



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNDC, MNR, MNSD, O, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid rent or utilities; damage to the unit or property; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain all or part of the security deposit and/or 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.

Issue(s) to be Decided

1. Has the landlord established an entitlement to unpaid utilities?
2. Has the landlord established an entitlement to compensation for damage to the rental unit or property?
3. Has the landlord established an entitlement to compensation for damage or loss under the Act, regulations or tenancy agreement?
4. Is the landlord authorized to retain all or part of the security deposit or pet deposit?

Background and Evidence

The month-to-month tenancy for the two bedroom basement suite commenced June 1, 2012 and the tenant paid a security deposit and a pet deposit of \$392.50 each. The monthly rent of \$785.00 was payable on the 1st day of every month. The tenant gave notice to end the tenancy on December 2, 2012. The tenant moved out on or about December 19, 2012 and a move-out inspection was conducted December 23, 2012. The landlord re-rented the unit as a one-bedroom unit effective January 1, 2013 for \$650.00 per month.

Below, I have summarized the landlord's claims against the tenant and the tenant's responses to those claims.

Utilities

The landlord and her family live in the main unit and the rental unit was occupied by the tenant and her spouse. The property is serviced by one hydro meter. Hydro is billed to the landlord. A signed addendum accompanies the tenancy agreement and includes the following term:

- a) **Utilities** – the landlord agrees to accept \$[785.00] per month in total for rent including utilities – heat, hot water & electricity **ON CONDITION THAT the total utilities do not exceed the average monthly total by more than 50%.** The average will be based on usage from previous years for that month taking into consideration occupancy of the suite.

In the event hydro and/or gas usage increases by more than 50%, the landlord reserves the right to request that the tenant to pay the difference.

Gross infractions of utilities usage caused by the tenant or the tenant's guests for whatever reason will be the sole responsibility of the tenant as determined by costs over and above reasonable average usage for the period in question. Deliberate overuse, negligence, businesses or illegal activities such as marijuana grow operations and/or other activities will be 100 % responsibility of the tenant for all usage costs over the average monthly use and will constitute a Material Breach of Terms resulting in immediate eviction of the tenant.

[reproduced as written]

Based upon the above term (herein referred to as the utility term), the landlord seeks to recover \$192.46 from the tenant comprised of \$176.43 for “over usage” of hydro for the period of September 22 – November 22, 2012 and \$16.05 for “over usage” for the period of November 23, 2012 through December 21, 2012.

The landlord submitted that the hydro bill for the period of September 22 – November 22, 2012 reflected consumption of 2,923 KWh whereas the bill for the same period the previous year reflected consumption of 1,167 KWh. The landlord determined there was an “over usage” when the KWh exceeded last year's KWh by more than 15%.

For the period of November 23, 2012 through December 21, 2012 the landlord calculated the “over usage” based upon an average daily usage and determined that the average daily usage exceeded the average daily usage of the previous year by more than 15%.

The landlord explained that the previous year the basement suite was occupied by one tenant who was provided a 35% allowable utility usage. Thus, the 50% utility allowance given to the tenant under the above term is to be reduced by the 35% allowance given to the former tenant in order to take into consideration occupancy of the suite.

Although the landlord submitted that she explained the meaning of the utility term to the tenant at the time of entering into the tenancy agreement the tenant was of the position she was unclear about how the landlord would calculate over usage. Further, the tenant believed, at the time of entering into the tenancy agreement, that she and her spouse were given a utility allowance of 50% in excess of prior years' utility bills and that they would not exceed the allowance of 50% as hydro consumption had not been an issue for them before.

The landlord was of the position the tenant's spouse was running a business from the rental unit and pointed to the tenant and/or her spouse running various appliances and electronics that use a great amount of electricity as the reason for the substantial increase in electricity consumption. The landlord pointed out that after the tenancy ended the electricity consumption decreased significantly. The landlord submitted, as an alternative position, that the tenant's consumption of electricity was a gross infraction of usage thereby entitling the landlord to recover the over usage pursuant to the agreed upon utility term.

The tenant denied that her spouse was running a business from the rental unit. Rather, the tenant's spouse was employed but worked from home.

Loss of Rent

The landlord was able to re-rent the unit starting January 1, 2013 for \$650.00 and seeks to recover the loss of \$135.00 from the tenant due to the tenant's late notice to end tenancy.

It was undisputed that the landlord re-rented the unit as a one-bedroom. The landlord submitted that she believed she had advertised the unit as a two bedroom unit by renewing a former on-line posting. The landlord acknowledged she did not verify whether her attempts to renew the posting were effective. Shortly thereafter the landlord posted an advertisement for a one-bedroom unit as prior experience has

shown that a one-bedroom unit is easier to rent. The second bedroom of the rental unit is accessible from the landlord's portion of the house and has since been used for storage by the landlord.

The tenant was of the position the landlord decided to rent the unit as a one bedroom and did not attempt to re-rent the unit as a two-bedroom. The tenant submitted that after giving notice to end tenancy the tenant watched for advertisements for two bedroom units and she did not see one for the rental unit as a two bedroom. The tenant noted in her search for a two bedroom unit there were not many two bedroom units available and believes the landlord would have been able to re-rent the unit as a two bedroom if she had advertised it as such.

Oil heater

Claim withdrawn by landlord

Damage to washing machine

The landlord submitted that the tenant damaged the washing machine and is seeking \$27.99 for the cost of enamel paint. The tenant offered to pay ½ of the amount requested in recognition that the washer was shared by the tenant and the landlord. The landlord was agreeable to the tenant's offer.

Dish rack missing

The tenant has dish rack and agreed to return it to the landlord.

Curtain panel missing

The landlord submitted that the bedroom had two curtain panels on the window at the beginning of the tenancy and only one panel remained at the end of the tenancy. The curtains were approximately one year old at the beginning of the tenancy and cost \$19.99 to replace.

The tenant explained that the curtain panels were pushed together and believes both panels are still there.

The move-out inspection report does not indicate missing curtain panels. The landlord explained that this was noticed after the inspection was performed.

Dispute costs

The landlord requested recovery of lost wages, printing, and mailing costs associated to preparing this dispute. As explained to the parties, the costs to file and/or participate in

a dispute resolution proceeding are not recoverable under the Act except for the filing fee. Therefore, these claims were dismissed summarily.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Utilities

The Act provides for terms that must appear in a tenancy agreement. Parties are at liberty to made additional terms; however, section 6(3) provides that a term of a tenancy agreement may not be enforceable. Section 6(3) provides:

- (3) A term of a tenancy agreement is not enforceable if
- (a) the term is inconsistent with this Act or the regulations,
 - (b) the term is unconscionable, or
 - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Requiring a tenant to pay all or part of utilities is not inconsistent with the Act as section 46 of the Act contemplates situations where a tenant fails to pay the landlord for utilities. Residential Tenancy Regulations provide the definition of “unconscionable” and I am satisfied the subject utility term is not unconscionable. However, given the dispute between the parties surrounding the landlord’s request for compensation for utilities from the tenant I have considered whether the subject utility term is “expressed in a manner that clearly communicates the rights and obligations under it” as provided under section 6(3)(c).

A term that clearly communicates the rights and obligations under that term should be understandable by a reasonable person who reads the term as it is written and should not require additional explanation from the author as to its meaning.

In reading the subject utility term I interpret it to mean the tenant was permitted to use utilities, without having to pay anything in addition to rent, so long as the tenant's consumption did not exceed the prior years' consumption by more than 50%.

Although the term includes a statement that prior consumption is to take into consideration occupancy I note that there is no reference or indication as to the number of occupants in the previous years; or, that the 50% allowance reflected in the utility term would be reduced to 15% in the landlord's calculations. The basis for doing giving the tenant an actual allowance of 15% was only attainable by making further enquiry of the landlord meaning the term does not clearly communicate the tenant's obligation was to pay for hydro in excess of 15% over prior year's consumption.

While I appreciate the landlord's motives to encourage tenants to be conservative with their utility consumption, surely, the intention to give the tenant an allowance of 15% could have been drafted in a manner that is more clearly and plainly written. In keeping with the rule of *contra proferentem*, as the landlord bears the responsibility of writing the tenancy agreement any ambiguity or uncertainty is interpreted in the manner least favourable to the landlord.

In light of the above, I find it reasonable to hold the tenant responsible for consumption of hydro that exceeds 50% over the prior years' consumption as this is clearly understandable from the term, as it is written, as it consistent with the tenant's understanding of the term.

For the period of September 22 – November 22, 2012 I calculate the tenant's obligation as follows:

Allowable: 1167 KWh (2011) x 1.50	=	1751 KWh (rounded)
Actual:	=	2923 KWh
Overage:	=	1172 KWh
Cost of overage:		
Step 1: 34 KWh x \$0.06800/KWh	=	\$ 2.31
Step 2: 1138 KWh x \$0.10190/KWh	=	\$ 115.97
Rider Fee @ 5%	=	\$ 5.92
HST @ 12%	=	\$ 14.91

BC HST credit @ 7%	=	\$ (8.70)
Owing by tenant	=	\$ 130.41

For the period of November 23 – December 21, 2012 I find the utility consumption by the tenant did not exceed the 50% allowance. The daily average from the prior year was 29 KWh giving the tenant the ability to consume an average of 43 KWh per day without having to pay for overage. Since the tenant's daily average for this period was 39 KWh, as calculated by the landlord, I find the tenant was within her allowable usage and I make no award for utilities for this period.

Loss of rent

It is undeniable that the tenant violated the Act with respect to giving at least one full month of written notice to end the tenancy. However, a violation of the Act does not in itself result in a monetary award for the other party. Rather, the party making the claim must satisfy all of the criteria outlined above.

The issue raised during the hearing was whether the landlord made a reasonable attempt to re-rent the unit as a two bedroom unit and mitigate her losses. I am inclined to believe she did not advertise it as a two bedroom unit based upon the written submission that accompanied her application where she states in part 4. a):

"I advertised for a one bedroom and was able [to] rent the suite January 1, 2013 for \$650.00."

[my emphasis added]

I find that if the landlord had made attempts to advertise the unit as a two bedroom unit she would have described those efforts in her otherwise very detailed written submission.

Therefore, I deny the landlord's request to recover loss of rent of \$135.00 on the basis I am not satisfied she made reasonable efforts to mitigate her loss of rent and because I find the landlord benefited from using the second bedroom for her own purposes.

Damage to washing machine

I accept the agreement reached by the parties during the hearing and I award the landlord ½ of the amount claimed or \$14.00.

Dish rack

I order the tenant to return the dish rack to the landlord without further delay.

Curtain panel

Section 21 of the Residential Tenancy Regulation provides that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The move-out inspection report does not indicate there is a missing curtain panel. I have turned to the landlord's photographs in an attempt to determine whether a panel is missing. Upon review of the photographs I find I am unable to determine whether there is a missing panel or whether two panels are pushed together as submitted by the tenant. Therefore, I find the photographs presented to me do not constitute a preponderance of evidence to contradict the move-out inspection report and I deny this portion of the landlord's claim.

Filing fee

I award the landlord one-half of the filing fee she paid for this application given her partial success in this application.

Security deposit, pet deposit, and Monetary Order

As the landlord is holding deposits that exceed the amounts awarded to the landlord I provide the tenant with a Monetary Order for the balance, calculated as follows:

Security deposit	\$ 392.50
Pet deposit	392.50
Less: award for utilities	(130.41)
Less: award for damage to washer	(14.00)
Less: award for filing fee	<u>(25.00)</u>
Monetary Order	\$ 615.59

The tenant may serve and enforce the Monetary Order as necessary if the landlord does not pay the tenant \$615.59 without further delay.

Conclusion

The landlord was partially successful in this application and has been awarded and authorized to deduct \$169.41 from the security deposit. The landlord must return the balance of the deposits of \$615.59 to the tenant without further delay and the tenant has

been provided a Monetary Order in this amount to ensure payment is made. The tenant has been ordered to return the landlord's dish rack to the landlord without further delay.

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: April 12, 2013

Residential Tenancy Branch

