



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

CNR, MNDC, OLC, LRE, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for an order to cancel a Ten Day Notice to End Tenancy for Unpaid Rent, an order that the landlord comply with the Act, an order to suspend or set conditions on the landlord's right to enter and a monetary order for \$1,200.00 for loss of quiet enjoyment and devalued tenancy. The hearing was also convened to consider a cross application by the landlord for an Order of Possession based on the Ten Day Notice to End Tenancy for Unpaid Rent and a monetary order for rent owed, loss of rent, repairs and cleaning costs in the amount of \$10,027.10.

Both the landlord and tenant were present and gave testimony in turn.

At the outset of the hearing the parties advised that the tenant had vacated the rental unit on August 10 or August 12, 2012. Therefore, the tenant's application to cancel the Ten Day Notice to End Tenancy for Unpaid Rent, to order the landlord to comply with the Act and to suspend or set conditions on the landlord's right to enter are all moot issues because the tenancy has ended and will not be heard. However, the tenant's monetary claims will still be considered.

The portion of the landlord's application requesting an Order of Possession is also moot and will not be heard. However the landlord's monetary claims for rent, loss of rent, damages, cleaning and repairs will be considered.

Issues to be Decided for the Tenant's Application

Is the tenant is entitled to a retroactive rent abatement for loss of enjoyment and facilities?

Issues to be Decided for the Landlord's Application

Is the landlord entitled to monetary compensation under section 67 of the Act for rent, loss of rent, cleaning and repairs?

The tenant has the burden of proof to prove damages and loss to support and justify the tenant's monetary claim. The landlord has the burden of proof to prove damages and loss to support and justify the landlord's monetary claim.

Preliminary Matter

The landlord testified that there was a previous tenancy that ended just prior to this tenancy that included one of the two co-tenants involved in this dispute who lived in the residence with another co-tenant from the previous tenancy who is not part of the tenancy now under dispute and is not named as a participant in this hearing. A copy of the previous tenancy agreement between this landlord and the other set of co-tenants was submitted into evidence. However, the terms and any claims related to this previous tenancy are not before me and will not be heard nor considered.

Background and Evidence: Tenant's Application

This tenancy with the co-tenants participating in this dispute began on July 1, 2012 with rent set at \$1,200.00 per month and a security deposit of \$600.00 was paid. A copy of the tenancy agreement was submitted into evidence. The tenant testified that during the months of July and August, 2012, the tenant was forced to endure construction noises, disruptions, missing or moved possessions and other problems including an inability to access their entry and use their patio. The tenant also stated that the landlord had entered the unit without proper notice, confiscated some of the furnishings that were included as part of the tenancy agreement and the tenant found it necessary to involve the police. The tenant testified that their tenancy was devalued by at least 35% due to all of the problems.

As the tenant has vacated and furnished the landlord with a forwarding address, the tenant is claiming the return of the security deposit of \$600.00. The landlord acknowledged that the tenant's security deposit was not refunded.

The landlord testified that during and after the tenancy, they were willing to work with the tenant to resolve concerns that arose, but the tenants were not receptive to their efforts. The landlord testified that, for example, when they made arrangements to repair the dryer for the tenant, the tenant denied entry and contacted the police.

With respect to the tenant's testimony about the ongoing renovation work on the exterior of the complex, the landlord argued that they had no control over the strata's activities. The landlord pointed out that the tenant had knowingly rented the unit during a period where he was clearly aware that the renovations were in process. The landlord denied that the disruption was as severe as the tenant has portrayed. The landlord stated that the tenant was merely trying to avoid paying the rent that was owed for August 2012.

The landlord said that some items belonging to the landlord were retrieved because the tenants were intentionally damaging them.

Background and Evidence: Landlord's Application

The landlord is making a monetary claim for the rent owed from August 1, 2012, until August 10, 2012 in the amount of \$387.10. The tenant did not dispute that this rent was validly owed.

The landlord is also seeking compensation for the following estimated costs:

- \$375.00 for dryer repairs
- \$250.00 for a broken mirror
- \$415.00 for a damaged bedroom door
- \$1,000.00 for damage to the walls
- \$6,000.00 for replacement floors
- \$400.00 for cleaning
- \$1,200.00 for loss of September 2012 rent

The landlord stated that, although no move-in inspection report was completed at the start of this tenancy, they attempted to conduct a move-out condition inspection with the tenant, but were met with hostility. The landlord testified that the unit was in near perfect condition when the tenant took occupancy, because it had been renovated and was vacant for a long period of time prior to the earlier tenancy that ended just before this one began. The landlord made reference to documents that verified the unit was painted and had new blinds installed in 2011. The landlord stated that repairs were necessary after the tenants left and the unit was not left in a clean condition. The landlord submitted photos of the damage being claimed.

Other evidence that was submitted by the landlord included copies of communications between the parties, a copy of the Strata Bylaws, a copy of a move-out inspection report signed by the landlord only, written testimony, copies of written witness statements, a copy of the Ten Day Notice to End Tenancy for Unpaid Rent, a copy of a card from a police constable, a letter from the landlord's contractor listing damage to the unit and the respective costs of repairs, written estimates and an invoice for dryer repairs.

In regard to the claim for the dryer repair, the landlord testified that this was done during the tenancy and on the request of the tenant. The landlord testified that the \$420.00 claim was for \$75.00 per hour plus GST. According to the landlord, the claimed costs reflect the fact that the landlord's contractor had to spend 2 hours awaiting police, due to the tenant's sudden refusal to permit entry, and another 2 hours dismantling the dryer to remove internal lint build-up in the inner electrical workings. The landlord's position is

that this build-up was caused by misuse of the appliance by these tenants during the tenancy and that the tenant's actions in this regard posed a serious fire hazard.

The tenant argued that the repair and maintenance of appliances are the landlord's responsibility under the Act and should not be allocated to the tenant. The tenant denied misusing the dryer in any way.

The landlord is claiming compensation of \$250.00 for a broken mirror that had been part of the tenancy, but was found destroyed in a bin.

The tenant stated that the mirror may have been knocked off the wall by the construction vibrations and also intimated that the landlord may have damaged it after removing it from the suite.

With respect to the damaged door, the landlord testified that it was compromised during the tenancy that ended just before this one. However, the damage had involved one of the current co-tenants, who had patched the door ineffectively. For this reason, the landlord argued that this co-tenant should still be responsible to repay the landlord for the damage that occurred during his prior tenancy. The landlord testified that the door has not yet been replaced, but will cost an estimated \$415.00, as supported by the written estimate from her boyfriend, who is a qualified professional contractor.

The tenant disputed the landlord's claim for the alleged door damage.

With respect to the claimed damage to the walls, the landlord stated that there was extensive damage and made reference to two photos that illustrate some dents in the wall. The landlord stated that the cost of \$1,000.00 being requested to fix the damage was based on an estimate from her contractor. The estimate in evidence did not include a breakdown of the labour and supplies and the landlord admitted that no money has been spent on the repairs as of yet. The landlord acknowledged that she was not sure if the walls were damaged during this tenancy or by the occupants during the previous tenancy that ended just prior to this tenancy. However, because one of the previous occupants subsequently became one of the current co-tenants, the landlord insisted that, the participant tenant should be held liable for the estimated expenditures to paint and repair the walls. The landlord acknowledged that no wall damage was noted on the move-out condition inspection report. However, the landlord pointed out that the report was not completed fully because the tenant did not cooperate.

The tenant disputed that there was any wall damage beyond normal wear and tear and referred to the tenant's photos that showed many of the walls in the rental unit apparently in good shape at the time the tenant vacated.

In regard to the \$6,000.00 being claimed for replacement floors, the landlord stated that this was based on estimates, given that the original wood floor was installed in 2001 and the flooring product used was no longer available to patch the damaged areas. The landlord also conceded that no monetary loss had yet occurred in purchasing new flooring. The landlord supplied photos of the floor that appeared to show gouges on the finish.

The tenant disputed that any damage had occurred during the tenancy that began in July 2012. The tenant made reference to the photos submitted by the tenant that showed most of the unit, including the floors, to be in reasonably good condition.

In regard to the claimed \$400.00 for cleaning, the landlord acknowledged that nobody has yet been hired to clean the unit, since the tenant vacated more than two weeks ago. However, the landlord feels that there is a substantial amount of cleaning necessary, including behind the refrigerator and stove and feels that the tenant should pay the estimated cost because the suite was in a spotless condition when the tenant moved in.

The tenant testified that the unit was left in a reasonably clean condition when they vacated and made reference to photos of the unit that were submitted into evidence, including pictures of the inside of the refrigerator, stove, bathroom fixtures and other areas of the unit that appear to be reasonably clean in the photos.

The landlord stated that she is claiming \$1,200.00 for loss of September 2012 rent as the tenant did not provide one month written notice to vacate and merely refused to pay rent for August and vacated after the Ten Day Notice to End Tenancy for Unpaid Rent was served. The landlord testified that she has not been able to make efforts to clean, repair and show the rental unit during August and it is evident that it will remain vacant next month.

The tenant does not agree with the claim for anticipated loss of rent for September.

Analysis – Tenant's Monetary Claim

A tenant's security deposit is always held in trust and functions as a credit to the tenant. In this case, the tenant is credited with \$600.00 that must be refunded unless the landlord obtains an order that permits the landlord to keep it in compensation for a debt or damages owed by the tenant.

With respect to the tenant's claim for a retro-active rent reduction to compensate for loss of quiet enjoyment, I find that an Applicant's right to claim damages from another party is governed by section 7 of the Act which states that if a landlord or tenant fails to comply with the Act, the regulations or tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the

Act grants a Dispute Resolution Officer authority to determine the amount and order payment under the circumstances.

In this instance, I find that the tenant did have some prior knowledge of the fact that there would be some construction going on. However, regardless of what terms parties agree upon, the terms of the contract must still be in compliance with the Act.

Section 5 of the Act states that Landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 28 of the Act protects a tenant's right to quiet enjoyment and states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

I find that the tenant did endure some disruption and the loss of use some facilities since this tenancy started. I find that the current tenancy started on July 1, 2012, and therefore this tenant is not entitled to retro-active compensation before that date. The tenancy ended on August 10, 2012. I find that the tenant is entitled to a rent abatement totaling \$158.71, representing 10% of the \$1,200 rent for July and the \$387.10 owed for August 2012.

I find that the tenant is entitled to total monetary compensation in the amount of \$758.71, comprised of \$600.00 for the return of the security deposit and a retroactive rent abatement of \$158.71.

Analysis – Landlord's Monetary Claim

Rent

In regard to the August rent of \$387.10 being claimed, I find that the amount was not disputed by the tenant and that the landlord is entitled to be compensated this amount.

Loss of Rent

In regard to the landlord's claim for \$1,200.00 loss of rent for September, 2012, I find that the landlord did incur a loss. I also find that the tenant was in violation of the Act by not paying rent, which ended the tenancy. However, I find that the landlord's evidence failed to satisfy element 4 of the test for damages because the landlord did not make a reasonable effort during the month of August to re-rent the unit for September 1, 2012, to minimize the losses as required under section 7(2) of the Act.

Cleaning and Repairs

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

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

With respect to the landlord's claim for cleaning and repairs, the burden of proof is on the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent.

Section 37(2) of the Act states 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.

Although I can accept that the rental unit was not left in a "spotless" condition, I find that the evidence supports the tenant's position that the rental unit was left in a reasonably clean condition as required under the Act. I also find that the landlord's claim for the estimated cost of \$400.00 for cleaning does not satisfy element 3 of the test for damages, as no money has been spent on the cleaning to date and therefore, no loss has been incurred.

In regard to the claim for the costs to repair the dryer, I accept the tenant's position that, under the Act, the landlord would normally be responsible for repairs to an appliance during the tenancy. I do not accept the landlord's position that the existence of lint in

the internal workings of the dryer constitutes absolute proof that this tenant had misused this appliance during the period from July 1, 2012 until August 10, 2012 and that the tenant had wilfully inflicted damage. Therefore, I find that the landlord has not sufficiently met the burden of proof to satisfy element 2 of the test for damages and the portion of the landlord's claim relating to the dryer repair must be dismissed.

I find that the tenant's role in causing the other damages to the suite could have best been established with a comparison of the unit 's condition before the tenancy began with the condition of the unit after the tenancy ended. In other words, through evidence using move-in and move-out condition inspection reports containing both party's signatures.

Section 23(3) of the Act covering move-in inspections and section 35 of the Act for the move-out inspections state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and the landlord and tenant must each sign the condition inspection report, after which the landlord must give the tenant a copy of that report in accordance with the regulations. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

In this instance, I find that the landlord admitted that a move-in condition inspection report was not completed. I find the failure to comply with section 23 of the Act has hindered the landlord's ability to establish what damages were caused by the tenant and did not pre-exist prior to July 1, 2012.

With respect to the landlord's claim for repairs and restoration of the rental unit, in addition to the fact that there was no move-in condition inspection report to establish the start-of-tenancy condition, I find that the repair claims do not satisfy element 3 of the test for damages, being that the landlord has not yet incurred any of the claimed expenditures including the estimated \$415.00 for the damaged bedroom door, the estimated \$1,000.00 for repairing damage to the walls or the estimated \$6,000.00 for replacement floors.

I also find that these estimated claims were not sufficiently detailed to verify what the claim was for and I find that the documentary evidence was not sufficient to meet the standard of proof required. Moreover, the claims were disputed by the tenant based on various grounds that included challenging the cause of the damage, the amount of the estimated cost and as well as allegations that some of the damage pre-existed the tenancy.

For the above reasons, I find that the portion of the landlord's application relating to these claims must be dismissed.

In regard to the damaged mirror, I accept the evidence showing that this mirror was placed in the suite in good condition, but was smashed and rendered unusable sometime during the tenancy. Although the landlord has not replaced the mirror, I find that this claim has met all elements of the test for damages and I therefore find that the landlord is entitled to be compensated in the amount of \$250.00 to replace the broken mirror.

Given the above, I find that the landlord is entitled to compensation in the amount of \$637.10 , comprised of \$387.10 for the rent owed and \$250.00 for the replacement cost of the mirror.

Conclusion

Based on the testimony and evidence I find that the landlord is entitled to compensation for rent and damages totalling \$637.10 and I find that the tenant is entitled to compensation for the return of their deposit and a rent abatement totalling \$758.71. In setting off these two amounts, I hereby grant a monetary order in favour of the tenant for the difference in the amount of \$121.61. This order must be served on the Respondent and may be filed in the Supreme Court, (Small Claims), and enforced as an order of that Court.

The remainder of the landlord's and the tenant's applications are hereby dismissed without leave to reapply. Each party must pay their own filing costs.

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 29, 2012.

Residential Tenancy Branch