



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HK Pacific Holdings Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This hearing was convened by way of conference call concerning an application made by the landlord 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 the application.

On the first scheduled day of the hearing, an agent for the landlord company and the tenant attended the conference call hearing. It was suggested by the tenant that the landlord did not serve the tenant with all of the landlord's evidence, and the landlord stated that the tenant already has it. It was not clear what evidence the tenant had been provided with, and the parties agreed to adjourn the hearing to ensure that each other received evidentiary material of the other party.

The parties both attended on the second scheduled hearing date and each called one witness. The parties and the witnesses gave affirmed testimony and 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. During the hearing, I neglected to allow the tenant to cross examine the landlord's witness, and the witness was re-called later during the course of the hearing to allow such cross examination. No issues respecting that irregularity were raised by the parties, and I find that no prejudice has resulted to either party.

Issue(s) to be Decided

Has the landlord established a monetary claim as against the tenant for unpaid rent or utilities?

Has the landlord established a monetary claim as against the tenant 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

The landlord's agent testified that this fixed term tenancy began on June 1, 2011 and was to expire on May 31, 2012 although the tenant moved from the rental unit on January 30, 2012. Rent in the amount of \$950.00 per month was payable in advance on the 1st day of each month. On June 3, 2011 the landlord collected a security deposit from the tenant in the amount of \$475.00 which is still held in trust by the landlord.

The landlord's agent further testified that the tenant told the caretaker of the landlord company on January 24, 2012 that the tenant would be moving out at the end of January, 2012 and that the tenant's name had been on a waiting list for another apartment which was now available. On January 25, 2012 the landlord's agent faxed a tenant's notice to end tenancy and a cleaning list to the caretaker to give to the tenant, but the tenant didn't return it. Copies of both documents were provided for this hearing, and the landlord's agent testified that the tenant's notice had been completed by the landlord's agent for the tenant's signature.

The landlord's agent further testified that the tenant provided a letter on January 30, 2012 which state different reasons for ending the tenancy, and has provided a copy for this hearing. The letter states that the reasons for the sudden departure include a failure of the landlord to give the tenant notice of bed bug fumigation, and the landlord's failure to correct an overheating problem in the rental unit. The landlord has also provided a copy of a letter dated February 1, 2012 from the caretaker to the landlord company stating that the tenant had told the caretaker on January 24, 2012 that the reasons for moving out of the rental unit were the overheating in the rental unit and that the tenant had been on a waiting list for another apartment. The landlord has also provided a letter from a pest control company stating that the rental location was serviced for bed bugs on November 18 and November 25, and that no previous records of the company were located for the rental location prior to November 18, 2011.

The landlord's agent also testified that the parties completed a move-in condition inspection report, but the tenant was not present when the move-out condition inspection report was completed. The tenant was provided with notice to do so on the cleaning list but the tenant didn't show up and didn't return the tenant's notice to end tenancy; the tenant left the keys under the door and skipped out.

The landlord's witness is the manager/caretaker and testified to cleaning the rental unit on February 1, 2012. The move-out condition inspection report was not completed because the tenant wasn't around, although the witness did not ask the tenant to attend.

The witness cleaned the fridge, stove, hood, counters and floor in the kitchen area and waxed the floor. Walls were also wiped as well as inside and the doors of cabinets. The witness also vacuumed the rental unit, cleaned the fan in the dining room, cleaned the sink, toilet and glass in the bathroom, waxed the bathroom floor, and repaired holes in the living room walls. The witness billed the landlord company 8 hours for the service for a total of \$144.00. The landlord has provided a copy of the invoice for this hearing. The witness testified that the kitchen appliances, walls and cabinets had not been cleaned by the tenant at all. When questioned about waxing floors, the witness stated that the floors are always waxed at the end of a tenancy, and that they are both very small floors and take about 5 minutes to wax.

The witness also smelled cigarette smoke in the drapes and had them cleaned, along with the carpets, by a carpet and upholstery cleaning company, and the landlord has provided a copy of an invoice for the rental unit in the amount of \$274.40, being \$85.00 for the carpet cleaning, and \$160.00 for the drapery cleaning and \$29.40 for HST. During cross examination the witness was asked if the witness had ever seen the tenant smoke, to which the witness responded "no," but agreed that the previous tenant was a smoker.

The witness also testified that on January 30, 2012 the tenant gave the witness a letter which stated that the tenant was moving and the reasons were contained in the letter. The witness replied to the tenant that the move-out condition inspection was required, and the tenant promised to get back to the witness, but the tenant never contacted the witness. The keys to the rental unit had been left in the rental unit.

The landlord has also provided evidence of having advertised the rental unit on Craigslist commencing January 25, 2012 through to February 13, 2012 as well as numerous other advertisements, but did not provide any testimony with respect to when the rental unit was re-rented.

The tenant also left without paying a utility bill in the amount of \$85.50. A copy of the bill was provided for this hearing, along with a copy of the tenancy agreement which shows that the utility is not included in the rent. The utility bill is dated March 30, 2012 and states that the account was closed on February 29, 2012 with the amount left outstanding.

The landlord's agent also testified that the tenancy agreement provides for liquidated damages in the amount of \$250.00 if the tenant moves out prior to the end of the fixed term and states that the payment by the tenant to the landlord is not a penalty, but to cover administration costs of re-renting the rental unit.

The landlord claims \$950.00 for one month's rent; \$144.00 for suite cleaning and wall repair; \$95.20 for carpet cleaning, \$179.20 for drapery cleaning, liquidated damages in the amount of \$250.00; \$85.50 for an unpaid utility bill and recovery of the \$50.00 filing fee for the cost of this application, for a total of \$1,753.90.

The tenant testified that the conversation between the parties on January 24, 2012 took place, but the tenant had advised that the reasons for ending the tenancy were because the tenant hadn't been notified of a bed bug infestation or fumigation and that the landlord had failed to deal with the heating problem in the rental unit.

The tenant further testified that upon speaking to the landlord's witness, the tenant was asked to not put in the letter any notations about bed bugs.

The tenant also testified that no one ever smoked in the rental unit, and the tenant does not tolerate cigarette smoke. The tenant cleaned the carpet upon moving into the rental unit because it smelled of smoke, and the drapes were stained from smoke. Several people were at the rental unit helping with cleaning. The furniture was moved on the 26th and the 28th to 30th of January were cleaning days. There were tiny holes in the living room wall which the parties spoke about and the landlord's witness stated that he would patch them.

The tenant gave the keys to the rental unit to the landlord's witness at the landlord's witness' rental unit on January 30, 2012, and the landlord's witness never mentioned a move-out condition inspection.

The tenant does not dispute the utility bill.

The tenant's witness testified to being one of the 4 or 5 persons involved in cleaning the rental unit on January 28 through to the 30th. The witness testified that the tenant went to see the landlord's manager about a walk-through, but the manager was not willing to attend. The witness does not recall what happened to the keys for the rental unit.

The witness also testified that the tenant had told the witness that the landlord was fumigating for bed bugs. Further, there was no thermostat in the rental unit.

There was no damage to the rental unit at all; the witness was there at the beginning of the tenancy and cleaned the rental unit, and again at the end of the tenancy. It took 2 hours for the witness to clean the bathroom at the beginning of the tenancy and less time when moving out. The rental unit is very poorly kept and poorly managed, for a tenant not to be told about bed bugs. The carpets were 20 year old shag carpets which the witness vacuumed and the drapes were very thin polyester fabric and were the same shape moving in as at move-out.

Analysis

Firstly, with respect to the landlord's application for a monetary order for unpaid rent, the tenant's position is that the tenant was justified in moving out earlier than the date set out in the tenancy agreement due to the landlord's failure to deal with the heating problem in the rental unit and the landlord's failure to advise the tenant of bed bug fumigation. If a tenant is of the opinion that a landlord has failed to comply with the *Act* or the tenancy agreement, the tenant's recourse is to make an application for dispute resolution applying for an order that the landlord comply with the *Act* or the tenancy agreement. There is no authorization in the law that permits a tenant to end a fixed term tenancy early because the landlord didn't comply with the *Act*. Therefore, I find that the landlord has established a monetary claim in the amount of \$950.00 for one month's rent.

I further find that the tenancy agreement provides for liquidated damages in the amount of \$250.00 and the landlord has established that claim as well.

The tenant has not disputed the utility bill, and therefore I find that the landlord has established a monetary claim in the amount of \$85.50.

The *Residential Tenancy Act* requires a landlord to provide a tenant with at least 2 opportunities to conduct the move-in and move-out condition inspection reports, and the regulations go into great detail about how those inspections are to take place, including a requirement for the landlord to provide the tenant a second opportunity in the approved form. In this case, it is clear in the testimony of the parties that the landlord did not provide the tenant with 2 opportunities. The consequence for failing to do so is that the landlord's right to make a claim against the security deposit for damages is extinguished, and I so find.

However, the landlord's right to make a claim against the security deposit for unpaid rent is not extinguished. Having found that the tenant is liable to the landlord for unpaid rent, liquidated damages and unpaid utilities, I find that the landlord is entitled to keep all of the security deposit in partial satisfaction of the claim.

Further, although the landlord's right to claim against the security deposit for damages is extinguished, the landlord's right to make a claim for damages is not extinguished. 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.

In this case, the landlord claims \$144.00 for cleaning the rental unit at the end of the tenancy and repairing picture holes in the living room wall and has provided an invoice to substantiate that claim. Also claimed are carpet cleaning and drapery cleaning in the amount of \$274.40 combined and an invoice to substantiate that amount has also been provided. The landlord made efforts to ensure the tenant received a list of cleaning requirements expected by the landlord, and I am satisfied that the landlord has established elements 1 and 4 in the test for damages.

The landlord's witness testified to 8 hours of cleaning and repairing. A tenant is not required to leave a rental unit in a pristine condition that a landlord may want for a future tenant; that is the landlord's responsibility. A tenant is required to leave a rental unit reasonably clean and undamaged except for normal wear and tear. The onus is on the landlord to prove that the tenant did not leave the rental unit reasonably clean and that the bill is for cleaning or repairs beyond normal wear and tear. The witness testified that the floors of all rental units are waxed prior to a new tenancy, and I find that that is not a tenant's responsibility in that there is no evidence that the un-waxed floors are or are not beyond normal wear and tear. However, the witness also testified that they are very small floors and only took about 5 minutes each.

The regulations to the *Act* state that the condition inspection reports are evidence of the rental unit at the commencement and end of the tenancy, and since no move-out condition inspection report was completed, there is little evidence and no written comparison. The tenant and the tenant's witness testified to cleaning the apartment and went into significant detail about the cleaning, stating that it was cleaned by them at the beginning of the tenancy and at the end. Further, where the testimony of parties is disputed and no evidence is provided to support the testimony, the party has failed to meet the burden of proof. In this case, I find that the landlord has failed to meet the burden of proof with respect to the claim for cleaning, and has specifically failed to establish elements 1 and 2 of the test for damages.

In summary, I find that the landlord has established a claim as against the tenant for rent in the amount of \$950.00; liquidated damages in the amount of \$250.00; and an unpaid utility bill in the amount of \$85.50. The landlord's application for suite cleaning and repair, carpet and drapery cleaning are hereby dismissed.

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 the application.

I hereby order the landlord to keep the security deposit in the amount of \$475.00 in partial satisfaction of the claim, and I grant the landlord a monetary order for the difference in the amount of \$860.50.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$860.50.

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: March 21, 2013

Residential Tenancy Branch

