Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Coldwell Banker Property Management
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNR, MNSD, FF

Introduction

This was a hearing with respect to an application by the landlord for a monetary order and an order to retain the security deposit. The hearing was conducted by conference call. The landlord's agent and the named tenants called in and participated in the hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary award and if so, in what amount?
Is the landlord entitled to retain the security deposit?

Background and Evidence

The rental unit is a strata title apartment in Kelowna. The parties submitted two different tenancy agreements. The first is dated April 13, 2012 and is made between the property management firm as landlord and its employee as agent for the landlord and the respondent, M.F. as tenant. It is for a one year term beginning May 1, 2012 and ending April 30, 2013 with rent in the amount of $1,200.00 payable on the first of each month. The tenant paid a $600.00 security deposit on April 13, 2012.

The tenants provided a second form of tenancy agreement in the same terms as the first agreement, but naming the owners T.T. and C.M as landlords and the tenant J.F. as the sole tenant. This agreement was signed on June 5, 2012.

The tenants testified that the tenant M.F. moved out of the rental unit at the end of May and allowed his former spouse J.F. to occupy the unit as the sole tenant. On June 1, 2012, J.F. sent an e-mail to one of the owners. She asked if she could get a new lease agreement without the tenant M.F.'s name on it. The owner replied saying that it was "no problem" and he would arrange it through the property manager. The tenant responded to say that she spoke to the property manager who told her to deal directly

with the owner, saying that: “I have to get ahold of you because he isn’t the fulltime property manager”. The owner replied to say: “ I will put together a new lease agreement and send your way in the next couple days.” On June 5, 2012 he sent another e-mail to J.F. wherein he said: “As discussed, attached is the updated agreement for (address of rental unit). Its identical to what (name of M.F.) had signed so please sign and send back to me and we should be all good.”

The applicant claimed payment of the sum of $5,503.20. The landlord’s agent testified that the tenants did not pay rent for June or for July. He said the tenant J.F. moved out in mid-July and did not clean the rental unit properly when she left. He said that there was an outstanding move-in fee levied by the strata corporation and that the carpets were stained to the extent that they had to be replaced. He testified that the carpets were professionally cleaned before it was decided that they had to be replaced. The carpets were replaced with laminate flooring because it was less expensive than new carpet. The landlord’s agent testified that the rental unit also needed to be painted because of damage caused by the tenants. He submitted photographs of the rental unit and condition inspection reports prepared on April 27, 2012 before the tenant moved in and a move-out inspection report dated July 16, 2012. The landlord’s agent also submitted a tenant ledger. The ledger recorded payment of a $600.00 security deposit on April 17, 2012 and a May rent payment of $1,200. The ledger showed an outstanding balance for June and July of $1,200.00 for each month. The landlord claimed $100.00 for a move-in fee charged by the strata corporation because the building manager was not notified of the move-in. The landlord claimed $112.00 for cleaning costs, a carpet cleaning charge of $89.60 and $2,045.50 for the cost of replacement flooring, made up of $1,069.20 for materials and $976.30 for installation. The landlord claimed a further $556.10 for the cost of painting. The landlord claimed a further $200.00 as the cost of hiring the property manager to handle the dispute resolution. The landlord’s agent referred to the photographs submitted as evidence; he said they showed that the rental unit had not been adequately cleaned, that painting was necessary due to scuffs, stains, chips and marks to the walls and that the carpet was so extensively stained and marked that it had to be replaced.

In the condition inspection report prepared on April 27, 2012, before the tenant M.F. moved into the rental unit, it was noted that there were a few chips and some paint scuffs to the walls in several rooms, including the entry, the living room and the bedrooms. There were other small deficiencies noted. There was no mention of any carpet defects.

The tenant M.F. participated in the move-out condition inspection that was conducted on July 16th. M.F. said that he attended for the tenant J.F. because she was in the final

stages of her pregnancy and unable to attend herself. The condition inspection report noted paint damage in many rooms and stained and dirty carpets in several rooms. Under The heading: “Damage to rental unit or residential property for which tenant is responsible the report provided:

- Carpet clean/replace – minor clean
- Patch & paint/paint job

The tenant M.F. signed the report and noted on the document that he agreed that the report fairly represented the condition of the rental unit.

The tenants denied the landlord’s claim that rent was not paid for June or July. The tenant M.F. testified that he paid June rent by cheque. He did not provide a copy of the cheque but said that he had records that showed the cheque was negotiated. He said that after the condition inspection on July 16th, he told the owners that he would return to the rental unit to perform cleaning and to clean the carpets. He said that the owner was prepared to have him come back to perform the cleaning, but would not give him the keys until rent was paid for July. The tenants testified that July rent was paid by J.F. who transferred the sum of $1,200.00 to the landlord by an online bank transfer on July 18th.

The tenant M.F. said that he was promised the keys, but they were not provided and he was prevented from performing the cleaning, including the carpet cleaning. He referred to e-mail exchanges between himself and the landlord. On July 18th the landlord said: “Before you gain access to the condo on Wednesday I need to have to $1200 for rent. Please work with (name of female tenant) (copied on this email) and forward me the money by tomorrow.” According to documents supplied by the tenants, J.F. sent $1,000 on July 18th and a further $200 on July 19th. On July 19th M.F. sent an e-mail to the landlord; he said:

> I’m not sure if you received my text. I also called you, but the keys were not left for me at (name of landlord’s agent’) office. I’ve tried to get ahold of (name of agent) but he has not gotten back to me. I went over and cleaned the patio. It looks really good now. I also went to Home Depot and spoke with them and purchased all the cleaning products to clean the walls and carpet. So could you please talk to (name of agent) so I can get the keys and get started on the cleanup. Thanks.

M.F. said that he was never granted access as promised and was therefore unable to clean the walls and carpet. He said that the tenant should not be liable for the landlord's charges because he was not allowed back as promised, to perform the work.

The tenants also submitted that M.F. was not a proper party to this proceeding because the tenancy agreement that he signed was replaced with a new tenancy agreement that named J.F. as the sole tenant. The landlord's agent did not agree with this submission; he took the position that both tenancy agreements were valid and subsisting because the landlord did not complete a mutual agreement to end tenancy that would have released M.F. from his obligations under the tenancy agreement that he signed.

The landlord's agent also submitted that if the tenants had paid rent for June and July they were still liable for two months loss of revenue for August and September because they breached a fixed term tenancy and the landlord was unable to re-rent the unit for more than two months, including all of August and September. He said that if he was not awarded the claimed rent he intended to file a new application to claim for loss of revenue.

Analysis

The evidence presented at the hearing established that rent was paid to the owners of the rental property and not to their agent. The owners were not called upon to provide evidence concerning rent payments made for June and July. The tenants' evidence, consisting of e-mail exchanges with the owner and evidence of bank transfers to the owner satisfies me that rent was paid for June and for July. I accept the tenants' evidence that July rent was paid after the owner made it a pre-condition to obtaining access to the rental unit to perform cleaning. There was no mention by the owner in the e-mail exchanges of any unpaid rent for June and I accept the evidence of the tenant, M.F. that June rent was paid. The landlord's claim for unpaid rent for June and July is therefore denied.

The landlord's agent referred to a claim for loss of revenue in his submissions at the hearing, but loss of revenue was not claimed in the application and documentary evidence, including evidence of efforts to mitigate was not provided. The application for dispute resolution was filed on December 13, 2012 and presumably if there was a claim for loss of revenue it was known at that time.

The tenant M.F. said that he was denied access to the rental unit and prevented from performing cleaning; he submitted that the landlord's damage claim should be rejected on that ground. The e-mail correspondence shows that the tenant was to have been

given access to perform cleaning after the July rent was paid. I have found that the rent was paid, but he was not given the keys and could not perform additional cleaning. Having paid rent for July, the tenant should have been entitled to access to the rental unit. For that reason I find that the respondent should not be responsible for the landlord's charges for claimed cleaning costs and for carpet cleaning, but I accept the landlord's evidence that there was damage to the carpet and to the paint that could not be rectified by cleaning or by carpet cleaning. There were stains in the carpet that could not be removed and there was paint damage that made painting a necessity. I find that the landlord is entitled to a monetary award for part of the cost of the new flooring and part of the cost to paint the rental unit. In the move-in inspection report that was completed on April 27, 2012 there was no mention of any carpet soiling or damage, but there was mention of paint defects. There were some chips in the entry and a few scuffs in the entry closet; there were a few scuffs noted in the living room and some scuffs and patch marks in the dining room. In the master bedroom there was a large crack by the door, a few scuffs and chips and some oil marks in the closet and there were some scuffs in the second bedroom.

The Residential Tenancy Policy Guideline 40 provides guidance with respect to the useful life of building elements; the guideline provides that:

> This guideline is a general guide for determining the useful life of building elements for considering applications for additional rent increases and determining damages which the director has the authority to determine under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* . Useful life is the expected lifetime, or the acceptable period of use, of an item under normal circumstances.
>
> **Damage(s)**
>
> When applied to damage(s) caused by a tenant, the tenant's guests or the tenant's pets, the arbitrator may consider the useful life of a building element and the age of the item. Landlords should provide evidence showing the age of the item at the time of replacement and the cost of the replacement building item. That evidence may be in the form of work orders, invoices or other documentary evidence.
>
> If the arbitrator finds that a landlord makes repairs to a rental unit due to damage caused by the tenant, the arbitrator may consider the age of the item at the time of replacement and the useful life of the item when calculating the tenant's responsibility for the cost or replacement.

According to the Policy Guideline, interior paint is considered to have a useful life of four years. I was told at the hearing that the rental unit was relatively new, but based on the reported move-in condition the unit had obviously been occupied before the tenancy began. Based on the noted damage on move-in I find that the landlord should be entitled to recover 50% of its painting cost and for paint I award the sum of $278.00.

With respect to the carpet, there were no reported defects at move-in. The expected life of carpet is stated to be 10 years. The tenant acknowledged the carpet damage on the move-out inspection. To take into account the fact that the carpet was not new at the commencement of the tenancy, I find that it would appropriate to award the landlord 80% of the cost of replacing the carpet with new flooring. I award the landlord the sum of $1,635.00 for the cost of new flooring and installation.

The landlord claimed a charge for a strata council by-law infraction, said to be the tenant's failure to pay a move-in fee. The landlord submitted a copy of a "Notice of Alleged Bylaw or Rule Contravention", but the Notice submitted by the landlord referred to an alleged contravention date of October 1, 2012, namely: a failure to notify the building manager of a move-in to the rental property. It has not been shown that this charge relates to the tenancy which ended long before the contravention date; this claim is therefore denied.

The landlord claimed $200.00 as the cost of hiring the property manager to handle the dispute resolution; this is not a recoverable cost. The only cost that may be recovered with respect to the cost to bring a dispute resolution proceeding is the filing fee paid pursuant to section 59 (2) of the *Residential Tenancy Act* to file the application for dispute resolution; this claim is therefore denied.

The remaining issue is: Who is liable to pay the award to the landlord? The respondent, M.F. took the position that he ceased to be the tenant and his responsibility ended when the owner prepared a new tenancy agreement in the same terms as the original agreement naming J.F. as the sole tenant. The position taken by the landlord's agent is that M.F. continues to be bound by the tenancy agreement that he signed because the parties did not execute a form of mutual agreement to end tenancy that released M.F. from his obligations.

I do not agree with the submission of the landlord's agent on this point. The tenant J.F. wrote to the owner and requested that he prepare a new lease agreement without M.F.'s name on it. The owner was not obliged to accept J.F. as his tenant or to prepare a new tenancy agreement that named J.F. as the sole tenant; nonetheless he did so at J.F's request and provided her with a document that he described as the updated

agreement. I find that by preparing a new tenancy agreement in identical terms to the first agreement, but naming both owners as landlords in place of the property manager and naming J.F. as the sole tenant, the owners effectively removed M.F. as tenant. I find that by so doing they released M.F. from his obligations under the original tenancy agreement. Because of the owner's action in updating the tenancy agreement, I find that J.F. became the sole tenant and is the only party liable in this dispute resolution proceeding.

Conclusion

The total award to the landlord is the sum of $1,913.00. The landlord is entitled to recover $50.00 of the $100.00 filing fee paid for a total award of $1,963.00. I order that the landlord retain the $600.00 security deposit that it holds in partial satisfaction of this award and I grant the landlord a monetary order against the respondent J.F. for the balance of $1,363.00. This order may be registered in the Small Claims Court and enforced as an order of that court.

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 19, 2013

Residential Tenancy Branch