Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNR, MND, FF

Introduction

This Dispute Resolution hearing is set to deal with an Application by the landlord to retain the tenant's security deposit for unpaid rent, cleaning, repairs, cost of refilling the oil tank, and loss of revenue from another suite in the same building.

The hearing is also to deal with the tenant's application to dispute a One-Month Notice to End Tenancy for Cause.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Preliminary Issues

Amend Tenant's Application

> At the outset of the hearing, the tenant stated that it was not her intention to dispute the One Month Notice to End Tenancy for Cause, but to object to monetary charges by the landlord's against the tenant for refilling the oil tank that served to heat the tenant's unit and the other suite in the same building. The tenant was also objecting to paying the hydro bill for the entire building and being required to collect $100.00 towards utilities from the other resident living in the second suite in the building. The tenant testified that the hydro was in her name and she ended up with a large bill at the end of the tenancy that represented payment for another suite in addition to the landlord's demand that she supply all of the heating oil for both units..

In the "*Details of Dispute*" section of the application, the tenant states,

> *"WHEN LEASE WAS SIGNED LANDLORD DID NOT MENTION LOWER TENANT SUIT WAS MY RESPONSIBILITY (ILLEGAL SUITE). THE LANDLORD DID MENTION THE TENANT LIVING THERE FOR 10 YEAR WOULD PAY ME $100.00 A MONTH FOR HYDRO. IT DID NOT COVER WHAT THE TENANT USED…." (*Reproduced as written*)*

I find that the tenant's application provided adequate notice to the landlord that the tenant is disputing the landlord's monetary claims on the basis that the tenant was paying utility costs for another unit in the building and being required to collect funds from another renter.

Given the above, I permit the tenant to amend the application to seek an order forcing the landlord to comply with the Act and agreement and to seek credit for additional costs imposed on the tenant by the landlord that should have been allocated to the resident occupying the other suite.

Service of Landlord's Application

The landlord testified that they had served their application and hearing package by mail sent to the tenant's place of employment.

Section 89(1) of the Act provides that an application for dispute resolution must be given in one of the following ways:

> (a) by **leaving a copy with the person**;
>
> (b) if the person is a landlord, **by leaving a copy with an agent of the landlord**;
>
> (c) by sending a copy by **registered mail to the address at which the person resides** or, if the person is a landlord, to the address at which the person carries on business as a landlord**;**
>
> (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
>
> (e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*. (my emphasis)

In the case before me, I find that the tenant was served at their place of employment. I find that this method of service is not compliant with the Act and the tenant took exception to being served at her place of employment. However,

I accept that the documents were served to this tenant, despite the noncompliant method of service because the tenant appeared at the hearing..

Tenant's Evidence

During the hearing, the tenant made reference to an evidence package submitted to Residential Tenancy Branch. However, the parties confirmed that this evidence was not served on the landlord. Therefore, I find that the evidence cannot be considered.

However, the tenant was granted an opportunity to give verbal testimony with respect to their evidence and the landlord was granted an equal opportunity to respond verbally to the tenant's testimony.

Issue(s) to be Decided

Is the landlord entitled to monetary compensation under section 67 of the *Act* for damages or loss?

Is the tenant entitled to financial relief for overpaid utilities used by another renter?

Background and Evidence

The landlord testified that the fixed term tenancy began on July 1, 2013 and ended on August 18, 2014. A security deposit of $500.00 was paid and the current rent was $1,000.00.

The landlord submitted into evidence a copy of the tenancy agreement, copies of communications, a copy of a 10-Day Notice to End Tenancy for Unpaid Rent, a copy of a One Month Notice to End Tenancy for Cause, copies of invoices and a bank statement. No copies of the move-in and move-out condition inspection reports were in evidence. The landlord testified that the tenant refused to sign the Move-out condition inspection report.

The landlord is claiming:

$250.00 for unpaid rent,

$94.50 for carpet cleaning,

$1,581.76 to fill the oil tank,

$1,650.00 loss of rent for the lower suite, and

$172.19 for repair of the sprinkler system.

The landlord testified that the tenant has short-paid her rent for the month of August by $250.00 and a 10-Day Notice to End Tenancy for Unpaid Rent was issued.

The tenant testified that she had discovered that, during the tenancy, she had wrongfully been paying hundreds of dollars extra in utility bills for services utilized in part by another unit. The tenant testified that she also paid for the cable and internet, shared by the other unit and received $100.00 per month from the resident occupying the other suite in the building.

However, the tenant stated that she did not consent to responsible for paying utilities for anyone other than her own suite nor to supply all of the hydro and oil for the building. The tenant testified that she would never have entered into a tenancy with these terms because she lives on a modest income.

The tenant testified that when she received the 10-Day Notice to End Tenancy for Unpaid Rent, she complied by moving out. However, according to the tenant, she still carried substantial debt for the extra hydro costs from this tenancy arrangement.

The landlord argued that the tenant had been reimbursed for the utilities by the other renter in the amount of $100.00 per month and had agreed to this term in the tenancy agreement. In regard to the rent owed, the landlord's position is that the tenant owes arrears of $250.00 and this must be paid.

The landlord testified that, despite a term in the tenancy agreement requiring that the tenant is responsible for filling the oil tank at the end of the tenancy, the tenant refused and left the tank empty. The landlord testified that the tank was completely full at the start of the tenancy. The landlord testified that they had to spend $1,581.76 to refill it. The landlord is seeking reimbursement.

The landlord also testified that, during the tenancy, the tenant had let the oil run out and this impacted the heating system affecting the other rental unit. The landlord testified that, because the tenant did not pay for the oil heating, the other renter in the building gave notice and vacated his suite and the landlord lost 3 month's rent as a result. The landlord submitted a copy of an email from the other renter who occupied the second suite in the building stating:

> "*I wanted to confirm why I moved out. I had an agreement with (the tenant) that I would pay 100 dollars a month for heat and power….I was also paying an additional 50 dollars a month for cable and internet….she had let the oil tank run out and in the middle of winter an I could literally see my own breath INSIDE the house*" (Reproduced as written)

The landlord is seeking $1,650.00 from the respondent tenant, representing $550.00 per month for 3 months, that the other resident would have paid in rent had he not vacated the second suite.

The tenancy agreement in evidence indicates that the tenant is responsible for paying electricity and heat for her suite, but does not mention that the heat and hydro service both units. Under additional terms there is a comment that states:

> "*oil tank is to be filled on departure*"

The tenant acknowledged that she did not fill the oil tank. The tenant testified that although she did sign the agreement, at no time was she informed that it would be her responsibility to furnish fuel to the suite housing the other renter.

The landlord testified that, after the tenant vacated, the carpets needed to be cleaned and the landlord is seeking compensation of $94.50. The landlord's submitted a copy of the invoice for the carpet cleaning. The tenancy agreement in evidence shows a notation under "*ADDITIONAL TERMS*" stating: "*Carpets to be cleaned*". The agreement does not specify whether this is a term applicable to the landlord or the tenant, nor whether the cleaning will be done at the start or end of the agreement.

The tenant stated that she had cleaned the carpets at the end of the tenancy. The tenant testified that she had refused to sign the move-out condition inspection report because she did not agree to the contents. No copy of the report is in evidence.

The landlord testified that the tenant had damaged a sprinkler head which cost the landlord $172.19 to repair. The landlord submitted a receipt and is claiming compensation.

The tenant denied damaging the in-ground sprinkler head and pointed out that it is located close to a public road and the landlord's driveway is often used by others.

The tenant is claiming the return of the $500.00 security deposit in full and seeking to force the landlord not to charge the tenant for extra costs for the utilities paid for by the tenant.

Analysis: Landlord's Claim

Rent

> In regard to the rent being claimed by the landlord, I find that section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act or the tenancy agreement.

Through testimony from both parties it has been established that the tenant did not pay all of the rent when it was due. However, the tenant's defense is that she was forced to pay an excessive amount for utilities to supply the other suite and was also not sufficiently reimbursed for the cost of the hydro or heat to the other suite, by the other renter or the landlord.

When a tenant fails to comply with section 26, section 46 of the Act permits the landlord to end the tenancy by issuing a Ten-Day Notice effective on a date that is not earlier than 10 days after the date the tenant receives it.

This section of the Act also provides that within 5 days after receiving a notice under this section, the tenant may either pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution. In this instance I find that the tenant chose to vacate the suite.

A tenant is not entitled to withhold rent under the Act, without an order to do so. Therefore, I find that the landlord is entitled to be paid the $250.00 rent owed.

Cleaning and Repairs

With respect to the claims for compensation, for the carpet cleaning and repairs to the sprinkler system, it is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

[1] Proof that the damage or loss exists,

[2] Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,

[3] Verification of the actual amount required to compensate for the claimed loss or to rectify the damage, and

[4] Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the landlord, to 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 respondent.

Section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear at the end of the tenancy.

I find that section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

To determine whether or not the tenant had complied with this requirement, I find that this can best be established by comparing the unit‘s condition as it was when the tenancy began with the final condition of the unit after the tenancy ended. In other words, through the submission of move-in and move-out condition inspection reports containing both party’s signatures.

Conducting move-in and move out condition inspection reports are a requirement of the Act under section 23(3) and section 35 of the Act and places the obligation on the landlord to complete the condition inspection report in accordance with the regulations. Both the landlord and tenant must sign the condition inspection report after which the landlord must give the tenant a copy of that report in accordance with the regulations.

In this instance neither a move-in condition inspection report nor move-out condition inspection report are in evidence.

In regard to the claim for cleaning the carpet, I accept that the landlord spent $94.50 to have the carpets cleaned after the tenant moved out. I find that this fact satisfies element 3 of the test for damages. However I also accept the tenant’s testimony that she had already cleaned the carpets prior to vacating the unit and that the additional cleaning was not necessary. I find that the rental unit was left in a reasonably clean condition, which is the standard imposed by section 37 of the Act. Therefore, I find that the landlord's claim for the cleaning costs must be dismissed.

Regarding the sprinkler damage, I accept that he sprinkler was damaged during the tenancy and that the landlord suffered a loss of $172.19 to repair it. However, in order to satisfy element 2 of the test for damages the landlord is required to prove that it was this tenant who perpetrated the damage. I find that there is sufficient evidence to prove that the damage resulted from the actions of the tenant. For this reason, I find that the landlord is not entitled to be compensated by the tenant for the repair costs.

Given the above, I find that the landlord's monetary claim for the cleaning and repairs must therefore be dismissed.

Supplying Heat and Filling Oil Tank

I find that the inclusion or exclusion of utilities in the rent is a matter that would fall under the tenancy agreement.. Section 58 of the Act states that, except as restricted under the Act, a person may make an application for dispute resolution in relation to a conflict dealing with: (a) rights, obligations and prohibitions under the Act; OR (b) *rights and obligations under the terms of a tenancy agreement*. (My emphasis)

In this instance, I find that the landlord seeks to establish that the tenant did not comply with a term in the tenancy agreement by neglecting to supply oil for the use of both units and refusing to refill the oil tank that serves both rental units and is basing a claim for damages on the violation of this term.

However, I find that section 6(3) of the Act states that a term of a tenancy agreement is **not enforceable** if: (a) the term is inconsistent with the Act or the regulations, (b) the term is unconscionable, or (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it. (My emphasis).

In addition, section 5(1) of the Act states that the Act cannot be avoided through contract and that **any attempt to avoid or contract out of the Act** or the regulations **is of no effect**. (My emphasis).

In regard to the term in this tenancy agreement that requires the tenant to place the account for hydro, shared between the units, in the tenant's name and then to collect the contribution of $100.00 from another renter is unconscionable. I find that this term places the tenant in a role that goes beyond that of mere tenant and would fall under a landlord's statutory responsibilities under the Act.

I also accept the tenant's testimony that the hydro usage by the other unit may likely have exceeded their $100.00 per month contribution on occasion, particularly in winter when space heaters were being used. .

With respect to the requirement that the tenant fill the oil tank and assume the responsibility to ensure that both units be heated at the tenant's cost, I find that this term is both unconscionable and unclear in the tenancy agreement and as such cannot be enforced.

I find that the tenancy terms described above are not compliant with the Act. Therefore, the landlord's claims for $1,581.76 to fill the oil tank and $1,650.00 for loss of rent due to a vacancy in the second suite must be dismissed.

Analysis: Tenant's Claim

In regard to the refund of the security deposit, I find that these funds are held in trust by the landlord on behalf of the tenant and, under section 38 of the Act, they the tenant must be paid back or credited with the amount being held.

In regard to the excessive utility charges, I find that the landlord did violate the Act by imposing an unconscionable term of this nature onto the tenant. I accept that the tenant has a valid reason to support requesting an order that the landlord comply with the Act in this regard. However I find that this would entail the landlord refunding the extra costs of the utilities already paid by the tenant.

I accept the tenant's testimony alleging that the first hydro bill in August 2013 exceeded $300.00 and subsequent bills in winter were significantly higher than that.

Although there is no way to accurately determine what percentage of utility costs should have been allocated to each unit, I find, based on a balance of probabilities, that the other unit's contribution of $100.00 per month likely did not cover their hydro usage in winter when space heaters were being utilized for heat. I find that, as a result, the tenant was left with a large outstanding bill to the hydro company when she vacated.

For this reason, I grant the tenant nominal compensation in the form of a rent abatement of of 2.2% of the rent for 10 months of the tenancy totaling $220.00 for administering the hydro account for both units for the duration of the tenancy.

Based on the evidence before me, I find that the Landlord is entitled to total compensation of $220.00 rental arrears owed by the tenant for the month of August 2014.

Based on the evidence before me, I find that the tenant is entitled to total compensation of $720.00 comprised of a refund of the $500.00 security deposit and a $220.00 credit for overseeing and paying the hydro account for the two units.

In setting off the two amounts, I find that the remainder in favour of the tenant is $500.00. Therefore, I hereby grant the tenant a monetary order in the amount of $500.00. This order must be served on the landlord and may be enforced through Small Claims Court.

The remainder of the landlord's and tenant's applications are dismissed without leave. Each party is responsible for their own costs of the application.

Conclusion

The landlord is partly successful in the application and granted rental arrears but the claims for cleaning, repairs, fuel and loss of revenue are dismissed.. The tenant is successful in the application and is granted compensation for overcharged utilities and a refund of the security deposit and is issued a Monetary Order for the remainder after the two claims are set off.

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: October 07, 2014

Residential Tenancy Branch