Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord named only the male tenant in his application for a monetary order for damage to the rental unit pursuant to section 67. Both of the individuals identified as tenants above applied for a return of the pet damage and security deposits (the deposits) for this tenancy pursuant to section 38. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The male tenant (the tenant) confirmed that on January 21, 2014, he received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on January 17, 2014. I am satisfied that the tenant was served with the landlord's dispute resolution hearing package and written evidence package.

The tenant gave sworn oral testimony and written evidence that he sent the landlord a copy of his dispute resolution hearing package and written, photographic and digital evidence by registered mail on January 15, 2014. He entered into written evidence a copy of the Canada Post Tracking Number, Customer Receipt and copy of the envelope returned by Canada Post as unclaimed. The tenant testified that he sent this package to the landlord's mailing address, the one also noted on the landlord's application for dispute resolution. The landlord testified that he received no notice from Canada Post as to the tenants' dispute resolution hearing and evidence package. He said that he was unaware of the tenants' application for dispute resolution. In accordance with sections 89(1) and 90 of the *Act*, I find that the landlord was deemed served with the tenants' dispute resolution hearing package on January 20, 2014, the fifth day after its registered mailing.

At the hearing, the tenant testified that he had not checked with the landlord before he included his digital evidence with the other evidence he sent to the landlord by registered mail on January 20, 2014. In accordance with the Residential Tenancy

Branch's (the RTB's) Rules of Procedure #11.8, I advised the parties that I could not consider the tenants' digital evidence as the tenant(s) had not checked with the landlord beforehand to determine whether the landlord could access this digital evidence. As stated at the hearing, I have considered the remainder of the tenants' written evidence as I consider it to have been deemed served to the landlord on January 20, 2014, in accordance with sections 88 and 90 of the *Act*.

At the commencement of the hearing, I confirmed the above address for the dispute address. In accordance with the powers delegated to me under the *Act* to make minor corrections to applications for dispute resolution, I corrected the dispute address on the landlord's application for dispute resolution to reflect the accurate dispute address as identified above.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for damage arising out of this tenancy? Are the tenants entitled to a monetary award for the return of the deposits for this tenancy?

Background and Evidence

The landlord gave undisputed sworn testimony that this tenancy began on January 1, 2012, on the basis of a one-year fixed term tenancy agreement. The landlord gave undisputed sworn testimony that the tenancy continued as a second one-year fixed tenancy on January 1, 2013, expiring on December 31, 2013. Monthly rent was set at $895.00, payable in advance on the first of each month. The landlord continues to hold the $447.50 security deposit and $200.00 pet damage deposit, both paid on or about January 1, 2012.

The parties agreed that the tenant and one of the landlord's representatives participated in a joint move-in condition inspection on January 1, 2012. The landlord testified that a report of that inspection was produced. However, the landlord did not enter a copy of that joint move-in condition inspection report into written evidence. The tenant gave undisputed sworn testimony that he never received a copy of the joint move-in condition inspection report.

The tenant gave undisputed sworn testimony that he vacated the rental unit on December 27, 2013. He said that the landlord's representative encouraged him to leave by that date, so as to enable another tenant to occupy the rental unit shortly after the tenant vacated the rental unit. The tenant gave undisputed sworn testimony supported by written evidence that the landlord's representative NH, the same individual who signed the joint move-out condition inspection report on December 27, 2013, told him that the landlord would refund the pro-rated rent for the final four days of this

tenancy. The tenant entered into written evidence his transcript of a voice mail message left for him by landlord representative NH to confirm the above arrangements.

The tenant entered into written evidence a copy of the signed joint move-out condition inspection report of December 27, 2013. This report showed the condition of everything in the rental unit as "Good" at the end of this tenancy. The landlord entered into written evidence a copy of the first page of the joint move-in condition inspection report of December 28, 2013, with the new tenant who took occupancy of the rental unit after the tenant vacated the rental unit the previous day. This report, apparently signed by the landlord's representative and the new tenant noted a number of problems with the rental unit, including a notation that there were "stains inside cabinet, water" in the bathroom.

The tenants' application for a monetary award of $647.50 was for the return of the deposits for this tenancy. The tenant gave written evidence that he included his forwarding address at the bottom of the signed joint move-out condition inspection of December 27, 2013. The tenant supplied written evidence in the form of a January 13, 2014 email from the landlord informing the tenant that he had applied for dispute resolution to seek authorization to retain the deposits. Although the tenants included a description of their request for an additional $117.70 for the pro-rated rent rebate for the final four days in December 2013, they did not include this amount in the amount of the monetary Order sought from the landlord, nor did they make any mention of their request for the recovery of losses, beyond those paid in their deposits.

The landlord's application for a monetary award of $2,000.00 included a request for an estimated $1,500.00 in labour and $500.00 in parts to repair water damage in the bathroom. The landlord testified that no work has been undertaken on these repairs, almost four months after this tenancy ended. The landlord entered into written evidence a $1,698.98 estimate from a company that serviced the rental unit in June 2013, when a flood caused by water flowing from a toilet in the rental unit above this one caused water damage to the rental unit. The landlord testified that the company that conducted the repairs in June 2013 also noticed water damage and mould that was unrelated to the water damage that came from the upper floor rental unit.

Analysis - Landlord's Application

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. The landlord claimed that damage arose from this tenancy for which the landlord is entitled to a monetary award from the tenant.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in and joint move-out condition inspections and inspection reports are very helpful. While the parties agreed that a joint move-in condition inspection occurred and the tenant confirmed that he signed that report, he gave undisputed sworn testimony that he never received a copy of that report. The landlord did not enter into written evidence a copy of this report. This deficiency on its own would likely be sufficient to call into question whether the alleged damage occurred during the course of this tenancy. However, the tenant and the landlord's representative participated in a joint move-out condition inspection on December 27, 2013, and the tenant entered into written evidence a copy of the signed joint move-out condition inspection report. This report revealed very little damage identified by either the tenant or the landlord's representative on December 27, 2013.

Rather than the joint move-out condition inspection report signed by the landlord's own representative on December 27, 2013, the landlord asked me to give weight to a June 2013 estimate given to him by a company that conducted repairs to the tenants' bathroom at that time and the December 28, 2013 joint move-in condition inspection report signed by the new tenant and the landlord's representative.

I should first note that I find little additional damage identified in the joint move-in condition inspection report signed by the new tenant that would give support to the landlord's application for a monetary award of $2,000.00. I find the best and the most reliable evidence as to the condition of the rental unit and the bathroom at the end of this tenancy was the joint move-out condition inspection report signed by both the tenant and the landlord's own representative on December 27, 2013. I give very little weight to the landlord's sworn testimony that the damage now claimed by the landlord after the tenancy ended was difficult to see at the time of the joint move-out condition inspection on December 27, 2013. While the landlord supplied some photographs showing mould and potential water damage, I give considerably more weight to the tenants' detailed photographs taken both during the course of the repairs undertaken in June 2013 and at the end of the tenancy on December 27, 2013, which reveal very little if any discernible current damage to the bathroom in this rental unit.

I find that the landlord has provided insufficient evidence to demonstrate that he has actually incurred any losses for which he should be compensated by the tenant. The landlord testified that he obtained a new tenant to occupy this rental unit as soon as the old tenancy expired. He said that he signed a new one year fixed term tenancy agreement with this new tenant who is paying the same $895.00 in monthly rent as was being paid by the tenancy in dispute in these applications. Almost four months after this tenancy ended and a new tenancy began, the landlord has not yet undertaken any repairs or incurred any actual losses. Rather, the landlord's claim reduces to his submission of estimates dating apparently from an inspection conducted in June 2013 during the course of other repairs for which the tenants were in no way responsible. In this regard, I also find that the tenant gave convincing first hand sworn testimony calling into question the accuracy of the information contained in the landlord's characterization of the estimate he obtained. I find little evidence that the landlord has lost any rent or has been required to undertake repairs in order to retain the same income stream from this rental unit.

Based on a balance of probabilities and after considering the sworn testimony of the parties, and their written and photographic evidence, I find that the landlord has fallen far short of demonstrating his entitlement to a monetary award for damage arising out of this tenancy. I dismiss the landlord's application for a monetary award for damage without leave to reapply.

Analysis – Tenants' Application

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposits or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposits. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposits, and the landlord must return the deposits plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the deposits (section 38(6) of the *Act*). With respect to the return of the deposits, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, the landlord had 15 days after August 26, 2013 to take one of the actions outlined above. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from the deposits if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant." As there is no evidence that the tenants have given the landlords written authorization at the end of this tenancy to retain any portion of the deposits, section 38(4)(a) of the *Act* does not apply to the deposits for this tenancy.

In this case, there is undisputed evidence that the tenant provided the forwarding address in writing to the landlord's representative on December 27, 2013, as part of the joint move-out condition inspection report. The landlord applied for dispute resolution to obtain authority to retain the deposits on January 13, 2014. In accordance with the legislation, I find that the landlord had until Saturday, January 11, 2014 to file for dispute resolution in order to remain in compliance with the provisions of section 38 of the Act as outlined above. As January 11, 2014 fell on a Saturday, the landlord had until Monday, January 13, 2014, the next business day to apply for dispute resolution to seek authorization to retain the deposits for this tenancy. As the landlord filed his application for dispute resolution on January 13, 2014, I find that the tenants are not entitled to a doubling of the value of their deposits pursuant to section 38(6) of the *Act*.

Under these circumstances, I find that the tenants are therefore entitled to a monetary order amounting to the $647.50 value of their deposits with interest calculated on the original amount only. No interest is payable over this period.

Although the tenants' application does not expressly identify their desire to obtain an additional $117.70 beyond the value of their deposits, I have considered their application for rebated rent for the final four days of December 2013. I do so as they have outlined this portion of their request in the Details of the Dispute as noted above.

While neither party entered into written evidence a copy of the fixed term tenancy agreement, I accept the landlord's undisputed sworn testimony that the second of the fixed term agreements entered into by the parties did not expire until December 31, 2013. When there exists a fixed term tenancy, I find that a tenant would need to demonstrate that the tenant had a written agreement from the landlord or one of the landlord's authorized agents to set aside the terms of the fixed term tenancy agreement and allow the tenants some form of rebate in rent. In this case, the alleged agreement with the landlord's representative was done by way of a voice mail message. The tenants did not provide any evidence that a new written agreement was entered into with the landlord or his representatives that would allow the tenants a rebate in rent that was not in accordance with the final fixed term tenancy agreement. As such, I find that the tenants have not demonstrated that there was a new contract in place that allowed them a rebate in rent for the final four days of December 2013, a contract that would take the place of the signed fixed term tenancy agreement that covered the final year of this tenancy. For these reasons, I dismiss the tenants' application for a monetary award of $117.70 for the recovery of their rent for the final four days of December 2013, without leave to reapply.

Conclusion

I order the landlord to return the tenants' $647.50 in deposits (comprised of $447.50 for the security deposit and $200.00 for the pet damage deposit) forthwith. In the event that this does not occur, the tenants are provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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.

The remainder of the tenant's application for a monetary award for the recovery of rent for the last four days of this tenancy is dismissed without leave to reapply.

The landlord's application is dismissed 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: April 29, 2014

Residential Tenancy Branch