total Hrs work in two days 17 hrs X \$16.00 per Hr."

Around Christmas time, the tenant told the landlord's property manager about the ceiling leak and he said he'd get it fixed, but didn't do it. When the tenant paid rent on March 1, 2012 the tenant asked again. A maintenance man looked at it and phoned the property manager and said it was a major problem and would be 10 to 14 days of repairs. The tenant's husband was coming home from hospice and the following Monday would work better for the tenant. The maintenance man replied that that would be no problem, but no one arrived on Monday, nor did anyone call. On the following Tuesday or Wednesday the tenant received a call from the maintenance man saying that the repairs could not be completed until there was no more frost.

The tenant left the rental unit due to the unsafe condition for the tenant's husband; the tenant had to get out. The leak was never fixed during the tenancy.

Analysis

Firstly, with respect to the landlord's claim for unpaid rent, I have reviewed the photographs provided by the tenant and I accept the testimony of the tenant that the tenant could not stay in the rental unit due to repairs that the landlord was told about but failed to correct. In the event that a tenant can establish that the landlord has breached the tenancy agreement by failing to provide and maintain a rental unit in a state of decoration and repair that meets standards required by law and make it suitable for occupation by a tenant, the tenant may give the landlord notice to vacate the rental unit earlier than one month after the notice is given. However, the tenant is still required to put that notice in writing. In this case, it's clear in the testimony that the tenant did not provide the notice in writing. Therefore, I must find that the tenant is required to pay to the landlord one month's rent in the amount of \$813.00.

The landlord also claims late fees in the amount of \$25.00 and \$36.00 for rental of the refrigerator and stove. I have reviewed the tenancy agreement, which states that "Any rent not paid by the 5th (fifth day) of any month will result in an eviction notice being delivered and an automatic \$25.00 eviction notice fee added to rent outstanding." In this case, the landlord did not issue an eviction notice to the tenant for April's rent, however, one was issued in January. Further, the regulations provide that a landlord may charge a fee for late rental payments if a clause in the tenancy agreement provides for such a charge, and in this case, I find that the fee applies and the landlord is entitled to a \$25.00 late payment fee. With respect to the rental of the appliances, I find that the tenant did not use the appliances after the end of the tenancy and I find nothing in the tenancy agreement that provides for written notice to the landlord if the tenant no longer requires them. Therefore, I find that the landlord is not entitled to rental on appliances that were left in the rental unit at the end of the tenancy.

With respect to the security deposit, the *Residential Tenancy Act* requires a landlord to offer a tenant at least 2 opportunities to conduct the move-out condition inspection report, and if the landlord fails to do so, the landlord's right to claim against the security deposit for damages is extinguished. Further, the *Act* requires the landlord to return the security deposit in full or apply for dispute resolution claiming against the security deposit within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing. In this case, the landlord's witness and property manager had difficulty in recollecting certain important information, such as the amount of rent or the fact that the tenant provided a forwarding address in writing. I find that the tenant provided the forwarding address in writing to the landlord's property manager on April 10, 2012 and the landlord's application for dispute resolution was filed on April 24, 2012. In the circumstances, I find that the landlord's right to claim against the security deposit for damages is extinguished, but the landlord's right to claim against it for unpaid rent is not extinguished. I further find that the landlord filed the

application for dispute resolution within the 15 days provided for in the *Act*, and therefore, the tenant is not entitled to a credit of double the amount of the security deposit.

With respect to the landlord's application for damages to the rental unit, I have reviewed the move-in condition inspection report and I find that the landlord has claimed an amount from the tenant for repairs that were required at the outset of the tenancy. For example, the move-in condition inspection report shows that the second bedroom was missing closet doors at the outset of the tenancy and the master bedroom contained a hole in one door of the closet as well as marks on the door of that bedroom, and the landlord has claimed \$452.35 for those repairs. Further, the invoice of the cleaner indicates washing concrete floors, yet the tenant testified there were no concrete floors in the rental unit, which was not disputed by the landlord. I also question what rental unit the cleaner cleaned. Further, the invoice states "wash all the walls front entrance..." and the move-out condition inspection report makes no mention of cleaning required. The same applies to the appliances; the invoice includes cleaning the stove yet the condition inspection reports show that stains existed on the stove and stove top at the outset of the tenancy and appears to be no different at the end of the tenancy. Further find that the balance of the cleaning contained in the invoice is normal wear and tear, especially considering the condition of the rental unit at the outset of the tenancy as evidenced by the move-in condition inspection report. In the circumstances, I am not satisfied that there ever was a window in the second bedroom.

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 other 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.

I find that the landlord has failed to establish that the damages requested for the window, the cleaning and repairs exist as a result of the tenant's failure to comply with the *Act* or the tenancy agreement.

In summary, I find that the landlord has established a claim against the tenant for one month's rent in the amount of \$813.00 and a \$25.00 late fee. The landlord's application for a monetary order for damages is hereby dismissed without leave to reapply. Since the landlord has been partially successful with the application, the landlord is also entitled to recovery of the \$50.00 filing fee for the cost of this application.

I order the landlord to keep the security deposit in the amount of \$390.00 and I grant a monetary order in favour of the landlords for the difference in the amount of \$498.00.

Conclusion

For the reasons set out above, I hereby order the landlord to keep the security deposit in the amount of \$390.00 and I hereby grant a monetary order in favour of the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$498.00.

The landlord's application for a monetary order for damage to the unit, site or property is hereby dismissed without leave to reapply.

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 27, 2012.

Residential Tenancy Branch