Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, MNR, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties.

The Tenant filed for a monetary order for return of double the security deposit under section 38 of the Act.

The Landlord filed their Application requesting a monetary order for unpaid rent, for money owed or compensation under the Act or tenancy agreement, for an order to keep the security deposit in partial satisfaction of the claim, and to recover the filing fee for the Application.

Both parties appeared at the hearing and the Tenant was assisted by an Advocate. The hearing process was explained and the participants were asked if they had any questions. Both parties and the Witness provided affirmed testimony and the parties were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party and the Witness, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Issues

The parties had been to one prior Dispute Resolution hearing, before a different Arbitrator, and a decision and monetary order were made on December 3, 2013. For ease of reference the file number is recorded on the front page of my decision.

Throughout the hearing before me the Landlord claimed that he should not have to pay the Tenant anything for the previous decision made against him, or anything in the present Applications for that matter, as the Tenant did not have any content insurance. He argued this was required by the tenancy agreement. His position was the lack of content insurance by the Tenant was a bar to her making any claims.

I explained that in the previous decision the rent for one month was returned to the Tenant for loss of use of the rental unit as the Landlord collected rent for that month but failed to provide a rental unit the Tenant could use for that month, and this had nothing to do with whether or not she had insurance. I note in my experience most content insurance policies would cover alternate accommodation, such as hotels or motels; however, these policies do not cover rent that has been paid for a rental unit that is not available for habitation. I also note that in the previous decision the claims that the Tenant made regarding damages to her personal property were dismissed as these might have been covered under the content insurance the Tenant was required to have under the tenancy agreement.

I explained to the Landlord that the previous decision has dealt with the Tenant's entitlement to the return of rent for one month and the insurance issues and therefore, the issue of Tenant insurance was *res judicata*, in other words, already decided upon in law. Therefore, I have no authority to vary or alter that previous decision.

I also note that during the course of the hearing the topic of the property left behind in the rental unit by the Tenant was raised. I explained to the parties that this was not a claim that was before me in their Applications and it still remained open for them to resolve or make further Application, as I did not hear the merits of this topic.

Issue(s) to be Decided

Is the Tenant entitled to return of double the security deposit?

Is the Landlord entitled to the relief sought?

Background and Evidence

This tenancy began on January 15, 2012, with the parties entering into a written, fixed term tenancy agreement for one year, following which it continued on as a month to month tenancy. The Tenant paid a security deposit of $325.00 on January 5, 2012, and the monthly rent was $650.00, payable on the first day of each month.

The parties agreed there was a flood into the rental unit on August 31, 2013. The Tenant claims the flood contained sewage and the Landlord claims the flood was not sewage, but classified as grey water.

The Tenant had already paid September rent in advance at the time of the flood and this rent was the subject of the previous decision, as described above.

The Tenant left the rental unit at the time of the flood and it does not appear she returned to live in the rental unit. On or about the last day of September the Landlord and the Tenant met to discuss issues regarding the tenancy. The Tenant testified that she and the Landlord had an argument as she no longer felt comfortable moving back into the rental unit due to its condition and the behaviour of the Landlord.

On October 1, 2013, the Tenant gave the Landlord a written notice she was ending the tenancy in 30 days time. In this note she explains it was difficult and awkward to be in the rental unit due to the conflict and miscommunication between her and the Landlord.

On October 2, 2013, the Landlord issued the Tenant a 10 day Notice to End Tenancy for unpaid rent and some utilities.

The Tenant testified she vacated the rental unit by the middle of October 2013, due to the 10 day Notice.

Tenant's Claims

The Tenant claims for the return of double her security deposit, totaling $650.00.

After the Tenant vacated the rental unit, the Tenant spoke with her Advocate. The Tenant and Advocate provided the Landlord with the forwarding address to return the deposit to in a letter sent to the Landlord on or about November 13, 2013. On January 31, 2014, the Landlord wrote to the Tenant at the address of the Advocate, and informed the Tenant he would not be returning the security deposit as the Landlord felt he was owed for damages to the rental unit and for unpaid rent.

The Tenant testified she did not sign over a portion of the security deposit to the Landlord.

The Tenant initially testified that the Landlord did not perform an incoming or outgoing condition inspection report. Later in the hearing, the Tenant agreed that she had

attended an incoming condition inspection report, but that she was not informed of the outgoing condition inspection report.

In reply, the Landlord agreed that he had received the forwarding address of the Tenant in November of 2013.

The Landlord testified the Tenant refused to be available for the outgoing condition inspection report. The Landlord testified he did not give the Tenant a written Notice of Final Opportunity to do the outgoing condition inspection report.

The Landlord further argued that the Tenant did not have insurance as required under the tenancy agreement, so she should not get the security deposit back.

The Advocate for the Tenant replied that the lack of insurance by the Tenant had no bearing on the return of the security deposit.

Landlord's Claims

The Landlord is claiming for loss of rent for October and November of 2013, in the amount of $1,300.00. The Landlord argues that the Tenant did not give him the required one month Notice to End Tenancy and did not pay October rent. He argues that the Tenant should also have to pay the rent for November due to the improper notice.

In evidence the Landlord supplied the Tenant's hand written 30 day notice she was leaving the rental unit dated October 1, 2013. The Landlord also submitted in evidence a copy of the 10 day Notice to End Tenancy he issued to the Tenant, showing an effective date to end the tenancy of October 15, 2013. The Landlord submitted he served the Tenant with the 10 day Notice to End Tenancy, by posting it to the door. The Landlord testified he was not paid the October rent.

The Landlord claims $154.25 for utilities outstanding from July to October 2013. The Landlord submitted in evidence a copy of the tenancy agreement which shows the Tenant was required to pay utilities. The Landlord argued that the Tenant was supposed to put the utilities in her name, but she did not do so. The Landlord testified that the Tenant asked him to keep the utilities in his name, as she could not afford the deposit required to put these in her name.

In evidence the Landlord has submitted two utility bills, one from July 10 to September 9, 2013, in the amount of $74.34, and a second from September 10 to November 7,

2013, in the amount of $78.25, although there was an adjustment made for credit and late payment charges, and the final bill was $77.71

The Landlord claims $801.48 for the replacement of the stove in the rental unit. The Landlord explained that the stove has not been replaced yet.

The Landlord alleges that the inside of the oven was destroyed by the Tenant. He testified that whatever was left in the bottom of the oven by the Tenant will not come off, and he alleges that the stove must now be replaced as it is a fire hazard. The Landlord testified he did not know what the substance on the bottom of the stove was. The Landlord testified the stove was already in the rental unit when he purchased the condo approximately five or six years ago. In evidence the Landlord submitted three photographs of the interior of the oven, and testified these were from before the tenancy began, after the Tenant had vacated and after the Landlord tried to clean the oven. He testified it was difficult to find a replacement stove, as this was an odd sized, smaller stove with a 24 inch cook top.

The Landlord claims $100.00 comprised of four hours of his own labour, for cleaning at the rental unit after the Tenant vacated. The Landlord testified he had to clean the stove and oven, and had to clean the windows and window blinds, wipe out the cupboards, and repair scrapes to the wall allegedly caused by the Tenant's kitchen table.

The Landlord testified that the rental unit is not currently occupied and is being advertised for rent or for sale. He testified that no one has occupied the rental unit since October of 2013.

In reply, the Tenant's Advocate first had the Witness testify, as the Witness needed to complete her testimony and leave.

The Witness testified that she attended the rental unit to help the Tenant move out and to clean the rental unit. The Witness testified she wiped down cupboards, emptied drawers and washed the walls and parts of the bathroom.

The Witness testified that she used Easy Off to clean the stove top and that she and the Tenant sprayed the stove with Easy Off and left it over night, as the Tenant planned to finish cleaning the oven the next day.

The Witness testified it was difficult to work the next day because there were plastic sheets over the doors and in the rental unit. The Advocate for the Tenant asked the

Witness to look at the stove photos provided by the Landlord in evidence and the Witness testified she did not recall the stove looking as bad as it does in the picture. The Witness testified that the Tenant tried to enter the rental unit the next day, but it was difficult due to the plastic being over everything.

The Witness examined photos provided by the Landlord of the scrapes on the walls and the Witness was unable to identify what these were. The Witness testified that she and the Tenant cleaned the rental unit as best they could, although the rental unit was being renovated and the floors were just exposed concrete. The Witness testified that it was tough to clean the exposed concrete floors.

The Witness testified she was unable to comment on the windows or window blinds, as she did not help clean those. The Witness testified that she visited the Tenant often and found the rental unit was always kept clean by the Tenant. The Witness testified she was surprised by how dirty the oven appeared in the Landlord's photos, as in her experience the Tenant seldom cooked and rarely used the oven.

The Witness testified she did not think the rental unit was habitable at all. Remediation work was still going on in the rental unit when they were trying to clean the unit and move out the Tenant's property.

The Landlord did not have questions for the Witness in cross examination.

The Tenant testified in reply to the Landlord's claims, and agreed she did not pay rent for October 2013, because the rental unit remained uninhabitable. The Tenant testified she did not live in the rental unit at all following the flood and that work was ongoing in the rental unit to restore even during the time she was moving out.

The Tenant testified she tried to discuss this with the Landlord but he became tense and intimidated her. She testified when she told him she was leaving the rental unit, the Landlord yelled at her that she did not give him proper notice to end the tenancy. She testified she gave the Landlord a written notice the next day.

The Tenant acknowledged she received the 10 day Notice to End Tenancy and testified she did her best to vacate the rental unit by October 15, 2013. The Tenant refutes the Landlord's claim for October rent, as she says she did not have use of the rental unit.

The Tenant testified there were heavy duty dryers and blowers in the rental unit and this caused the electricity bill for when she was not in the rental unit. She argues that nothing in the Landlord's evidence suggests the rental unit was habitable for October.

She had concerns about certain portions of the unit being taped off and not being able to use those portions.

The Tenant testified that she hardly cooked and that the stove was pretty old when she moved in. She testified she sprayed the oven with Easy Off and did wipe it out after she sprayed it.

The Tenant testified that when the flood occurred sewage came in through the walls and combined with the time it took for the repairs to be made and the disagreements she was having with the Landlord, she was uncomfortable in the rental unit. She alleged the Landlord acting in a bullying manner towards her when they met at a local coffee shop to discuss the tenancy. She testified she felt embarrassed due to the way he treated her in the coffee shop.

The Tenant alleged that the rental unit is still not rented out because it remains uninhabitable.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities.

Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on each of the Applicants to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the respective Respondent. Once that has been established, the Applicant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Applicant did everything possible to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find as follows.

Tenant's Claims

I allow the claim of the Tenant for return of double the security deposit.

There was no evidence to show that the Tenant had agreed, in writing, that the Landlord could retain any portion of the security deposit.

There was also no evidence to show that the Landlord had applied for arbitration, within 15 days of the end of the tenancy or receipt of the forwarding address of the Tenant, to retain a portion of the security deposit, as required under section 38. In fact, the Landlord acknowledged receipt of the forwarding address and replied in writing that he was not returning the deposit. This is clearly a breach of section 38 of the Act.

Furthermore, by failing to provide the Tenant with the final opportunity to attend the outgoing condition inspection reports in accordance with the Act, the Landlord extinguished the right to claim against the security deposit for damages, pursuant to section 36(2) of the Act.

Therefore, I find the Landlord has breached section 38 of the Act. The Landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to Residential Tenancies.

The security deposit is held in trust for the Tenant by the Landlord. At no time does the Landlord have the ability to simply keep the security deposit because they feel they are entitled to it or are justified to keep it. If the Landlord and the Tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the Landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later. It is not enough that the Landlord feel they are entitled to keep the deposit, based on unproven claims.

The Landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the Tenant. Here the Landlord did not have any authority under the Act to keep any portion

of the security deposit. Therefore, I find that the Landlord is not entitled to retain any portion of the security deposit.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenant the sum of **$650.00**, comprised of double the security deposit (2 x $325.00), ***subject to any setoff in the Landlord's claims below***.

Landlord's Claims

I allow the Landlord's claim for October rent, in the amount of **$650.00**.

The Tenant was required to give the Landlord a one month Notice to End Tenancy under section 45 of the Act. Under the Act the month period is calculated by when the payment of rent is due. In this instance the October rent was due on October 1st.

Therefore, if the Tenant wanted the tenancy to end on October 31st, the latest she could have given the Notice to End tenancy to the Landlord was on September 30, 2013, the day before rent was due under the tenancy agreement, and it was required to be in writing under the Act. The Tenant gave the Landlord a 30 day notice on October 1st and therefore did not give the Landlord the required notice for October and in fact, this notice was not valid to end the tenancy under the Act.

However, the Landlord issued the Tenant a 10 day Notice to End Tenancy on October 2, 2013, and the Tenant did not pay the rent or file an Application to dispute the 10 day Notice. Therefore, the tenancy ended on the effective date of the 10 day Notice, October 15, 2013, pursuant to section 46 of the Act. This leads me to find the Tenant owes the Landlord rent for October of 2013. I also find that as the tenancy ended by operation of the Act in October the Landlord is unable to claim for November rent.

I allow the Landlord claims for utilities outstanding from July 10 to August 31, 2013, and have calculated this to amount to be **$63.54**. (The bill was $74.34 for 62 days, and the Tenant used the utilities for 53 of these days.) I do not allow the Landlord's utility claims for September onward.

I find that in September and October the Tenant was not residing in the rental unit and in fact, based on the evidence in the utility bills, there was an increase in the bills despite the Tenant not living there. This would likely be attributable to the blowers, dehumidifiers and other electrical devices and tools used for the remediation work being performed in the rental unit. I do not find the Tenant should be liable for these utilities,

as she was not residing in the rental unit and it was not her responsibility to pay for the Landlord's costs of remediation.

I dismiss the Landlord's claims for replacement of the stove. I find the Landlord had insufficient evidence that the stove was destroyed, or a "fire hazard", or that the deposits on the bottom of the oven could not be removed and had destroyed the oven. The Tenant testified she had sprayed the oven with Easy Off and left it over night. If the Tenant was unable to enter the rental unit the next day, as was testified to, she may not have finished the wiping off of the Easy Off from the interior of the oven. From the photos it appeared that this might have been burnt on deposits from using the self cleaning function of the oven, prior to completely cleaning the Easy Off sprayed in the oven by the Tenant, although due to the lack of evidence by the Landlord, it is not possible to make a finding on what caused these deposits. They simply look like burnt on food or oven clean residue. In any event, the Landlord failed to prove these deposits could not be removed. For these reasons, I find the Landlord has failed to prove the Tenant should be responsible to replace the oven, and dismiss this claim.

Nevertheless, I do find the Landlord's evidence has established that the Tenant failed to completely clean the oven before she vacated. I also find the Landlord's evidence supports that other cleaning had to be performed in the rental unit, such as around the fridge, countertops and windows. The Tenant left behind some cleaning materials and what appear to be small amounts of debris, which the Landlord would have had to clean and remove. There are also some scrapes to the walls that the Landlord would have had to clean or touch up with paint, which appeared to be just beyond reasonable wear and tear. Therefore, I allow the Landlord **$100.00** for cleaning and repairs to the rental unit.

Based on the above, I find the Landlord has established a total monetary claim of **$863.54**, comprised of $650.00 for one month of rent, $63.54 for utilities, $100.00 for cleaning and repairs, and $50.00 for the filing fee for the Application, ***subject to the set off from the Tenant's award above.***

Having found the Landlord is entitled to $863.54 and the Tenant is entitled to $650.00, I set off these amounts against each other ($863.54 - $650.00 = $213.54) and award the Landlord the balance due of **$213.54**. The Landlord is granted a monetary order in this amount and must serve the Tenant with a copy of this order. The order may be enforced in the Provincial Court.

Conclusion

The Landlord breached the Act and tenancy agreement by failing to deal with the security deposit as required under the Act and tenancy agreement.

The Tenant breached the Act and tenancy agreement by failing to give the required notice to end tenancy, by not paying for the portion of utilities she used and she did not completely clean and repair the rental unit, before vacating it.

Both parties were given monetary awards, and following an off set, the Tenant must pay the Landlord the sum of **$213.54.** The Landlord is granted a monetary order in those terms, and must serve the Tenant with the order. The order is enforceable in the Provincial Court.

I note, without making any binding order, that the Tenant has an outstanding judgement against the Landlord from a previous hearing, and the parties are at liberty to set that award off against the one awarded in this decision in favour of the Landlord, in order to avoid enforcement costs through the Provincial Court.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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 25, 2014

Residential Tenancy Branch