Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPB; MND, MNDC, MNR, MNSD, FF
Tenants: MNDC, MNSD, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking a monetary order. The landlord also sought an order of possession.

The hearing was conducted via teleconference and was attended by the landlord; his witness; and both tenants.

The landlord testified each tenant was served with the notice of hearing documents and this Application for Dispute Resolution, pursuant to Section 59(3) of the *Residential Tenancy Act (Act)* by registered mail on March 27, 2014 in accordance with Section 89. As per Section 90, the documents are deemed received by each tenant on the 5th day after it was mailed.

The landlord also testified that each tenant was served with his evidence on June 11, 2014 by registered mail and that it was returned to him as unclaimed. During the hearing, with approval of the tenants, I confirmed with the Canada Post website that for both tracking numbers provided by the landlord Canada Post delivered two notices for each of the tenants that they had registered mail.

While the tenants submit that they did not receive any notification from Canada Post, I find it unlikely that Canada Post would indicate that they provided 4 notices to the tenants (two for each one of the tenants) and then fail to provide these notices. I find the tenants' failure to retrieve at least one of the packages of evidence resulted from inaction on the part of the tenants and the landlord should not be prejudiced.

Based on the above, I find that each tenant has been sufficiently served with the documents pursuant to the *Act*.

The tenants testified the landlord was served with the notice of hearing documents and this Application for Dispute Resolution and evidence, pursuant to Section 59(3) of the *Act* by registered mail on March 26, 2014 in accordance with Section 89. As per Section 90, the documents are deemed received by the landlord on the 5th day after it was mailed. The landlord confirms that he did receive the tenant's evidence.

Based on the testimony of both parties, I find that the landlord has been sufficiently served with the documents pursuant to the *Act*.

The tenants submit that they had provided several photographs in their evidence. The landlord did not dispute receiving photographs. However, no photographs were found in the Residential Tenancy Branch file. The tenants offered, at the end of the hearing, to re-submit the photos to me. I advised that if I found it necessary to review their photographic evidence that I would have an Information Officer contact the tenants for them to do so. I find there is no need to consider the tenants' photographs and I did not request they be provided.

The parties confirmed, at the outset of the hearing that the tenants vacated the rental unit on March 1, 2014 and as such the landlord has possession of the rental unit and does not require an order of possession. I amend the landlord's Application to exclude the matter of possession.

At the outset of the hearing I clarified with the landlord that his claim in total was $3,930.00 which included $2,440.00 for a lease breaking penalty and $1,490.00 for damage and cleaning of the rental unit.

The landlord testified that he had submitted additional evidence that showed that his actual claim for damage and cleaning of the rental unit was increased $2,035.00. However I note that the landlord did not submit an amended Application increasing the amount claim.

Residential Tenancy Branch Rule of Procedure 2.5 states the applicant may amend the application without consent if the dispute resolution proceeding has not yet commenced. If applications have not been served on any respondents, the applicant must submit an amended copy to the Residential Tenancy Branch and serve the amended application.

If the application has been served, and all requirements can be met to serve each respondent with an amended copy at least seven (7) days before the dispute resolution proceeding, the applicant may be permitted to file a revised application with the Residential Tenancy Branch. A copy of the revised application must be served on each respondent at least five (5) days before the scheduled date for dispute resolution proceeding.

As the landlord did not amend a copy of his Application in accordance with Rule 2.5 I do not accept his request to amend his Application and find the landlord can only claim in this Application a total amount of up to $3,930.00 ($2,440.00 lease breaking penalty and $1,490.00 for damage and cleaning).

I instructed the landlord that I would consider any portion of his claim for damage and cleaning that totalled up to his original claim amount of $1,490.00. While he did not specifically identify which items he wanted considered when he presented his evidence

and testimony I stopped him from presenting any items after he had reached a total of $1,540.00. He continued to present items over and above this amount until I advised him again that I would not be considering any of these additional items.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for damage and cleaning; for a lease breaking penalty; for all or part of the security deposit and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 38, 45, 67, and 72 of the *Act.*

It must also be decided if the tenants are entitled to a monetary order for double the amount of the security deposit and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 67, and 72 of the *Act.*

Background and Evidence

The parties agree that the female tenant moved into the rental unit in September 2012 under a 1 year fixed term tenancy agreement with a different roommate. The parties agree that when the roommate moved out and the remaining tenant's boyfriend moved in they entered into a new and separate tenancy agreement.

The parties have both submitted into evidence a copy of a tenancy agreement signed by the subject parties on August 26, 2013 for a new 1 year fixed term tenancy beginning on September 1, 2013 for a monthly rent of $1,220.00 due on the 1st of each month with a security deposit of $1,190.00 paid. The parties agree the tenants vacated the rental unit effective March 1, 2014.

The tenancy agreement contains an addendum with "several" items. In particular and relevant to part of the landlord's claim is the last clause that states:

> "If the tenant(s) terminates the effective Residential Tenancy Agreement prior to the agreed upon end date the tenant(s) will pay the lesser of the remaining lease period or the amount equivalent to 2 month rent fee starting from the date of formal vacation of premises."

The tenants acknowledge vacating the rental unit early but state that they had to move as a requirement for the male tenant's employment. The landlord seeks what he refers to in his evidence as the "early termination penalty" in the amount of $2,440.00 or the equivalent of two month's rent.

The landlord submits that he had new tenants move in to the rental unit effective April 1, 2014 or one month after these tenants vacated the rental unit. The landlord did not seek any lost revenue for the month of March 2014.

The parties agree that a move in condition inspection was not completed at the start of the first tenancy agreement. They also agree that at the end of the first tenancy agreement the remaining female tenant conducted the move out condition inspection on behalf of the landlord and completed the Condition Inspection Report. The parties further acknowledge that they had agreed they would use this Report as the move in Report for the second tenancy.

However, during the hearing the female tenant testified that she had never done a condition inspection before and was not really aware of what to look for, how to do it, or how to complete the Report.

The parties acknowledge that the landlord had his witness attend as his agent to complete the move out condition inspection and that the male tenant attended the inspection on March 1, 2014.

The landlord submitted into evidence a copy of the document the parties are using as the Condition Inspection Report for this tenancy. This report indicates that the possession date was September 1, 2012; that the move in inspection date was September 1, 2012; and that the move-out inspection date was August 31, 2013.

The report also includes all comments about the condition for move in and for move out in the same column entitled “Condition at End of Tenancy”. The parties clarified that the typewritten comments were completed by the female tenant at the start of this tenancy and the handwritten comments are from the move out inspection. I note that many of the handwritten comments are too small to read. I also note that the report is not signed by any representative for the landlord for either the move in or the move out condition inspection.

The landlord submitted that he has not as of yet completed any of the required work to correct these deficiencies and that all of his submissions as to the value are based on estimates. The landlord seeks the following amounts:

Description	Amount
Carpet steam cleaning and flattening	$342.00
Oven cleaning	$56.00
Drywall patching and painting	$202.00
Kitchen and Bathroom flooring replacement	$560.00
3 broken cabinet sliders in kitchen	$62.00
Kitchen cabinet door replacement	$112.00
Kitchen shelves repainting	$56.00
Oven loose handle fixing	$11.00
Replacement of 2 stove knobs	$22.00
Kitchen light cover replacement	$22.00
Living room – window covering	$39.00
Dining Room walls	$56.00
Total	$1,540.00

The parties agree the tenants provided the landlord with their forwarding address on January 26, 2014 and that they vacated the rental unit on March 1, 2014. The landlord originally submitted his Application for Dispute Resolution on March 12, 2014.

I note that while processing the landlord's Application the Residential Tenancy Branch send the landlord back his Application for some corrections on March 18, 2014 and the Application was not completely processed until March 22, 2014.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 45(2) of the *Act* stipulates that a tenant may end a fixed term tenancy by giving the landlord a notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy and is the day before the day in the month that rent is payable under the tenancy agreement.

Section 45(3) states that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

While there is no evidence before me that the tenants had identified that the landlord had failed to comply with a material term of the tenancy and that they would end the tenancy over it I find that the earliest the tenants could have ended the tenancy according to the tenancy agreement was August 31, 2014. I find the tenants did breach the terms of the tenancy agreement related to the fixed term duration.

Residential Tenancy Policy Guideline #4 allows for parties to agree to a liquidated damages clause in their tenancy agreement. This clause is where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The guideline stipulates that the amount agreed upon must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable.

From the landlord's own submission he refers to the amount he is seeking as a penalty for breaking the lease. In addition, I find the amount is based solely on the amount of

rent and there is no evidence before me that it represents any estimate whatsoever of any actual loss.

For these reasons, I find the term of the addendum of the tenancy agreement requiring the tenants to pay such a penalty is not enforceable. I dismiss this portion of the landlord's Application.

Section 23 of the *Act* requires a landlord and tenant to inspect the rental unit on the day the tenant is entitled to possession of the unit. The Section goes to state that it is the landlord's obligation to set the time of the inspection and complete a Condition Inspection Report and provide a copy of that Report to the tenants.

In the case before me, I find that the landlord or his agent did not attend the condition inspection that was completed when the first tenancy ended. As the landlord is using this as the move in inspection I find that he or his agent was required to attend the inspection – the tenant could not represent her interests and the interests of the landlord at the same time.

In addition because the document submitted into evidence is not signed for either the move in or out inspection reports by the landlord I find that the landlord has failed to comply with the requirements of Section 18(1) of the Residential Tenancy Regulation that states the landlord must give the tenant a copy of the signed condition inspection report.

Despite the parties agreement regarding the move out inspection from the previous tenancy and the use of the report from that inspection as the move in condition inspection for this tenancy I find that the landlord has failed to comply with the requirements of Section 23 of the *Act*.

As such, I find the landlord has no acceptable record of the condition of the rental unit at the start of the tenancy.

Section 37 of the *Act* requires a tenant who is vacating a rental unit to leave the unit reasonably clean, and undamaged except for reasonable wear and tear, and give the landlord all keys or other means of access that are in the possession and control of the tenant and that allow access to and within the residential property.

As the landlord has failed to establish the condition of the rental unit at the start of the tenancy and because the landlord has not completed any of the work that he states was required despite the tenancy ending 4 ½ months ago and a new tenant moving in I find the landlord has failed to establish the he has suffered any loss that results from a violation of the *Act*, regulation or tenancy agreement. I therefore dismiss this portion of the landlord's Application.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit

or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

From the testimony provided by both parties I find the landlord had the tenants' forwarding address prior to the end of the tenancy and the tenancy ended on March 1, 2014. As such, I find the landlord had until March 16, 2014 to either return the deposit in full or file an Application for Dispute Resolution to claim against the deposit.

I find the landlord did submit his Application for Dispute Resolution on March 12, 2014 and although it was returned to the landlord for corrections prior to having the hearing set up I note that it was the Residential Tenancy Branch who did not return it to the landlord until March 18, 2014.

As such, the landlord was prevented from completing the corrections prior to March 16, 2014 by the actions of the Branch. I find that this action should not prejudice the landlord and I find the landlord had submitted his Application for Dispute Resolution claiming against the deposit in compliance with Section 38(1). Therefore, I dismiss the portion of the tenant's Application seeking double the amount of the deposit.

However, as the landlord has failed to establish any of his claim I find the tenants are entitled to return of their original deposit.

Conclusion

I find the tenants are entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **$1,240.00** comprised of $1,190.00 security deposit and the $50.00 fee paid by the tenants for this application.

This order must be served on the landlord. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be enforced as an order 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: July 16, 2014

Residential Tenancy Branch