



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MND, FF

Introduction

This hearing was scheduled to deal with cross applications. The tenants applied for compensation for damage or loss under the Act, regulations or tenancy agreement. I have amended their application to reflect the correct dispute code. The landlord applied for compensation for damage to the rental unit. 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.

Preliminary Issue – Jurisdiction

During the first hearing date of January 15, 2014 I heard testimony from the landlord suggesting the Act may not apply to this tenancy. I ordered the hearing adjourned and that both parties provide me with a copy of their written tenancy agreement and end of tenancy letter since neither party had provided it prior to the commencement of the initial hearing date. Upon reconvening the hearing I was satisfied that both parties had the identical copies of the same documents and I have relied upon them in making this decision.

The Act applies to all residential tenancy agreements between a landlord and a tenant unless specifically excluded under section 4 of the Act. Section 4(c) excludes agreements related to: “living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation.”

In this case, the landlord (who is an owner) took the position that she shared the kitchen and bathroom facilities in the lower level of the house occupied by the tenants, primarily when her living space was undergoing a renovation. The tenants submitted that they were unaware of the landlord using their kitchen or bathroom facilities.

The landlord submitted that the tenants had also used her kitchen facilities. The tenant responded by stating that on one occasion, when the tenant wished to make a surprise birthday cake for her visiting mother, she requested and was permitted to use the landlord's oven to make the birthday cake.

The tenancy agreement names the landlord and three tenants. The written document provides, in part, the following information:

3 single rooms for 3 single people, for a charge of \$1500 per month.
Rent includes, heat, water, hot water, electricity, TV and Internet service.

That will include;
Private Bedroom with fixture of bed and bedding, closet, desk, chair and night table.

To share:

1. Living room includes furniture sofa set, dining set with 4 chairs, coffee table, and side table, TV and TV stand.
2. Bathroom and Kitchen includes Stove, Refrigerator, Microwave, coffee maker and all cutlery.
3. Rent \$1,500 a month for 6months started 12 April 2013
4. If tenant decide to stay to October 2013 rent will be \$1650 staring 1st October

[reproduced as written]

The landlord was of the position that the "To share" portion of the agreement meant the landlord and the landlord's family members would share the living room, bathroom and kitchen with the tenants.

The tenants were of the position that the "To share" portion of the agreement applied to the 3 tenants sharing the living room, kitchen and bathroom with each other.

I heard that there was a door that separated the tenants' living space from the landlord's living space. The door was lockable on the landlord's side. I heard the tenants had a separate entry door that they used exclusively and the landlord had a separate entry.

I found the wording of the tenancy agreement could be interpreted in a manner that reflects the positions put forth by both parties so I reserved judgement with respect to

this matter and continued to hear from the parties with respect to their monetary claims against each other in order to assess credibility. During that process, I determined that the tenants were highly credible and the landlord's testimony seriously lacked credibility. Further details of this determination are reflected in the sections of this decision that follow.

Since I accepted the tenants' version of events over that of the landlord, I was satisfied that the tenants were not sharing kitchen and bathroom facilities with the landlord and that the one occasion the landlord's oven was used for the specific purpose of baking a surprise birthday cake is insufficient to exclude this tenancy from application of the Act.

In light of the above, I have found that the Act applies to this tenancy and that I have jurisdiction to resolve their respective disputes.

Procedural Matter – Evidence

At the commencement of the first hearing, I noted the landlord had provided photographs in support of her damage claim but did not provide any other supporting documentation such as invoices or estimates to verify the monetary value assigned to the damage. The landlord was cautioned about the difficulty she may face in proving her claim with a lack of evidence and I gave the landlord the option to withdraw; however, the landlord stated she wished to proceed based upon the photographs. During the adjournment, the landlord provided the requested documentation (tenancy agreement and end of tenancy letter) but she also included an "estimate" for drywall repair that is dated prior to filing her Application and prior to the service of the photograph. I had serious concerns about the veracity of this document and the tenants stated they had not been served with a copy of the "estimate". Since I had given the parties specific instructions as to which documents I would accept during the adjournment and the landlord's "estimate" was not one of those documents, I excluded the "estimate" from further consideration in making this decision.

Issue(s) to be Decided

1. Have the tenants established an entitlement to compensation from the landlord in the amounts claimed?
2. Has the landlord established an entitlement to receive compensation from the tenants in the amount claimed?

Background and Evidence

The tenancy commenced April 12, 2013 and the tenants paid a security deposit of \$750.00. The monthly rent was \$1,500.00 payable on the 1st day of every month. The tenancy ended September 30, 2013. The tenants were refunded \$700.00 of their security deposit.

Tenants' Application

Below, I have summarized the tenants' claims against the landlord and the landlord's responses.

1. Charge for overnight guests

It was undisputed that the landlord charged the tenants and the tenants paid to the landlord a sum of \$365.00 as a fee for having a family member or friend stay overnight in the rental unit. The tenants asserted that charging for overnight guests is in violation of the Act and it should be refunded.

The landlord pointed to the tenancy agreement that states "No overnight guest without consent." The landlord explained that she gave consent for the tenants to have guests in exchange for a verbal agreement that they pay \$25.00 per night; however, the landlord discounted that rate in certain occasions.

2. Loss of privacy

The tenants are seeking a total of \$1,200.00 in compensation for a loss of privacy for a period of three months. The tenants submit that the landlord would come into their living space through the adjoining door unannounced while they were home, including times when: the landlord was showing the unit to prospective tenants, while the tenants had guests, when the landlord wanted to access the fuse box in one of the bedrooms; and, when the tenant was just about to go in the shower. During those times, the landlord's behaviour included lectures by the landlord that the tenants were immoral by lying horizontal on the couch with a male guest; that their unit was messy; and, demanding to see passports of the tenants' guests.

The tenants also asserted that the landlord would come into their rental unit while they were out as evidenced by the landlord: sending them text messages stating: "just went down to your unit...it's a pigsty"; leaving mail on their table; and, taking a phone charger that did not belong to her and that the landlord would not return it without passport information.

The landlord responded by taking the position the landlord and tenants had shared use of the entire house and that as part of that shared accommodation agreement, the landlord could enter the tenants' living space without notice or consent of the tenants.

The landlord acknowledged taking a phone charger from one of the bedrooms but submitted that it was the vacant bedroom that had been used by one of the tenants who had moved out. The phone charger was returned at the end of the tenancy.

The tenants objected to the landlord's assertion that the parties had an agreement for shared use of the entire house as they were not permitted use of the landlord's living space. The tenants explained that the landlord's frequent unannounced entries made an awkward living environment but that they did not complain as the tenants felt they did not have a say about anything when it came to dealing with the landlord.

Landlord's Application

The landlord had applied for monetary compensation of \$2,550.00 for damage to the rental unit; however, her individual monetary claims did not add to that sum. Below, I have summarized each of the landlord's claims against the tenants and the tenants' responses:

Item	Amount (\$)	Landlord's Reason	Tenants response	Evidence provided by landlord
Hole in wall and mouldy bathroom ceiling	1,800.00	Tenants created hole in the wall, likely from an elbow, and mould by drying their clothes in bathroom.	Tenants unaware of hole in wall and submitted that walls already had signs of mould when they moved in. The bathroom had no window but did have a fan that they used. The tenants denied using bathroom to dry clothes. Rather, they used Laundromat to wash and dry.	Photograph of wall and ceiling

Bed damage	250.00	Bed frame was chipped on corner and slats underneath broken.	The bed was chipped in the corner but tenant uncertain as to when that occurred. The slats underneath the bed always fell out and needed realignment regularly.	Photograph of bed frame
Broken antique table	650.00	Damaged by tenants using it for their gym equipment.	Unaware of any damage.	Photograph of table
Ripped couch	350.00	Couch had a run in the fabric.	Couch was quite old and the tenants unaware of a run being caused during their tenancy.	Photograph of blue floral couch
Cleaning	500.00	Use of alcohol and smoking in the unit, requiring additional cleaning.	Tenants denied smoking in unit.	Photograph of small burn in carpet.
Sum of claims	3,550.00			

It was undisputed that the landlord did not prepare a move-in or move-out condition inspection report, or any other document, to document the condition of the rental unit at the beginning and end of the tenancy. Rather, the landlord largely relied upon her testimony that the unit had been renovated in 2010 and “everything [was] new”.

The tenants pointed out the landlord refunded \$700.00 of their deposit without any mention of damage. The landlord responded by stating she was most concerned about retrieving the keys and ensuring the tenants had removed their possessions; but, that after the tenants left the property she inspected the unit.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons with respect to each Application.

Tenants' Application

The Act prohibits a landlord from unreasonably restricting a tenant, or the tenant's guest, from accessing the rental unit. The Residential Tenancy Regulations provide for fees a landlord may or may not charge a tenant. Section 5 of the Regulations provides for prohibited fees, including: (1) A landlord must not charge a guest fee, whether or not the guest stays overnight. Even if there was a verbal agreement to pay the fees, parties cannot agree to contract outside of the Act and any such agreement is unenforceable. As the landlord charged the tenants a prohibited fee, they are entitled to return of the fees charged illegally. Therefore, I grant the tenants' request to recover \$365.00 in guest fees paid to the landlord.

Under the Act, tenants have a right to quiet enjoyment of the rental unit and residential property. Quiet enjoyment includes the right to reasonable privacy; and, freedom from unreasonable disturbance and significant interference by the landlord or other occupants.

As I have rejected the landlord's position that the parties had a shared accommodation agreement that involved the landlord's having shared use of the living room, kitchen and bathroom in the rental unit, I find the landlord was obligated to comply with section 29 of the Act by obtaining the tenants' verbal consent to enter the unit or give the tenants written notice of entry 24 hours in advance. As I was presented largely undisputed testimony that the landlord entered the rental unit frequently without notice or consent I find the landlord violated the Act. I am further satisfied the tenants suffered a significant loss of privacy and were unreasonably disturbed by the frequent and often inappropriate conduct of the landlord that included: lecturing the tenants about morals, taking possessions out of the rental unit, and demanding passport information from guests. Therefore, I find the tenants have established that the landlord violated the tenant's right to quiet enjoyment and that they suffered a loss because of those violations.

Despite finding a violation on part of the landlord, the tenants have an obligation to take steps to minimize their loss. I find it reasonable to expect that the tenants would have complained to the landlord and requested that she cease such conduct rather than do nothing and allow a claim to build. In the absence of evidence to suggest the tenants took steps to minimize their loss I find it unjust to award the tenants compensation for

three months, as they requested. Therefore, I limit the tenants' award to 1/3 of the amount claimed or \$400.00.

As the tenants' application had merit, I further award the tenants recovery of the \$50.00 filing fee they paid for their Application.

In light of the above, the tenants have been awarded the total sum of \$815.00 [calculated as: \$365.00 + \$400.00 + \$50.00].

Landlord's Application

As the applicant of a damage claim, the landlord must be able to prove the tenants damaged the rental unit; provide verification of the value of the loss associated with that loss; and, be able to demonstrate the landlord to reasonable steps to minimize any loss.

The purpose of preparing condition inspection reports is to establish the condition of the rental unit at the beginning and at the end of the tenancy. These reports are mandatory for every tenancy under the Act and are to be done in the presence of the tenant to avoid future disputes about the condition of the rental unit. In the absence of condition inspection reports, or any other evidence to corroborate the condition of the rental unit at the beginning of the tenancy, I have been left with disputed verbal testimony and photographs.

I have reviewed the photographs and find as follows:

- There is a hole in the plaster in the bathroom; however, it is uncertain as to when the hole was created or when the photograph was taken.
- There appears to be black scuff marks on a ceiling (perhaps the bathroom); however, I am uncertain it is mould and if it is mould the photographs do not establish the mould formed during the tenancy or as a result of the actions or neglect of the tenants.
- The pictures of the bed depict a chip in the corner of the frame but do not establish when the chip occurred.
- The pictures of the bed show the bed frame slats are away from the supporting rail; however, I heard the bed was always like this when the tenants lived in the unit and that the slats merely needed realigning.
- The antique table has a few slats missing from the lower part of the table; however, the photographs do not establish when this occurred.

- The photographs of the couch depict a very old couch given its colour and pattern and not a couch that was new in 2010 as stated by the landlord. Given its age, I find the couch is past its useful life and has no value.
- The photograph of the carpet depicts a small burn hole; however, even if I accepted this carpet was new in 2010 it was still three years old when the tenancy commenced and the photograph does not establish when the burn hole originated.

In summary, the landlord failed to establish the tenants damaged the rental unit. Therefore, the landlord's claims against the tenants are dismissed entirely.

Pursuant to my findings in this decision, I provide the tenants with a Monetary order in the amount of \$815.00 as calculated previously. To enforce the Monetary Order it must be served upon the landlord and it may be filed in Provincial Court (Small Claims) to enforce as an order of the court.

Conclusion

The tenants have been provided a Monetary Order in the amount of \$815.00 to serve and enforce as necessary.

The landlord's Application has been dismissed entirely.

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 01, 2014

Residential Tenancy Branch

