Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MND, MNSD, MNDC, FF

Introduction

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has requested compensation for damage to the rental unit, compensation for damage or loss under the Act, to retain the security and pet deposits and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present affirmed oral testimony evidence and to make submissions during the hearing.

Preliminary Matters

The landlord said that he submitted a number of documents with the application for dispute resolution. The tenants confirmed that they each received a copy of the tenancy agreement, a letter from a former tenant, a copy of their notice ending tenancy, the pet policy, the tenancy addendum and move-in condition inspection report.

Documents reviewed during the hearing were not disputed and I considered the oral testimony in relation to those documents. I determined there was no need to request copies of any of the documents served to the tenants by the landlord.

On March 26, 2014 the landlord served the tenants with a 5 page evidence submission. This evidence was left at the tenant's door. Residential Tenancy Branch Rules of Procedure requires evidence submissions be made at least 5 days prior to the hearing. As the evidence was not given at least 5 days prior to the hearing that evidence was set aside and the landlord was able to provide affirmed testimony.

Issue(s) to be Decided

Is the landlord entitled to compensation in the sum of $880.00 as damage or loss under the Act?

Is the landlord entitled to compensation in the sum of $650.00 for damage to the rental unit?

May the landord retain the security and pet deposits?

Is the landlord entitled to filing fee costs?

Background and Evidence

The 1 year fixed term tenancy commenced on May 1, 2013; rent was $880.00 due on the 1st day of each month. A security and pet deposit in the sum of $440.00 each were paid.

The tenancy addendum included a "lease breaking" clause that indicated if the tenants ended the tenancy before the end of the fixed term a sum of $880.00 would be charged for the costs of re-renting the unit.

The addendum required the tenants to professionally clean the carpets at the end of the tenancy.

A move-in condition inspection report was completed and a copy was given to the tenants. The tenants said they were told the kitchen cupboard was going to be replaced as it was old.

The landlord has claimed $880.00 for a "lease breaking" fee; $500.00 for repairs and $150.00 for carpet cleaning.

There was no dispute that in late August or early September, 2013 the tenants reported a leak under the kitchen sink. The tenants had gone under the sink to clean and found mushrooms growing and mold. There had been a slow leak from the plumbing.

The landlord said he was at the unit twice to deal with the leak and then around late August or early September, after the tenants complained again, a plumber was hired to fix the leak.

The landlord said the tenants had talked about ending the tenancy because the unit had mold and a leaking pipe. At the end of October the tenants told the landlord they would be leaving and written Notice was given ending the tenancy November 30, 2013. The Notice provided a contact phone number for the tenants. The tenants thought the landlord was not disagreeing to the end of the tenancy, as they had had issues with the

leak and mold. Several days after the landlord received the tenant's written notice he gave them a letter requesting payment of $880.00 within 3 days, as a "lease breaking" fee.

On November 21, 2013 the landlord received the tenant's written forwarding address.

The tenants vacated prior to the end of November; the landlord did not schedule a move-out condition inspection report as he believed the tenants were responsible for setting a time they would be available.

The landlord did not complete a move-out inspection report.

The landlord has claimed the sum owed as a result of the tenants ending the fixed term tenancy before the end of the fixed term. The sum owed was referred to as a "lease breaking fee" for costs such as advertising and re-renting the unit. The tenants said that no one came to view the unit and that, to their knowledge, it was not advertised.

The landlord claimed $500.00 for the cost of replacing damaged portions of the kitchen cabinet. The tenants did not tell the landlord that the sink continued to leak, resulting in the need for repairs. The landlord had already replaced the base of the cabinet and then had to complete more repairs after the tenants vacated. If the tenants had told the landlord about the continued leak they landlord could have fixed it, avoiding additional costs.

The tenants supplied photographs which showed the state of the unit on the day they vacated. The unit appeared clean. The kitchen cabinet showed what appears to be some sort of mold growth on the pluming and a jar placed under the plumbing to catch a drip. The base of the cabinet appeared to be fairly new plywood. The tenants did not realize that the leak had continued; it was a slow leak. A photograph was taken of the flooring immediately in front of the kitchen cabinet; it showed signs of a swelling under the linoleum, which was curling upward.

The tenants said they wanted to vacate as one of them was experiencing respiratory problems they believed was the result of the presence of mold in the unit.

The tenants said they rented a carpet cleaner at the end of the tenancy. The landlord has claimed the cost of cleaning; an invoice was not supplied as the landlord cleaned the carpets himself.

There was no claim in relation to any damage caused by a pet.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the

damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

First I have considered the “lease breaking” clause of the tenancy agreement. There was no dispute that the tenants ended the fixed term tenancy agreement prior to the end of the fixed term. The term was meant to cover rental costs incurred by the landlord.

I have considered Residential Tenancy Branch policy which suggests that liquidated damages must be a genuine pre-estimate of the loss at the time the contract is entered into; otherwise the clause may be found to constitute a penalty and, as a result, be found unenforceable.

Policy suggests that an arbitrator should determine if a clause is a penalty clause or a liquidated damages clause by considering whether the sum is a penalty. The sum can be found to be a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. Policy also suggests that generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

I have considered the fee imposed by the landlord and find that it constituted a penalty. There was no evidence supplied by the landlord that would support a cost equivalent to the rent owed; no advertisement costs were provided or any other evidence that would support this fee as being anything other than a penalty for terminating the fixed term. Therefore, in the absence of evidence showing the fee was equivalent to the greatest loss that could be expected for re-renting, that the sum is oppressive and I find that the claim for the lease breaking fee is dismissed.

In relation to the claim for repairs; no evidence was supplied verifying the sum the landlord has claimed. Further, I find that the repairs required were part of what was an on-going slow leak that existed under the kitchen sink. After 3 attempts to repair the leak it would have been reasonable for the landlord to check it, in order to ensure that the repairs had in fact succeeded. The tenants did not notice the leak was not repaired until they were vacating and they took steps to protect the cabinet by placing a container under the plumbing. There was no evidence to support the claim that the tenants had been negligent; in fact, I find that the landlord needed to assume the responsibility to ensure the repairs were successful.

Therefore, in the absence of evidence verifying the cost of repairs and, in the absence of any evidence that the tenant’s had been negligent, I find that the claim for repairs is dismissed.

As the landlord failed to provide verification of the cost claimed for carpet cleaning I find that the claim is dismissed. Further, the landlord required the tenant’s to professionally clean the carpets, but the landlord chose not to do so.

There was no dispute that a move-out condition inspection report was not scheduled by the landlord at the end of the tenancy. Section 35 of the Act sets out the landlord's responsibility in relation to a move-out condition inspection report:

Condition inspection: end of tenancy

> ***35*** *(1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit*
>
> *(a) on or after the day the tenant ceases to occupy the rental unit, or*
>
> *(b) on another mutually agreed day.*
>
> *(2)* ***The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection****.*
>
> (Emphasis added)

The landlord waited for the tenants to schedule the report; however, it was the landlord who was required to offer the tenants at least 2 opportunities to schedule the inspection; the landlord had the tenant's contact information but did not arrange the inspection.

Consequences for tenant and landlord if report requirements not met

> ***36*** *(1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if*
>
> *(a) the landlord complied with section 35 (2) [2 opportunities for inspection], and*
>
> *(b) the tenant has not participated on either occasion.*
>
> *(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.*

Therefore, as the tenants had not abandoned the unit I find, pursuant to section 36(2) of the Act, that the landlord extinguished his right to claim against the deposits. The right to claim was extinguished when the landlord failed to schedule the move-out inspection.

I have applied section 38 of the Act which determines that when the right to claim against the deposit has been extinguished, the landlord must return the deposits within

fifteen days of the end of the tenancy or the date the written address was received; whichever is later.

There was no dispute that the forwarding address was given to the landlord prior to the end of the tenancy; November 30, 2013.

Section 38(1) of the Act provides:

> ***38*** *(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of*
>
> > *(a) the date the tenancy ends, and*
> > *(b) the date the landlord receives the tenant's forwarding address in writing,*
>
> *the landlord must do one of the following:*
>
> > *(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;*
> > *(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.*

Section 38(6) of the Act provides:

> *(6) If a landlord does not comply with subsection (1), the landlord*
>
> > *(a) may not make a claim against the security deposit or any pet damage deposit, and*
> > *(b)* ***must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.***
>
> (Emphasis added)

Therefore, as the landlord's right to claim against the deposits for damage to the rental unit was extinguished and, as the deposits were not returned to the tenants within fifteen days of November 30, 2013 I find that the landlord is holding deposits in the sum of $1,760.00. The landlord had a right to submit a claim for compensation but had extinguished the right to hold the deposits.

Residential Tenancy Branch policy suggests that when a landlord applies to retain the deposit, any balance should be ordered returned to the tenant; I find this to be a reasonable stance.

Therefore, I find that the security and pet deposits in the sum of $1,760.00 must be returned to the tenants. Based on these determinations I grant the tenants a monetary Order in the sum of $1,760.00**.** In the event that the landlord does not comply with this

Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

Conclusion

The landlord's claim is dismissed.

The tenants are entitled to return of could the security and pet deposits.

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 31, 2014

Residential Tenancy Branch