Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNSD, FF

Introduction

This hearing dealt with cross-applications. The landlord applied for a Monetary Order for damage to the rental unit or property; unpaid rent or utilities; and authorization to retain the security deposit and pet deposit. The tenants applied for return of their security deposit and pet deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

The landlord originally applied for the statutory limit of $25,000.00 for damage to a rhododendron tree; however, the landlord sought to amend the claim to include other damages and reduce the overall claim to $10,647.14 as outlined on her Monetary Order worksheet served upon the Branch and the tenants more than five days before the scheduled hearing. I amended the Application to be consistent with the landlord's Monetary Order worksheet. I determined the landlord is not seeking compensation for unpaid rent or utilities and I did not consider that issue further.

The tenants originally applied for return of their security deposit and pet deposit; however, during the hearing, the tenants requested their claim be amended to request return of double the deposits. I have amended the tenants' application and have considered their request for return of double the deposits.

Due to time constraints and the amount of evidence being put forth the originally scheduled hearing was adjourned and reconvened at a later date in order to permit both parties ample opportunity to make their submissions and provide responses to the claims against them. All parties appeared at the originally scheduled hearing and the reconvened hearing.

Issue(s) to be Decided

1. Has the landlord established an entitlement to the compensation she is claiming for damage to the rental unit and property?
2. Are the tenants entitled to return of double the security deposit and pet deposit?

Background and Evidence

The tenancy commenced August 15, 2010 for a fixed term set to expire August 15, 2012. The tenants were required to pay rent of $7,000.00 on the 15th day of every month. The tenants paid a security deposit of $3,500.00 and a pet deposit of $3,500.00. For the month of January 2012, $2,000.00 of the security deposit was applied to rent, with the consent of the landlord, leaving a total of $5,000.00 in deposits at the end of the tenancy.

The tenants vacated the rental unit and returned the keys on August 12, 2012 although they continued to remove possessions from the garage and yard over the next couple of weeks with the landlord's knowledge.

The landlord did not prepare move-in or move-out condition inspection reports. The house was originally built many years ago but had undergone a major renovation between the years 2006 and 2009. It was acknowledged that the rental unit was in "nice shape" at the beginning of the tenancy.

Security deposit, pet deposit, and tenants' forwarding address

The tenants are seeking return of double their deposits, or $10,000.00. The tenants submit that the landlord extinguished her right to claim against the deposits by failing to prepare condition inspection reports and that there was no damage caused by their pet. Further, the landlord failed to return their deposit or file an Application for Dispute Resolution within 15 days of receiving the tenants' forwarding address in writing.

It was undisputed that the landlord knew where the tenants had moved to when their tenancy ended as the landlord was acquainted with the tenants' new landlord, the tenants had remained in the same area, and the landlord had brought mail to the tenant's new home. The issue under dispute was whether the landlord had been provided the tenants' forwarding address in writing prior to filing their Application for Dispute Resolution.

The landlord submitted that she had not received the tenants' forwarding address until she was served with their Application for Dispute Resolution via registered mail.

The tenants submitted that the landlord had received their forwarding address in writing prior to filing their Application for Dispute Resolution. The tenants explained that the tenants had loaned their piano to the landlord for her use at her home during the tenancy. After the tenancy ended the piano was returned to the tenants at their new home. A piano moving company picked up the piano from the landlord's residence on August 27, 2012 the Bill of Lading contained the tenants' new address of residence.

The Bill of Lading was provided as evidence by the tenants. It contains the tenants' new address of residence, indicates the landlord was to be charged for the delivery fee, and bears the landlord's signature.

Neither of the parties could recall with certainty as to whether the landlord or the tenants had provided the delivery address to the piano moving company.

The tenants submitted that they contacted the piano moving company and confirmed that it is the moving company's practice to give the shipper a copy of the Bill of Lading.

The landlord could not recall whether she received a copy of the Bill of Lading and claimed that in looking through her records she could not locate it.

The landlord filed her Application for Dispute Resolution on September 17, 2012 and the tenants filed their Application for Dispute Resolution on October 2, 2012.

Landlord's claim re: rhododendron

It was undisputed that in September 2010 the tenants severely pruned the rhododendron in the front yard of the property. The landlord submitted that the rhododendron was shaped like a tree and was approximately 80 years old. Although the landlord did not measure the tree before it was severely pruned, the landlord estimated that it was between 16' and 20' tall. Immediately after the rhododendron was cut is was approximately 1' to 3' tall. The severe pruning did not kill the plant. Rather, new shoots sprouted and the plant is currently a thick bush approximately 8' to 9' tall.

The landlord had a certified arborist prepare a written report and provide an estimate as to the value of the rhododendron tree that was on the property. The arborist used two methods of valuation. The landlord is seeking to recover the average amount of

$8,400.00 from the tenants as well as the cost of the arborist's report of $285.60 and the estimated cost $1,100.00 to clean up the cuttings.

I note that included in the arborist's report, including the addendum, are the following relevant statements:

- "Large mature shrubs like this are not likely to be found in nurseries and expensive to find and purchase from other sources."
- "Such specimens exist in parks and botanical gardens but are not likely to be available for removal."
- "This plant is located in the middle of the front yard and plays a significant role in aesthetics of the property and would therefore have somewhat of an influence on the perceived value of the property."
- "It is in very good condition now as evidence by the vigorous re-growth. Even with the vigorous new growth, as is common with this type of shrub, I estimate that for it to reach the size and appearance it had before having been cut back would take at least twenty years."

Both parties pointed to the addendum to the tenancy agreement, where it states:

> "Guests are responsible for grass cutting during the stay. Owner is responsible for agreed upon landscaping."

The landlord was of the position that the above term meant that the tenants were not to perform landscaping tasks except grass cutting. The tenants were of the position that when the tenancy formed the landscaping was not yet completed so the above term referred to the completion of the landscaping but that they were permitted to do other landscaping takes. It was undisputed that the landlord was at the residential property on a frequent and regular basis to perform various landscaping tasks.

The tenants submitted that they performed other landscaping tasks not expressly permitted under the tenancy agreement with the landlord's knowledge, including pruning of the holly bush, watering plants, weeding, and painting.

The landlord acknowledged that the tenants pruned new shoots from the holly bush but that the pruning was minor and she did not object to this activity. Nor, did the landlord object to watering and weeding activities undertaken by the tenants as this was beneficial in nature. The landlord was uncertain as to what painting efforts were undertaken by the tenants.

The landlord acknowledged that when she first discovered the cut rhododendron she did not say anything to the tenants as she was so upset but the tenants noticed the shocked look on the landlord's face. The matter was brought up a month or two later during which time the tenants apologized for their actions.

The landlord cleaned up the cuttings over the several weeks that followed when she attended the property to tend to the yard maintenance and landscaping. The tenants submitted that they also participated in the cleanup efforts. It was acknowledged that the landlord had not requested the tenants take care of or dispose of the cuttings.

The landlord submitted that prior to the cutting of the rhododendron the landlord had described her pain-staking efforts to preserve the plant during the major renovation. The tenants did not recall this conversation taking place prior to cutting the rhododendron.

The tenants submitted that the rhododendron did not look overly healthy or attractive before they cut it and that its current appearance is much healthier and attractive looking. The landlord submitted that she had wanted the plant to look like a tree, complete with its thick and twisted limbs, that take decades to achieve.

The tenants pointed out that in filing her Application for Dispute Resolution the landlord indicated the rhododendron was 16' tall but that the arborist's estimate is for a shrub 20' tall. The tenants also questioned whether the rhododendron was healthy as a tree.

The landlord provided photographs depicting the rhododendron during the renovation that took place in 2006 – 2009 and a nearby rhododendron tree. The tenants provided photographs of the rhododendron bush as it looks currently.

Landlord's claim for other damages

Below, I have summarized the landlord's claims for other damages and the tenants' responses.

Carpet cleaning - $14.95
The landlord is seeking to recover the cost of purchasing spot remover to remove the stains left on the carpet or sofa. The tenants are unaware of the stains the landlord is referring to and claim they had the rental unit professionally cleaned.

Refinish maple top on kitchen island - $134.40
The landlord claimed the maple top was marred with marks visible it certain light. The landlord is seeking the cost to refinish the maple top. The tenants submitted that they used the kitchen island normally and any marks would be normal wear and tear. Further, the marks may have been present before their tenancy began. The landlord claims to have had the top finished right before tenancy commenced.

Missing vacuum pieces - $20.00
The landlord submitted that she purchased a new vacuum during the tenancy and that at the end of the tenancy the attachments were missing. The landlord is seeking to recover the cost to replace the attachments. The tenants took the position that an inventory was not taken when they received the vacuum or when their tenancy ended and they are unaware of any missing attachments.

Replacement microwave - $545.42
The landlord submitted that the microwave door was blemished, likely due to the tenants burning food in it, and that it was replaced at a cost of $545.42. The microwave was new as of July 2009. The tenants submit that the microwave was used before their tenancy commenced and that they approached the landlord about the damaged microwave early on in their tenancy. The tenants stated that they rarely use microwaves for health reasons. The tenants submit that the damage may be due to an electrical issue or normal wear and tear.

Registered mail costs - $21.37
This portion of the landlord's claim was dismissed summarily as the cost of serving dispute resolution documents upon the other party is not recoverable under the Act.

Analysis

Upon consideration of everything presented to me I provide the following findings and reasons with respect to each Application.

Tenants' Application - security deposit and pet deposit

Sections 24 and 36 of the Act provide that where a landlord fails to prepare condition inspection reports, the landlord's right to claim against the deposits for damage is extinguished. The Act further stipulates that a pet deposit is to be used for damage caused by a pet only.

Section 38(1) requires the landlord to either return the security deposit and pet deposit to the tenant or make an application for dispute resolution claiming against the deposit within 15 days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing. Should a landlord fail to comply with the requirements of section 38(1) the landlord must pay the tenant double the security deposit and pet deposit.

At issue in this case is whether the landlord received the tenants' forwarding address in writing, and if so, on what date. The tenants bear the burden to prove the landlord received their forwarding address, in writing. The burden is based on the balance of probabilities.

Having carefully considered everything presented to me, I find the tenants have met their burden to show the landlord received the tenants' forwarding address. I find that the landlord received it on August 27, 2012 by way of the Bill of Lading. I make this determination based upon the following factors:

- The landlord's signature appears on the Bill of Lading along with the tenants' new address and a date of August 27, 2012.
- The tenants confirmed with the moving company that it is their practice to give the shipper a copy of the Bill of Lading, as is customary for delivery companies to do.
- The Bill of Lading indicates that the delivery fee was to be charged to the landlord, and I find it probable that the landlord was provided a copy of the Bill of Lading on August 27, 2012 by the moving company in order for the moving company to collect payment.

Having found the landlord was in receipt of the tenants' forwarding address on August 27, 2012, did not refund the deposits to the tenants within 15 days, and filed an Application for Dispute Resolution on September 17, 2012, I find the landlord failed to comply with the requirements of section 38(1) of the Act. Therefore, I find the tenants entitled to double the security deposit and pet deposit remaining in trust and I award the tenant's $10,000 [($3,500.00 + $1,500.00) x 2].

Landlord's Application - Rhododendron

Having reviewed the photographs and the parties' submissions I accept the rhododendron was 16 – 20' tall prior to the severe pruning, was shaped more like a tree and exhibited thick and twisted limbs that takes multiple decades to achieve. In

contrast, plant is currently shaped with a round bush with many thinner stems. Thus, I find I am satisfied the tenants' actions significantly changed the character of the plant and the appearance of the front yard.

While it was undisputed that the tenants' yard work activities, such as minor pruning of the holly bush, watering, and weeding were found to be acceptable to the landlord I find these activities distinct and separate from the severe pruning of the rhododendron as those activities did not significantly change the character or overall appearance of the yard. Therefore, I find it unlikely that a reasonable person would translate the landlord's acceptance of minor pruning, watering, and weeding activities as consent to make drastic changes to a very large and old plant which had a significant influence on the appearance of the front yard.

Having heard the landlord was at the property frequently and regularly, especially at the beginning of the tenancy, I find it especially incomprehensible that the tenants would not ask or approach the landlord about cutting the rhododendron prior to undertaking such drastic action.

While the tenants took the position the plant is more attractive in its current state, the landlord desired a much different look for the plant and the appearance of the property. Clearly, this is a matter of personal taste. However, the tenants' decision to make a plant more attractive, ***in their opinion***, for the length of their tenancy, has resulted in long term consequences for the landlord as the desired look of the plant takes decades to achieve.

I have largely rejected the tenants' suggestion that the rhododendron tree may have been unhealthy as there is no evidence of such and the subsequent vigorous re-growth of the plant satisfied me that the plant was healthy.

I have rejected the tenants' concerns that the landlord's estimate of the height of the rhododendron increased from 16' to 20' in valuing the rhododendron. The first valuation technique used the cost to locate, remove and install a replacement plant with the actual cost to purchase the plant being nominal. I find that the plant's height, whether it was 16' tall or 20' tall, less significant than the age and character of the twisted limbs that takes decades to achieve; and, considering the arborist's comments that such plants are extremely difficult to locate as such plants are usually found in botanical gardens or parks and unavailable for purchase. The second method of valuation involved the area of the trunk(s) at 1' from the ground and did not factor in the height of the plant when it was cut.

In light of the above, I find the tenants did not have the right to drastically change the character and appearance of the residential property and their actions resulted in damages or loss to the landlord. I find the landlord has substantiated a reasonable estimate of the value of the loss that she has suffered as a result of the tenants' actions. Therefore, I grant the landlord's request to recover $8,400.00 from the tenants for the cut rhododendron.

I also award the cost of the arborist's report of $285.60 to the landlord as requested as I am satisfied the report was directly associated to the tenants' actions.

I make no award for the estimated clean up costs of the cuttings as I find the quote for $50.00 per hour to be excessive considering the landlord did the work herself. Nor was I satisfied the landlord attempted to mitigate the loss of her time by asking the tenants to help clean up the cuttings or notify the tenants that she would clean up the cuttings at their expense.

Landlord's Application – Other damages

A tenant is required to leave a rental unit reasonably clean and undamaged at the end of a tenancy. Normal wear and tear does not constitute damage.

A landlord bears the burden to prove the tenant damaged the rental unit or residential property provided for their use. The burden of proof is based on the balance of probabilities. The landlord also bears the burden to show the value of the damaged item and that the landlord took reasonable steps to mitigate their loss.

As awards for damage are intended to be restorative, where an item needs to be replaced due to damage the replacement cost should be reduced by depreciation of the original item.

In the absence of condition inspection reports, photographs, or other corroborating evidence, and considering the spot remover and vacuum attachments were purchased several months after the tenancy ended, I find the disputed verbal testimony concerning the spots on the sofa and the missing vacuum attachments to be insufficient to meet the landlord's burden to prove the tenants are responsible for the damage or loss.

In the absence of condition inspection reports, photographs or other corroborating evidence, I find the receipt showing the polish on the maple kitchen island was removed a month after the tenancy ended, I find the disputed verbal testimony to be insufficient

to meet the landlord's burden to prove the tenants damaged the kitchen island or that they damaged it beyond normal wear and tear.

While it was undisputed that there was a blemish on the door of the microwave I find the disputed verbal testimony, in the absence of a move-in inspection report or other corroborating evidence, insufficient to conclude the blemish occurred during the tenancy as submitted by the landlord. Further, the landlord's request for full replacement value does not factor in the fact the microwave was still functional or depreciation of the original microwave.

In light of the above, I make no award for the remainder of the landlord's claims against the tenants.

Filing fees and Monetary Order

The landlord paid $100.00 for her application and the tenant's paid $50.00 despite amending their claim to exceed $5,000.00. As I found both claims to have merit and their respective awards exceeded $5,000.00 I find it appropriate to order the tenants to pay the landlord $25.00 to equalize the filing fees they paid for their respective applications.

Pursuant to section 72 of the Act I have offset the awards made to both parties and I provide the tenants with a Monetary Order for the net amount calculated as follows:

Awarded to tenants	
■ Double security deposit and pet deposit	$10,000.00
Less: amounts awarded to landlord	
■ Damage or loss re: rhododendron	(8,400.00)
■ Arborist's report re: rhododendron	(285.60)
■ Filing fee	(25.00)
Monetary Order to tenants	$ 1,289.40

The landlord is ordered to pay the tenants $1,289.40 without further delay. The tenants have been provided a Monetary Order in this amount to serve upon the landlord and enforce as necessary.

Conclusion

Both parties were successful or partially successful in their respective applications. The awards have been offset and the tenants are provided a Monetary Order for the net amount of $1,289.40 to serve upon the landlord.

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: February 28, 2013

Residential Tenancy Branch