



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MND, MNSD, FF
 AAT, CNC, CNL, MT, O

Introduction

This hearing was convened by way of conference call in response to applications filed by the landlords and by the tenants. The landlords have applied for an Order of Possession for cause; for a monetary order for damage to the unit, site or property; for an order permitting the landlords to keep the security deposit or pet damage deposit and to recover the filing fee from the tenants for the cost of the application. The tenants have applied for an order that the landlords allow access to and from the rental unit or site for the tenants and the tenants' guests; for more time to dispute a notice to end tenancy; for an order cancelling a notice to end tenancy for cause and for an order cancelling a notice to end tenancy for landlords' use of property.

Both landlords and both tenants attended the conference call hearing and each gave affirmed testimony. The parties also provided evidentiary material prior to the commencement of the hearing to the Residential Tenancy Branch and to each other. The parties were given the opportunity to cross examine each other on the evidence and testimony provided, all of which has been reviewed and is considered in this Decision.

No issues with respect to service or delivery of documents or evidence were raised.

During the course of the hearing, the tenants agreed that the landlords obtain an Order of Possession effective November 30, 2012, and the tenants' application in its entirety has been withdrawn.

Issue(s) to be Decided

The issues remaining to be decided are:

- Have the landlords established a claim as against the tenants for damage to the unit, site or property?

- Are the landlords 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

The first landlord testified that this month-to-month tenancy began on July 1, 2012 and the tenants still reside in the rental unit. Rent in the amount of \$1,800.00 per month is payable in advance on the 1st day of each month and there are no rental arrears. On June 18, 2012 the landlords collected a security deposit from the tenants in the amount of \$900.00 as well as a pet damage deposit in the amount of \$900.00. The rental unit is the upper 2 stories of a 3 story house on an acreage, and the landlords reside in the lower level of the same house.

The landlord further testified that a move-in condition inspection report was completed by the landlord in the absence of either tenant and was given to the tenants to go over, and the landlord asked that they sign it within a few days.

The landlord testified that the tenants' pets damaged the lawns with urine and feces burns. The lawn had been partially destroyed due to irrigation problems previously, however the landlord is asking that the tenants pay a portion of the invoice. An Estimate/Invoice dated October 16, 2012 has been provided showing a cost of \$239.98 for labour and supplies to top dress and seed damaged lawn areas including 2 yards of composted soil and seed.

Further, the tenants' children have broken and uprooted trees on the property. Many trees surround the multi-level property which contains deep slopes. The landlord heard a cracking noise, saw the tenants' children playing on the bank and then saw a broken tree and the top of it down the hill. Another 14 foot tree was bent and twisted at the top and wrapped around the tree. The tenants' children were sliding down and grabbed one of the trees uprooting it. The same invoice shows a cost of 484.00 for labour and equipment to remove, haul away and dispose of 2 maples and 1 mountain ash trees, and \$991.94 for supplying and delivery and installing 2 maples and 1 mountain ash tree including topsoil and bonemeal.

The landlords have also provided photographs of the areas affected on the lawn area as well as the broken trees and copies of emails sent to the tenants with respect to damages.

The first tenant testified that the landlord did complete the move-in condition inspection report in the absence of the tenants and gave it to them to sign. The tenants signed it and gave it to the landlords but did not receive a copy back. The tenant does not recall anything on the report showing that the outside of the rental unit had been inspected.

The tenant further testified that the lawn had suffered a lot of heat stress due to the irrigation problems, and there was some pet damage, but none by feces. Also, the property is not fenced and other dogs in the area frequent the yard. Some of the feces on the lawn are from neighbor's dogs. The tenant testified that on the Sunday prior to this hearing the tenant picked up feces and certainly not all of it was from the tenants' dogs, although the tenant did not elaborate. The landlords had asked the tenants to stay off the lawn from September until spring because the landlords have already put top-soil and grass seed on the damaged areas.

With respect to broken trees, the tenant testified that no one saw the children break any trees. The tenant is a journeyman landscaper and teaches the children how difficult it is to grow a tree, and the tenant cannot believe that the children would deliberately break one. Also, it seems impossible that the children could break a 14 foot tree. The children were sliding down the hills, but that area is not manicured; wild native trees grow over the slopes.

The other tenant testified that the emails the landlord was referring to in testimony were all sent to an old email address of the tenants that was disconnected in July. In mid-July the landlord had sent an email about cable TV to the tenants' new email address but no others have been received.

The tenant further testified that the landlords' estimate shows 2 yards of grass seed and top soil but most of the repairs have already been done.

The tenant finds it unrealistic that the children could have broken the trees. The tenants had agreed to pay for the maple tree and told the landlords that but find it unrealistic to blame the children for all wild trees. Lots of wild trees are broken. The tenant has seen wildlife: deer, bears and other dogs sometimes daily, and provided photographs of wildlife in the yard as evidence.

Analysis

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.

Further, any award for damages must not put the claiming party in a better financial position than that party would be if the damage or loss did not exist.

I have reviewed the photographs provided by both parties as well as the Invoice/Estimate provided by the landlords. The tenants have agreed to pay for one maple tree, but dispute the other damages claimed by the landlords. Where a tenant disputes the damages claimed, the landlord must be able to prove the claim.

The lawn had suffered heat stress from an irrigation problem previously, and I must consider the undisputed testimony of the tenants that the property is not fenced and other neighbour's dogs frequent the yard. I accept that the landlords do not deny the heat stress, and I accept that the claim is for a portion of the Invoice/Estimate, and that although the landlords have already completed the repairs, the landlords' position is that the landlords ought to be reimbursed a portion of an honest estimate. However, I am not satisfied that the lawn area damage has been caused by the tenants' pets or that the landlords have satisfied elements 2, 3 or 4 in the test for damages.

I also accept, as evidenced by the tenants' photographs that bears, deer and other wildlife frequent the property, and I find that the landlords have failed to establish that the tenants' children have caused the trees to bend or break. I also consider the testimony of the tenant that other wild trees in that area of the property are also broken which may also have been caused by wildlife.

With respect to the maple tree, the Invoice/Estimate shows the cost of replacing 2 maple trees and 1 mountain ash tree, but the document does not indicate what portion is for a maple tree. Therefore, I find that the landlords have failed to satisfy element 3 in the test for damages.

The landlords' application is hereby dismissed.

Since the parties have agreed to an Order of Possession in favour of the landlords, the balance of the landlords' claim has been dismissed, and the tenants' claim has been withdrawn, I decline to order that either party recover the filing fees for the cost of these applications.

Conclusion

For the reasons set out above, I hereby grant an Order of Possession in favour of the landlords effective November 30, 2012 at 1:00 p.m.

The balance of the landlords' application is hereby dismissed.

The tenants' application is dismissed in its entirety as withdrawn.

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: November 16, 2012.

Residential Tenancy Branch