



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, FF

Introduction

This hearing was convened by way of conference call in repose to the landlord's 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 tenant's security deposit; and to recover the filing fee from the tenant for the cost of this application.

The tenant and landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other and witnesses on their evidence. The landlord and tenant 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.

Preliminary Issues

From the evidence provided I find a previous hearing took place on July 27, 2012 on the tenant's application for the return of double the security deposit and a monetary order was issued in favour of the tenant. The landlord has now applied to keep the security deposit.

Section 77 of the *Act* states that, except as otherwise provided in the *Act*, a decision or an order is final and binding on the parties. Therefore any findings made by the Dispute Resolution Officer that presided over the prior hearing are not matters that I have any authority to alter and any decision that I render must honour the existing findings. Part of the landlord's application in this matter concerns the landlords request for an order to retain the security deposit. As this matter has already been determined the principle of *res judicata* applies. Therefore the landlord's application to keep all or part of the tenant's security deposit is dismissed without leave to reapply.

Issue(s) to be Decided

Is the landlord entitled to a Monetary Order for damage to the unit site or property?

Background and Evidence

Both parties agree that this tenancy started on January 15, 2011 for a fixed term that was due to expire on June 01, 2012. The tenancy ended on January 30, 2012. Rent for this unit was agreed at \$850.00 per month and was due on the first day of each month in advance.

The landlord agrees that she did not complete a move in condition inspection report with the tenant at the start of the tenancy. The landlord testifies that she did do a walkthrough of the unit with the tenant. The landlord also agrees that she did not conduct a move out condition inspection of the property with the tenant at the end of the tenancy.

The landlord testifies that she had left some personal items in the rental unit for the tenant to use. This included an antique solid oak chair. The landlord testifies that at the end of the tenancy she found the chair seat had been split and had knife gouges on it. The landlord states it looked as if the tenant had glued the seat back together roughly and had then stained the chair a red colour. The landlord seeks to recover the sum of \$250.00 to replace this chair and has provided a hand written receipt which does not identify the store or person the chair was purchased from.

The landlord testifies that the unit had a laminate floor put in prior to this tenancy in November, 2011 which cost \$3,000.00 at that time. The landlord testifies that the tenant has left this floor with approximately 20 gouges in that look like they have been made with a knife. The landlord testifies that she believes the tenant practised taxidermy in the living room as the marks are concentrated around the tenant's desk area. The landlord testifies that although these marks were in the living room the whole floor in the unit has had to be replaced as this flooring is no longer available. The landlord seeks to recover the sum of \$3,074.64 to replace the flooring. The landlord testifies that she has not provided a copy of the receipt as this was only obtained last week from the contractor.

The landlord testifies that the unit had a new shower head at the start of the tenancy. The tenant did not notify the landlord that the shower head was not working and the tenant removed the shower head. The landlord found it at the end of the tenancy hidden away and covered in black tape. The landlord testifies that the tenant did not leave a new shower head in the bathroom. The landlord seeks to recover the sum of \$39.19 for a replacement shower head and the sum of \$65.00 for the insulation. The landlord has provided a receipt for the shower head but not for the insulation.

The landlord testifies that a previous tenant living upstairs had purchased an oil heater for the landlord in 2009. The landlord paid the sum of \$66.57 for this heater. At the end of the tenancy the landlord states she found this oil heater in this tenants unit and it was in a state of disrepair. The control panel was broken and the heating coils were touching the floor. The landlord states the tenant did not have permission to use this oil heater. The landlord testifies that she has not replaced the heater as she has fitted an electrical baseboard but still seeks to be reimbursed for the damaged oil heater.

The landlord testifies that she had purchased a new shower curtain for the unit in 2010 at a cost of \$16.45 plus HST. At the end of the tenancy the landlord testifies that she found this shower curtain with a piece cut of the bottom.

The landlord testifies that there was an old television set left in the unit that the landlord had purchased second hand for \$15.00. At the end of the tenancy the landlord found the control knobs had been burnt off as the tenant had left a candle burning on top of the controls. The landlord testifies that there was also a Chinese carved coffee table left in the unit and the tenant had burnt the top of that table with candles. The landlord states she has not been able to replace this table and had paid \$450.00 for it. The landlord states she is willing to accept the sum of \$200.00 from the tenant due to the damage.

The landlord testifies that there was a solid wood table base with a glass top left in the unit. This table base was approximately 10 years old and was solid oak. The landlord states the tenant must have thrown the base away as it was not in the unit at the end of the tenancy. The landlord testifies she had to replace the wooden base with a metal one and seeks to recover the cost of this to the sum of \$75.00. The landlord has not provided a receipt for the new base.

The landlord testifies that there was a toaster and a bar stool left in the unit and these were missing at the end of the tenancy. The landlord testifies that she has replaced the toaster and seeks to recover the sum of \$35.67. The landlord has not provided a receipt for this.

The landlord testifies that there was an Iranian pray rug hanging on the wall in the unit at the start of the tenancy. The landlord states the tenant removed this and placed it by the door in the entrance way. The landlord states she is seeking \$16.00 to have the pray rug cleaned. The landlord has not provided a receipt or quote for this cost

The landlord testifies that the tenant took the wires out and broke the shade of an antique ballerina brass lamp. The landlord seeks to recover the sum of \$35.00 for the electrician fees for the rewiring of this lamp. The landlord has not provided a receipt for this cost.

The landlord testifies that she had left 10 flat sheets, seven or eight towels and a goose down duvet in the unit. The landlord testifies that the tenant said the landlord had given the tenant permission to donate the sheets and towels but the landlord states this is untrue and the sheets, towels and duvet are now missing from the unit. The landlord seeks to recover this sum of \$200.00 to replace some of these sheets and towels and \$100.00 to replace the duvet. The landlord has not provided any receipts or quotes for these costs.

The landlord testifies that the neighbours had to call the police because the tenant was firing an air gun. The landlord testifies that the tenant caused damage to the shed and broke two windows in the shed with this gun. The landlord seeks to recover the sum of \$150.00 to replace the windows. The landlord has not provided a receipt or quote for this cost.

The tenant disputes all of the landlord's claims. The tenant testifies that the chair was not damaged and was left in the same condition it was in at the start of his tenancy. The tenant calls into question the landlord's receipt provided for this replacement chair as it does not contain the store's name or any indication that the chair was purchased as the price charged is \$223.22 plus HST. The receipt does not have an HST number and therefore HST cannot be charged as the landlord claims. The tenant suggests this receipt is fraudulent.

The tenant testifies he did not cause any damage to the flooring in the unit either purposefully or accidentally. The only receipts provided by the landlord are from when the floor was originally laid. The tenant states the floor had some marks on it at the start of his tenancy, these were pointed out to the landlord but the landlord did not complete a condition inspection report. The tenant testifies that he is a landscaper and does not practise taxidermy in the unit. The tenant states he did collect some bones years ago and suggests this is what the landlord is referring to.

The tenant testifies that he replaced the shower head two days before the tenancy ended as the existing one had always leaked and as the tenancy agreement states that the tenant is responsible for minor repairs the tenant had taped the old shower head up to stop the leaks and then decided to replace it to comply with the tenancy agreement. The tenant disputes the landlord's claim that he damaged a shower curtain.

The tenant testifies that the oil heater was left in the same condition it was in when it was given to him by the upstairs tenant. The tenant states this heater was in a prime condition and was not damaged as stated by the landlord.

The tenant testifies that there were wax marks on the old television set when he moved into the unit. The tenant states he never used this television throughout his tenancy and has no idea if it worked or not as the tenant had his own television. The tenant also disputes the landlord's claims that he damaged the Chinese table with candles. The tenant testifies that the Chinese table was in the same condition at the start of the tenancy and the tenant does not use candles. The tenant states had the landlord completed a move in condition inspection report at the start of the tenancy it would have shown all these areas to be as the tenant has described.

The tenant testifies that the toaster and bar stool were left in the unit at the end of the tenancy along with the towels, sheets and duvet. The tenant testifies that he did not use any of the landlord's linens as he did not want to use linens belonging to someone else.

The tenant testifies that the pray mat was already on the floor in the entrance way. The tenant states he did not take it from the wall and it was simply used as a welcome mat which he thought it was.

The tenant testifies that he did not remove any wires from a brass lamp. The tenant states he is not an electrician and would not know how to remove wires from a lamp. The tenant testifies that when the landlord came to visit the tenant she asked for the lamp back and it was returned to the landlord at that time.

The tenant testifies that he does not own an air gun. The tenant states he does own a child's soft toy gun but this would not have the power to break windows. The tenant agrees the neighbours called the police and when the police spoke to the tenant they saw the gun and just asked the tenant not to use it at the home because of the neighbours.

The tenant cross examines the landlord and asks what evidence the landlord has to support the damage to the floor or repair. The landlord states it was on an itemized receipt that included repairs to the plumbing and electrical panel. The landlord states she did not provide this as she only received it a week ago and she was having chemotherapy at the time. The tenant questions the landlord about the purchase of the chair. The tenant asks where the landlord purchased the chair and how much it was.

The landlord replies and names the store on Main Avenue and states the chair was \$275.00 but it was reduced to \$223.22.

The landlord declines to cross examine the tenant.

The landlord calls her witness who is a friend of the landlord. The witness testifies that he did not see the rental unit at the start of the tenancy as he met the landlord later while they were undergoing chemotherapy together. The witness testifies he first went to the unit in September and witnessed the landlord having a discussion with the tenant and the tenant telling the landlord to get out of the unit. The witness testifies that he noticed the shed had holes in the window and one window was missing. On a subsequent visit the witness states the landlord pointed out knife cuts in the living room flooring, a broken shower head and a sliced shower curtain. The witness states that only today he noticed holes in a tree which appear to be bullet holes. The witness testifies that he also saw an antique chair with a slit in the seat which was painted a reddish green colour and the landlord showed the tenant a picture of how the chair looked originally.

The tenant cross examines the landlords witness and asks the witness when he had the opportunity to sit in this chair and was it cracked and red. The witness replies he sat in the chair when the landlord moved into the basement suite and it was cracked and red. The witness states this was the first time he went to visit the landlord after the tenant moved out.

The tenant calls his witness. The tenants witness is a former tenant who resided in the unit above the tenants until the witness moved out. The tenants witness testifies that he was engaged in a similar dispute with this landlord after the landlord accused the witness of theft and damage. The witness testifies that the landlords claim was dismissed. The witness states it appears to be the pattern with the landlord when a tenant leaves, the landlord files a claim to go after the former tenants for money.

The tenant asks his witness if he was familiar with the condition of the tenants unit and the furnishings before the tenant moved into the unit. The witness replies that he was familiar with the tenants unit. The tenant asks his witness if he had opportunity to assess the tenants unit when he moved out and was he privy to any damages in the unit as alleged by the landlord. The witness replies that he did not observe any damage and he would not have agreed to be a witness for the tenant if there had been any damage to the tenants unit. The tenant asks his witness if he saw the tenant and the tenants helpers bring the rental unit up to a good condition at the end of the tenancy.

The witness replies that there were no problems with the unit. The witness states as he had warned the tenant what the landlord was likely to do the tenant made extra effort in the unit and the witness states he was not surprised by all the effort the tenant took to ensure the unit was left in a good condition.

The landlord cross examines this witness. The landlord asks the witness if the witness gave the oil heater to the tenant. The witness replies that he bought the heater for the landlord and it belonged to the house. The landlord states the heater belonged in the laundry room. The witness states the landlord says these things and then back tracks on what she has said.

The landlord testifies that the tenant has continued to harass her and does drive by in a Camero car checking out the house. The tenant disputes this and states he does not own and does not know anyone who owns a Camero. He has never driven by his old residence and would never put himself in further conflict with this landlord.

The landlord has provided some photographic evidence which is of a poor quality and show limited accounts of the items under dispute.

Analysis

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 or 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.

I have considered the documentary evidence and verbal testimony before me from the parties and their witnesses. Having pursued this evidence I find the landlord has insufficient evidence to show that all the claimed for damage exists, there is insufficient evidence such as a move in and move out condition inspection report to show that the damage was caused by the tenant's actions or neglect in violation of the *Act*. The landlord has provided no itemized documentation showing the items that were left in the rental unit at the start of the tenancy or the condition of any personal belongings; the landlord has insufficient evidence to verify the actual amount required to replace or repair damaged items and some of the landlords receipts are brought into question.

The landlord has asked a friend to appear at the hearing today and with all due respect the landlords witness was not privy to the condition of the rental unit at the start of the tenancy and cannot make a statement on any alleged damages caused during the tenancy as anything told to the witness by the landlord is hearsay. The witness cannot make an assumption that the damage was caused by the tenant if the witness did not see what the original condition of the unit and landlords belongings in the unit were at the start of the tenancy. Therefore the landlord's witness's testimony carries little weight in these proceedings.

The tenants witness however was privy to the condition of the unit and some of the landlords belongings contained within the unit at both the start and end of the tenancy and is therefore in a better position to make statements based on his own observations.

Consequently, I find the landlord has insufficient evidence to support her claim for damages and the landlord has not met the test for damage and loss claims. Therefore the landlords claim is dismissed.

As the landlord's claim is unsuccessful I find that the landlord is not entitled to recovery the filing fee and must bear this cost herself.

Conclusion

The landlords claim is dismissed in its entirety without leave to reapply.

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: August 15, 2012.

Residential Tenancy Branch