Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNDC, MNSD, FF,

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of her security deposit pursuant to section 38; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that she received copies of the landlord's dispute resolution hearing package sent by the landlord by registered mail on August 9, 2013, and the landlord's written and photographic evidence. The tenant testified that she sent the landlord a copy of her original dispute resolution hearing package on August 13, 2013, and her amended dispute resolution hearing package in October 2013, both by registered mail. The landlord testified that he only received a copy of the tenant's October 2013 registered mailing, including her written evidence. I am satisfied that the parties served one another with the above documents in accordance with the *Act*.

The tenant's amended application for dispute resolution withdrew her application for the cancellation of a 1 Month Notice to End Tenancy for Cause (a 1 Month Notice). She testified that she had been confused by the application process and confirmed that no 1 Month Notice was issued to her by the landlord.

Issues(s) to be Decided

Are either of the parties entitled to monetary awards for damage or losses arising out of this tenancy? Are either of the parties entitled to recover their filing fees from one another?

Background and Evidence

This periodic tenancy for a strata rental unit commenced on December 1, 2005. Monthly rent was initially set at $850.00, payable in advance on the first of each month. By the time this tenancy ended on July 31, 2013, the monthly rent had increased to $885.00. The tenant paid a $425.00 security deposit on November 25, 2005. The tenant confirmed that the landlord returned her security deposit in full plus applicable interest on August 14, 2013. The tenant also confirmed that she has cashed the landlord's cheque returning her security deposit in full.

The tenant testified that she participated in a joint move-in condition inspection of the rental unit on or about November 25, 2005 with the landlord's then agent, Mr. J. The landlord confirmed that Mr. J. did represent him at that stage in this tenancy, but no joint move-in condition inspection report was created by the landlord or his agent. Although the parties met on August 5, 2013 to conduct a joint move-out condition inspection of the rental unit after the tenant had already vacated the premises, this inspection did not lead to the landlord's production of a move-out condition inspection report.

The landlord provided written evidence and sworn oral testimony that the tenant telephoned him on or about June 26, 2013, advising him that she was likely going to be ending her tenancy by the end of July 2013. He said that he requested a written notice to end tenancy at that time. The landlord testified that he did receive a June 30, 2013 email from the tenant advising that she intended to vacate the premises and end her tenancy by July 31, 2013. He said that he does not often check his emails and only discovered this emailed notice on or about July 9, 2013. The tenant did not dispute the landlord's evidence and sworn testimony regarding his contact with her about the end of this tenancy. She confirmed that she did not provide the landlord with written notice to end her tenancy. Although the tenant said that she ended her tenancy on July 31, 2013, she also testified that she did not return her keys until August 1, 2013.

The landlord applied for a monetary award of $2,240.00. The landlord provided no written or oral breakdown of how he arrived at the amount of his requested monetary award. He testified that some of this amount was to compensate him for the lack of notice given by the tenant to end her tenancy. He said that when he and his wife returned to this community on August 2, 2013, to paint and conduct repairs to prepare for a new tenant, they discovered that the rental unit had not been properly cleaned. He

submitted a series of photographs and testified that evidence of dirt and smoke was clearly evident on the walls. He also entered into written evidence signed statements from the current and past Presidents of this strata council who confirmed that the premises were dirty when they inspected the premises with the landlord on August 3 and August 4, 2013. In their joint written statement, they maintained that "it would take some days of cleaning to catch up to what was not done in quite a while." At the hearing, the landlord said that these two individuals may be available to be called to provide their first hand sworn testimony regarding the condition of the rental unit on August 3 and 4, 2013. The tenant said that this was not necessary as she accepted that the photographic evidence submitted by the landlord was accurate and that the two strata council representatives would confirm the information contained in their joint letter entered into written evidence by the landlord. With the agreement of the parties, I did not attempt to contact the current and past Presidents of the strata council for this rental unit.

The landlord entered into written evidence copies of five cheques each issued to "Cash" which he testified were for cleaning he paid to his wife's family members to assist in the cleaning of the rental unit shortly after the end of this tenancy. These cheques covering the period from August 12, 2013 until September 2, 2013 ranged from $30.00 to $182.50. The landlord testified that the lack of cleaning in the rental unit seriously interfered with his plans to paint the rental unit and replace the floors with vinyl planking.

The landlord testified that the flooring was not replaced until the second week of August and that he started to try to rent it to new tenants somewhere between the middle and end of August. He testified that advertisements were placed on two popular rental websites, although he produced no copies of these advertisements or details on when they were first placed. When he could not find new tenants, he decided to list the property for re-sale in mid- September 2013. He said that the tenant's failure to clean the rental unit properly led to delays, which have affected the price he can obtain on the real estate market for this strata unit. The tenant confirmed that the property was listed for sale on September 16, 2013.

The tenant disagreed with the landlord's claim that she left the premises in an unclean state at the end of her tenancy. She provided her own set of photographs, which were less clear than those provided by the landlord. She also entered into written evidence a copy of an emailed invoice from the cleaners she hired to clean her rental unit at the end of her tenancy. In this email, the unnamed cleaner outlined the steps taken to clean the rental unit on July 31, 2013, noting that the cleaners were paid the "move out rate which both parties were happy with." Although she said that the cleaners were willing to provide testimony to confirm their cleaning of this rental unit on July 31, 2013,

she said that they were working at the time and would not be available for this hearing. At the hearing, the tenant testified that she hired cleaners, but they "likely missed a few places."

The tenant's application for a monetary award of $605.00, included her request for reimbursement of expenses she incurred during the course of her tenancy as follows:

Item	**Amount**
One Set of Wooden Blinds	$150.00
Painting Charges	350.00
Bevelled Mirror	90.00
Bathroom Faucets	25.00
Total of Above Items	**$615.00**

She said that when she first moved into the rental unit many features of this strata unit built in 1979 needed repair or refurbishing. She said that she discussed her concerns with the landlord's agent, Mr. J. She said that she understood that Mr. J. spoke with the landlord who approved her proposals to repair and paint the rental unit. She undertook these repairs and renovations on the understanding that she would be compensated for her work by the landlord. She acknowledged that the landlord did agree to pay her for the paint she purchased in 2006. The parties agreed that the rental unit was not repainted again after the tenant's 2006 repainting of the premises until after the tenancy ended. The tenant testified that she had nothing in writing from either Mr. J. or the landlord advising that the landlord had agreed to pay her for the renovations and repairs she undertook during her tenancy with the exception of the tenant's painting of the rental unit in 2006.

The landlord testified that he never agreed to pay for any of the items outlined in the tenant's claim. He said that there were some communication problems with Mr. J. at one point, but that the landlord paid for many repairs and items requested by the tenant during the course of this lengthy tenancy. He said that he disagreed with the tenant's installation of the bevelled mirror as it damaged the underlying drywall. He gave undisputed testimony that he compensated the tenant for the paint she purchased in 2006. He said he never agreed to pay for any of the other items listed in the tenant's claim. He gave undisputed testimony that the tenant had never attempted to recover any of the above items until he submitted his own claim for a monetary award.

Analysis –Landlord's Claim for Loss of Income

Section 45(1) of the *Act* requires a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due.

In this case, in order to avoid any responsibility for rent for August 2013, the tenant would have needed to provide her notice to end this tenancy before July 1, 2013. Section 52 of the *Act* requires that a tenant provide this notice in writing.

I find that there is undisputed evidence that the tenant did not comply with the provisions of section 45(1) of the *Act* and the requirement under section 52 of the *Act* that a notice to end tenancy must be in writing. Sending notice to end a tenancy by email on the last day of June 2013 does not satisfy the requirement under section 52 to provide a notice to end tenancy in writing.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. There is undisputed evidence that the tenant did not pay any rent for August 2013. As such, the landlord is entitled to compensation for losses he incurred as a result of the tenant's failure to comply with the terms of their tenancy agreement and the *Act*. However, section 7(2) of the *Act* also places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

In this case, the landlord testified that he had made no efforts to seek a new tenant for this rental unit when he learned that this tenancy was ending by July 31. Rather, his plan was to conduct major repairs including removing the existing flooring, replacing it with new flooring, and repainting the rental unit. He did not attend the rental unit until August 2, 2013, and did not complete his repairs until the second week in August. However, he testified that he did not place advertisements as to the availability of this rental unit until at least mid-August and perhaps as late as late August. Other than his sworn testimony, he submitted no other confirming evidence regarding the placement of any advertisements on rental websites. He also confirmed the tenant's assertion that he listed the property for sale by mid-September 2013. He asserted that the delays caused by the tenant's failure to leave the rental unit clean and undamaged led to delays in his efforts to locate a new tenant and to losses resulting from the decline in the real estate market.

Based on the evidence presented, I find that the landlord has not taken adequate measures to mitigate his loss of income for August 2013. He had made no efforts to locate another tenant until at least mid-August and then provided no written evidence of any attempts he undertook in mid to late August. He was fully expecting to undertake major repairs and renovations to premises that had received little work since at least 2006, before he viewed the condition of the rental unit on August 2, 2013. I find that the tenant had little impact on the landlord's tardiness in seeking new tenants for August

2013, given the plans the landlord already had in place for this rental unit. Under these circumstances, I find that the landlord has not discharged his duty under section 7(2) of the *Act* to minimize the loss of income for August 2013 that he has asked the tenant to assume. I dismiss the landlord's application for a monetary award for loss of income without leave to reapply.

Analysis – Landlord's Claim for Damage

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

In this case, there is conflicting evidence with respect to the condition of the rental unit at the end of this tenancy. The landlord provided his own sworn testimony, an undisputed letter from the current and past Presidents of the strata council, and photographic evidence regarding the condition of the rental unit at the end of this tenancy. The tenant disputed the landlord's claim as to the thoroughness of the cleaning conducted at the end of her tenancy and maintained that the rental unit was lacking when she moved into it in 2005.

When disputes arise as to the changes in condition between the start and end of a tenancy, condition inspections and inspection reports are very helpful. Although a joint move-in condition inspection apparently occurred on November 25, 2005 between the tenant and the landlord's then agent, Mr. J., no joint move-in condition inspection report was created at that time. After this tenancy ended, the landlord did meet with the tenant to conduct a joint move-out condition inspection on August 5, 2013. There is no evidence that the landlord submitted any written request for an earlier move-out condition inspection before the tenant vacated the rental unit. The landlord did not create a joint move-out condition inspection report.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes

regarding the condition of rental units at the beginning and end of a tenancy. For example, section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***36*** *(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord*
>
> > *(a) does not comply with section 35 (2) [2 opportunities for inspection],*
> >
> > *(b) having complied with section 35 (2), does not participate on either occasion, or*
> >
> > *(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...*

Similar provisions are in effect in section 24 of the *Act* with respect to joint move-in condition inspections and inspection reports.

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-in and move-out condition inspection reports, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. However, the landlord has returned the security deposit in full and his current claim is for damage arising out of the tenancy.

Section 37(2) of the Act requires a tenant to "leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear." The parties entered conflicting evidence regarding the condition of the rental unit when this tenancy ended. The tenant maintained that the rental unit was in unsatisfactory condition when she commenced her tenancy. Although she produced some written evidence that she did hire cleaners at the end of her tenancy, she also testified that she did not check their work and that they may have missed cleaning some of the rental unit.

Based on the oral, written and photographic evidence of the parties, I find on a balance of probabilities that the tenant did not comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit "reasonably clean" as cleaning was likely required by the landlord after the tenant vacated the rental unit. However, I find that the landlord's claim that he paid family members large amounts of cash to clean the rental

unit, which took many days to complete, excessive. Cheques paid to unnamed individuals for cash may have been for any number of different services or items. I give very little weight to this written evidence submitted by the landlord as "evidence" of his losses to repair damage to the rental unit. I also note that the landlord was expecting to spend considerable time in the rental unit given that he and his wife were planning major repairs to the rental unit at the end of this tenancy. Under these circumstances and after considering the sworn testimony, the written evidence and the somewhat conflicting photographic evidence, I allow the landlord 8 hours of cleaning at a rate of $20.00 hour. This results in a monetary award in the landlord's favour in the amount of $160.00 (8 hours @ $20.00 per hour = $160.00) for general cleaning that was required at the end of this tenancy.

As the landlord has been only partially successful in his application, I allow him to recover $25.00 from his filing fee from the tenant, representing one-half of that fee.

Tenant's Claim for Damage and Losses Arising out of this Tenancy

Although I have given the tenant's claim for losses arising out of this tenancy careful consideration, I find that she has provided very little evidence to support her entitlement to any monetary award. She produced minimal evidence to support her claims and confirmed that she had never received written confirmation from either the landlord or his then agent that the landlord had agreed to compensate her for the items listed in her monetary claim.

The landlord maintained that the tenant waited until her tenancy was over to raise these requests for reimbursement, most of which occurred very early in her eight-year tenancy. Her delay in seeking compensation for these items calls into question whether she genuinely believed that she was entitled to recover these costs from the landlord.

Black's Law Dictionary defines the "doctrine of *laches*" in part, as follows:

> *[The doctrine] is based upon maxim that equity aids the vigilant and not those who slumber on their rights.*
>
> *…neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity.*

Following from the tenant's extended delay in making any attempt to collect amounts she maintained were owed to her by the landlord and in accordance with the legal doctrine of *laches*, I find that the tenant's application must be dismissed without leave to reapply.

Conclusion

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord a monetary award for damage and to recover a portion of the landlord's filing fee:

Item	**Amount**
Cleaning (8 hours @ $20.00 = $160.00)	$160.00
Recovery of ½ of Landlord's Filing Fee for his Application	25.00
Total Monetary Order	**$185.00**

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I dismiss the tenant's application without leave to reapply.

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 12, 2013

Residential Tenancy Branch