



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for unpaid rent and for damage to the unit pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenants 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 landlord testified that she sent the tenants copies of her dispute resolution hearing package by registered mail on September 10, 2013 and on September 27, 2013, by registered mail. The tenants confirmed that they received these packages. I am satisfied that the landlord served her hearing packages to the tenants in accordance with the *Act*.

At the commencement of the hearing, the landlord confirmed that a previous decision of an Arbitrator appointed under the *Act* had allowed the landlord to retain the tenants' \$890.00 security deposit. As such, the landlord withdrew her application to retain the tenants' security deposit. The landlord's application to retain the security deposit is withdrawn. Based primarily on the landlord's withdrawal of the application to retain the security deposit, the landlord reduced the monetary award she sought in this application from \$4,999.00 to \$4,063.56.

At the hearing, the landlord testified that she sent the final portion of her reply evidence to the Residential Tenancy Branch (the RTB) by fax on December 15, 2013 and to the tenants by registered mail on December 16, 2013. The tenants testified that they had not yet received this late evidence. I noted that section 90 of the *Act* establishes that documents sent by registered mail are deemed served on the 5th after their mailing. On

the basis of the landlord's sworn testimony, I advised the parties that the landlord's late evidence would not be deemed served until the day after this hearing. As the landlord did not serve this evidence in a timely fashion, I advised the parties that I would not be considering anything in the landlord's written evidence package sent on December 15 and 16, 2013 that was not already in the tenants' possession. I have taken into account a December 3, 2013 Review Consideration Decision of an Arbitrator, who dismissed the tenants' application for a review hearing of the original September 6, 2013 original decision. Both of the above decisions would have been received by the tenants well in advance of this hearing.

During the course of the hearing, the landlord provided the telephone number of the office that handles the management of the strata corporation. Although she had not made prior arrangements with anyone at the strata corporation to make themselves available as witnesses for this hearing, the landlord asked that that we try to connect with the strata corporation to obtain sworn testimony from either the strata manager or the caretaker. The TELUS operator was unable to connect us with anyone from the strata corporation, so neither of these potential witnesses gave sworn testimony at this hearing.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and for damage arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

On April 7, 2013, the parties signed a one year fixed term tenancy agreement that was to run from April 29, 2013 until April 30, 2014. Monthly rent was set at \$1,795.00, payable in advance on the first of each month, plus heat and hydro. Although the tenants paid the landlord a \$890.00 security deposit on April 7, 2013, the parties agreed that the original decision allowed the landlord to retain that deposit.

This tenancy ended on September 1, 2013, at which time the tenants yielded vacant possession of the rental unit to the landlord.

In his Review Consideration decision, the Arbitrator described the issues in dispute and the matters addressed in the original hearing of September 6, 2013, as follows:

...The Landlord applied to end the tenancy for cause and for a monetary order for compensation for lost rental income, for damage to the unit site or property and to retain the Tenant's security deposit. The Tenant applied to cancel the notice to end tenancy for cause and for monetary compensation for loss or damage

under the Act, regulations or tenancy agreement. The Arbitrator found for the Landlord and awarded the Landlord a monetary order for \$57.50 and ordered the Landlord to retain the Tenant's security deposit of \$890.00. The Tenant's application was dismissed without leave to reapply.

In Arbitrator #####'s decision he indicates that he preferred the evidence of the Landlord as the Tenant failed to provide sufficient evidence to satisfy the Arbitrator that an acceptance of the mutual agreement to end the tenancy was made...

The Arbitrator described the issues before him in the tenant's application for review of the original decision as follows:

... The Tenant is requesting a review of the file with new and relevant evidence submitted with the review application. The new and relevant evidence are two emails one dated August 9, 2013 and the other is dated August 26, 2013. The Tenant's contention is that these emails confirm the mutual agreement to end the tenancy and therefore the Landlord should not have been awarded any lost rental income for September, 2013...

The landlord's claim for a monetary Order included the following list set out in a table entitled "Calculation of Materials and labour to repair damage..."

Item	Amount
Professional Cleaning Service	\$235.00
Carpet cleaning	195.00
Materials for painting and cleaning	187.31
Labour for painting and repairs	1,800.00
Strata fine for not following guidelines	200.00
Loss of September 2013 Rent	1,795.00
Total of Above Items	\$4,412.31

In addition, the landlord requested a monetary award for a bill that had yet to be issued by the strata corporation for damage. The landlord also requested the recovery of her \$50.00 filing fee from the tenants.

The landlord testified that she re-rented the premises to another tenant as of October 1, 2013. The new tenant entered into a periodic tenancy, the type of tenancy requested by the landlord. She testified that the new tenant is paying monthly rent of \$2,000.00.

Analysis- Landlord's Claim for Loss of Rent

In the original decision, the Arbitrator noted that the landlord's request for the recovery of unpaid rent for September 2013 was properly before him:

...The Landlord seeks a monetary order for \$1,795.00 for the loss of rental income for September 2013. The Tenant disputes this stating that they entered into a mutual agreement to end the tenancy on September 1, 2013 which was dated July 17, 2013...

Much of the evidence heard on September 6 by the Arbitrator involved the tenants' claim that they had entered into a mutual end to tenancy, which enabled them to end their tenancy without paying any rent for September 2013. In the original decision, the Arbitrator concluded as follows:

...The Tenant has failed to provide sufficient evidence to satisfy me that an acceptance was made of the mutual agreement and that the Landlord was properly notified as per the agreement. As such, I find that no agreement was in place and that the Tenant failed to provide proper notice to end the tenancy. However, the Landlord has failed to provide sufficient evidence to satisfy me of any efforts to mitigate any possible losses and that as of the date of this hearing on September 5, 2013, the Landlord has failed to provide sufficient evidence to satisfy me of the loss of rental income for the entire month September. As such, I find that the Landlord is only entitled to ½ of the monthly rent equal to \$897.50 for the first 15 days of the month. The Landlord's remaining portion of the claim is dismissed with leave to reapply as I find that this portion of the claim is premature...

The Arbitrator has already made a final and binding decision that this tenancy did not end on the basis of a properly executed agreement to a mutual end to this tenancy. He also issued a final and binding decision with respect to the landlord's claim of unpaid rent for the first 15 days of September 2013. The legal principle of *res judicata* prevents me from reconsidering a matter where a final and binding decision has already been made. As such, I cannot consider the landlord's claim for a monetary award for the first 15 days of September 2013.

However, the Arbitrator's decision leaves open the possibility that the landlord could reapply for a monetary award for the final half of the rent owing for September 2013. In this context, I find that the landlord's claim for the recovery of the remaining portion of the rent for September 2013 (i.e., \$1795.00 - \$897.50 = \$ 897.50) is properly before me.

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. I find that the tenants were in breach of their

fixed term tenancy agreement because they vacated the rental premises prior to the April 30, 2014 date specified in that agreement. As such, the landlord is entitled to compensation for losses she incurred as a result of the tenants' failure to comply with the terms of their tenancy agreement and the *Act*.

There is undisputed evidence that the tenants did not pay any rent for September 2013. However, section 7(2) of the *Act* 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.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises. Rather than seeking similar monthly rent from prospective new tenants, the landlord increased her asking rent significantly to \$2,000.00, \$205.00 more than the tenants had committed to pay for the duration of their tenancy. In fact, the landlord was successful in obtaining her increased asking rent of \$2,000.00 commencing on October 1, 2013. Rather than demonstrating a loss in rent as a result of the tenants' actions in ending their tenancy prematurely, I find that the landlord has received a net gain of \$205.00 per month since October 1, 2013. By the time of this hearing, the landlord had increased her revenue from this rental unit by \$205.00 for each of October, November and December 2013. Since the new tenant remained in his tenancy as of the date of this hearing, the landlord can reasonably expect to receive an additional \$205.00 from this periodic tenancy for at least January 2014 and quite possibly until the end of the original fixed term tenancy on April 30, 2014.

Had the landlord reduced her asking rent to the level she was obtaining from the tenants in the fixed term tenancy, it is possible that she would have been able to re-rent the premises for some portion of September 2013. In addition, the net gain that she has received from these premises for at least four months has been substantial. For these reasons, I dismiss the landlord's claim for a loss of rent arising out of the tenant's breach of their fixed term tenancy agreement without leave to reapply. I find that any minimal losses that the landlord may have incurred resulted from the significant increase in rent that she was seeking from prospective new tenants. I also am not satisfied that the landlord has experienced any true losses in rent as a result of the tenants' actions.

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.

Section 37(2) of the *Act* requires a tenant to “leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.” On a balance of probabilities and after considering the joint move-in and move-out condition inspection reports, the written evidence of the parties and the sworn oral testimony, I am satisfied that the landlord is entitled to a monetary award for additional cleaning that needed to be undertaken at the end of this tenancy. However, I find that the charge of \$50.00 per hour noted on the handwritten “invoice” for four hours of cleaning is excessive. I issue a monetary award in the landlord’s favour in the amount of \$100.00, which is designed to compensate the landlord for 5 hours of cleaning at a rate of \$20.00 per hour, which includes the cleaning of the fridge and stove.

Based on the evidence before me, I find no mention of any problems with the condition of the carpets in the joint move-in condition inspection report at the beginning of this tenancy. I am satisfied by the landlord’s written evidence and sworn testimony that the carpets required professional carpet cleaning by the end of this tenancy. I allow the landlord’s application for a monetary award of \$195.00 for professional carpet cleaning at the end of this tenancy.

At the hearing, the landlord testified that the rental unit was painted in October 2011, approximately two years before this tenancy ended. RTB Policy Guideline #40 establishes the useful life of various elements of a tenancy. This Guideline establishes that the useful life of an internal paint job is 4 years. On this basis, the landlord would be entitled to recover approximately one-half of the costs she incurred with respect to damage caused by the tenants that required repainting. However, my review of the photographs does not lead me to believe that the damage claimed by the landlord was so severe that it resulted in a need to conduct a widespread repainting of the premises. The landlord also grouped some of her costs for materials and labour for painting together, making it difficult to arrive at an accurate estimate for her repainting costs. For these reasons, I issue a monetary award in the amount of \$500.00, an amount designed to compensate the landlord for what I consider to be relatively minor repairs and painting of that portion of the rental unit that was damaged during the course of this tenancy.

I dismiss the remainder of the landlord's claim for repairs without leave to reapply, as I find that some of this damage may very well have pre-dated the beginning of this tenancy, while others would correctly fall within the definition of reasonable wear and tear. In this regard, I find that many of the landlord's photographs do not reflect the level of damage claimed by the landlord in her written evidence and in her sworn testimony. For example, the landlord provided a photograph of alleged graffiti, which by her own admission did not reveal any damage, but which she still maintained was evident to the eye when viewed in person. On such points, I find an element of merit in the female tenant's written assertion that the landlord grossly exaggerated the extent of damage that arose during this tenancy.

At the hearing, the parties provided sworn testimony with respect to the incident that led to the imposition of \$200.00 in fines by the strata corporation for failing to follow the strata rules regarding the timing of moving and the requirement to have elevators pre-arranged with the strata management. At the hearing, the female tenant testified that the tenants did not follow the strata rules regarding their move from the rental unit, although she maintained that the building caretaker had given his oral consent to their plans. Since I am satisfied that the landlord did incur a \$200.00 loss as a result of the tenants' failure to follow the rules of the strata when they left the building, I allow the landlord's application for a monetary award of \$200.00 for this item.

I have also considered the landlord's request for the recovery of costs assigned to her by the strata for damage allegedly caused by the tenants in common areas of this strata property. The areas in question are in the hallway on the floor of the rental unit and in the parking garage. While the landlord entered written evidence and sworn oral testimony that the landlord had video evidence that the tenants caused this damage, she testified at the hearing that she had never viewed this evidence. The landlord testified that the building caretaker had witnessed the tenants cause some of this damage, but she did not arrange for the caretaker to attend this hearing to give sworn testimony to that effect. She also did not dispute the strata's imposition of this fine against the tenants for damage which the tenants maintained was not caused by them.

While damage caused inside a rental unit can reasonably be attributed to tenants who have exclusive possession of that unit, there is a much higher burden placed on a landlord attempting to claim for damage to common areas of a strata complex where any number of residents or visitors could have been responsible. In this case, I am not satisfied that the landlord has presented sufficient evidence to demonstrate that the tenants were responsible for the damage that led to the strata corporation's imposition of a fine against her as the tenants' landlord. Section 7(2) of the *Act* requires a landlord

to take proper measures to mitigate a tenant's losses. In this case, I find that the landlord did not fulfill the onus placed on her by section 7(2) of the Act as she did not contest or dispute the strata corporation's fine after the tenants maintained that they were not responsible for this damage. For these reasons, I dismiss the landlord's claim for the recovery of additional strata fines imposed on her by the strata corporation without leave to reapply.

As the landlord has been partially successful in her application, I allow her to recover her filing fee from the tenants.

Conclusion

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover losses arising from damage to the rental unit and to recover her filing fee.

Item	Amount
Cleaning	\$100.00
Carpet cleaning	195.00
Painting and Repairs	500.00
Strata fine for not following guidelines	200.00
Filing Fee	50.00
Total Monetary Order	\$1,045.00

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.

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: January 07, 2014

Residential Tenancy Branch