Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes RPP, MND, MNR, MNDC, FF

Introduction
This hearing was set to deal with two related applications. One was the tenants' application for a order returning personal property and a monetary order. The other was the landlord's application for a monetary order.

The tenants had filed their application for dispute resolution on September 23. The hearing was set for November 7. The landlord filed his application for dispute resolution and was not able to serve it, or his supporting evidence, on the tenants until November 5. The tenants acknowledged receipt of the application for dispute resolution and said they needed time to collect, serve and file evidence in response to the landlord's application.

After reviewing the two applications for dispute resolution I was of the view that it would be best if the two applications were heard and decided together. Accordingly, I applied Rules 3.17 and 6.4 and adjourned the hearing to a date and time convenient to both parties – November 24 at 1:00 pm.

The hearing reconvened on November 24. Both parties appeared and gave their evidence in full.

As the parties and circumstances are the same for both applications one decision will be rendered for both.

The tenants advised that the male tenant's name had been misspelled on the landlord's application and in some of the correspondence from the Residential Tenancy Branch. The correct spelling is reflected in this decision and order.

Issue(s) to be Decided
- Should an order with respect to the tenants' personal property be made and, if so, on what terms/

- Should either the tenants or the landlord be granted a monetary order and, if so, in what amount?

Background and Evidence

This month-to-month tenancy commenced the third week of February, 2014. The landlord said the monthly rent is $950.00; the tenants said they paid $975.00. The landlord said the tenants paid a security deposit of $475.00; the tenants said it was $487.50. Although the landlord's written submission referred to a written tenancy agreement a copy of the agreement was not filed in evidence.

The rental unit is a two bedroom basement suite; the landlord lives upstairs.

At a hearing on July 3, on an application by the tenants for an order setting aside a 1 Month Notice to End Tenancy for Cause, the parties agreed that the tenancy would end on September 1, 2014 and that the landlord would be granted an order of possession for that date.

The female tenant says she was assaulted on August 17. Her injuries included six broken ribs. She was treated at the OR and sent home. She was in great pain and unable to pack or move. The male tenant is an older man with a variety of health problems including significantly reduced hearing, poor memory, and a recent eye surgery.

The female tenant says that on or about August 20 she offered the landlord the September rent but he refused to accept it. The landlord says the tenant spoke to him or August 28 or 29 and asked for an extension. He said he would think about a ten day extension. The landlord says he never heard from the tenants after that. On August 31 he posted a notice of entry. The tenants did not contact him and they did not return his calls. The tenant says that on September 1 the landlord came to talk to them. They agreed that in return for payment of a full month's rent the tenants could stay until September 10.

The tenants say that on September 2 they went to the bank to get the money for the landlord. When the male tenant returned to the unit his key did not work. He said that one of the two locks was bright and shiny and he concluded that the locks had been changed.

The landlord says that on September 1 he noticed that the tenants had taken his hand dolly and damaged three window screens. He called the police to report a theft. He testified that after he talked to the police he tried to open the suite and discovered that his keys would not work. Later in his testimony he said that September 19 was the first

time he tried to open the door. The landlord testified that he did not change the locks on September 1 or 2.

The male tenant says that when he went to the rental unit on September 2 the landlord refused to answer his door.

The female tenant says she called the landlord at least twice a day. He told her they were not getting in unless they paid him some money. Finally on September 4 they filed an application at the Residential Tenancy Branch. The landlord says he is home all day. No one came to his door and there were no calls on his home telephone or his cell phone.

On September 4 the tenants filed an application for dispute resolution asking for an order of possession, not for return of their personal property. That day the male tenant went to the house to serve it on the landlord. The male tenant says that when he got there he asked the landlord for entry to the unit. The landlord told him to go away so he left the documents in the mail box. The landlord says the male tenant made no effort to talk to him – just delivered the documents and left as quickly as possible. The landlord said this was the first contact he had had with the tenants since their conversation at the end of August.

The hearing was set for September 17 and went ahead that day. The tenants' application was dismissed because an order of possession had already been granted to the landlord. At the hearing the parties agreed that the tenants would go to the rental unit at 3:30 pm on September 19 to pick up their personal property.

The meeting took place as scheduled. The landlord said he tried to use his key but it did not work. The tenants say that when they got there the landlord said they had broken the lock and they would have to pay for the locksmith. The female tenant said the male tenant was the only one who had keys as hers were still in the rental unit. He tried his keys as well but they did not work.

The landlord says they agreed that he would get the lock fixed and the tenants would come back on September 22. He got the lock changed. He was at home all day on September 22 but the tenants did not attend. The tenants say there was no agreement about coming back and they left unsatisfied.

On September 23 the tenants filed this application for dispute resolution and served it on the landlord on September 26.

The landlord said he kept trying to call the tenants but they did not respond until October 30. He said someone would answer the telephone but whoever answered could not hear what he was saying and would hang up. The male tenant said he thought that the landlord called him but he could not hear anything. The female tenant explained the various difficulties she had with her telephone and plan that prevented her from picking up her messages.

When the parties finally connected on October 30 the landlord told the tenants that if they did not pick up their stuff he would throw it away. The tenants said they would be there on November 4.

The tenants came on November 4 but only stayed a half hour. They were back on November 5, again for a very short time. On November 12 they arrived with a helper and a truck and moved everything but two sofas. The tenants explained that neither of them has a motor vehicle or a driver's licence and they had difficulty finding someone to move them.

The landlord claims arrears of rent for July and August. In the application for dispute resolution that he filed on October 31 the landlord claimed arrears in the amount of $1600.00. In his written submission filed November 14 the landlord said the tenants paid $500.00 on August 2, $200.00 on August 4 and $200.00 on August 8 and claimed arrears of $1120.00. In his oral testimony at the hearing the landlord said the tenants made two payments, each in the amount of $400.00. The tenants said the rent was paid in full. The female tenant said she paid the rent in cash; the male tenant said he paid by money order. The landlord said he had the receipts that proved otherwise but they were not filed in evidence.

The landlord claims $1000.00 for painting and cleaning. He filed an estimate dated October 20, 2014, for removing all of the contents of the suite and cleaning. No estimate for painting was filed. The landlord testified that the unit had been painted just nine months ago. He testified that when he showed the unit to some potential renters on August 16 the unit was clean. He filed photographs taken before the tenants removed their belongings. They show marks on the walls which the landlord's notes identified as blood. The photographs do not show any other damage to the walls.
The tenants say that when they moved into the suite it was dirty, the paint was in poor condition, and there were holes in the walls. They agree the unit needs to be cleaned and say they would have cleaned it if they could have gotten in.

The landlord says the tenants have left full garbage bags and other debris outside the unit. The tenants say that much of that debris was then when they moved in – left by previous tenants – and they have made arrangements to have someone haul away their garbage.
The landlord claims $270.00 for a hand dolly which he says the male tenant borrowed and never returned. The male tenant denied taking the dolly. The landlord says he has everything on video tape. No tape, images from the tape, or invoice for the replacement dolly was filed in evidence.

The landlord claims $55.00 for the locksmith. No copy of an invoice was filed in evidence.

The landlord claims $75.00 to repair three screens. The tenants say they were broken when they moved in. The landlord says the tenant broke them by climbing in and out of the window. No invoice or photographs were filed in evidence.

The landlord claims $80.00 for a broken blind. He says the blind is about five years old and he estimates the replacement cost to be about $80.00.

The landlord claims compensation for providing storage fort the tenants' goods for three months.

The tenants claim return of their personal property and general damages in the amount of $5000.00.

Analysis

On any claim for damage or loss the party making the claim must prove, on a balance of probabilities:

- that the damage or loss exists;
- that the damage or loss is attributable solely to the actions or inaction of the other party; and,
- the genuine monetary costs associated with rectifying the damage.

In a claim by a landlord for damage to property, the normal measure is the cost of repairs or replacement cost (less an allowance for depreciation), whichever is lesser. The Residential Tenancy Branch has developed a schedule for the expected life of fixtures and finishes in rental units. This depreciation schedule is published in *Residential Tenancy Branch Guideline 40: Useful Life of Building Elements* and is available on-line at the Residential Tenancy Branch web site.

Subsection 7(2) of the *Residential Tenancy Act* provides that a landlord or tenant who claims compensation for damage or loss that has resulted from the other's non-compliance with the act, the regulations or the tenancy agreement must do whatever is reasonable to minimize the damage or loss.

The first comment that must be made is that the parties' evidence differed on almost every aspect and I did not find any of the witnesses particularly compelling. Both the landlord and the tenants testimony contained inconsistencies and neither told a particularly coherent story.

The landlord's application would have been greatly strengthened if he had provided the following documentation, which is usual on such applications:

- Copy of the tenancy agreement;
- Copy of the completed move-in condition inspection report;
- Copy of receipts for rent payments and the security deposit;

- Invoices for expenses incurred or items replaced; and
- Current estimates for work required to be done but not yet completed.

The evidence regarding the claim for rent is a good example of inconsistent and contradictory evidence. The landlord first claimed arrears of $1600.00; then in a later submission arrears of $1120.00. He testified under oath that the tenants paid him $800.00, which would have left the arrears at $1100.00. In his written submission he said the tenants paid him $900.00, which would make the arrears $1000.00. Meanwhile the female tenant said the rent was paid in cash and the male tenant said it was paid by money order.

In light of the inconsistent and contradictory evidence and the lack of any documentary evidence the claim for arrears of rent for July and August is dismissed.

There are several problems with the landlord's claim for painting:

- There is no move-in condition inspection report to establish the condition of the walls at the start of the tenancy.
- The photographs filed by the landlord only show blood stains on the walls, which can be washed off. Nothing in the photographs established that the unit must be repainted.
- There is no written estimate for the cost or repainting or a copy of the invoice from the last paint job to verify the cost of painting.

Based on the evidence before me the claim for painting is dismissed.

Without the completed move-out condition inspection report there is no compelling evidence of the condition of the unit at the start of the tenancy, only the conflicting oral testimony of the parties. For that reason, and the lack of either invoices or written estimates to back up the amounts claimed, the claims for blind replacement and screen repair are dismissed.

The claim for the hand dolly is dismissed. The only evidence before me is the contradictory oral testimony of the parties. There is nothing, such as a copy of the surveillance video, to tip the balance of probabilities in the landlord's favour. Further, there was no written evidence of the actual cost of a dolly like the landlord's.

The claim for the locksmith is dismissed because there is no invoice from a locksmith or any other proof of payment.

Regarding the landlord's claim for cleaning costs, the situation at the rental unit has changed since the photographs were taken and the estimate for cleaning obtained. A further variable is whether the tenants will follow through on their undertaking to haul away their garbage. With the evidence before me it is not possible to accurately estimate what the landlord's cost of cleaning and garbage removal will be. Accordingly, this claim is dismissed, with leave to re-apply, once the unit has been cleaned and the landlord knows his actual cost.

The landlord's claim for storage costs and the tenants' claim for damages arise from the same set of facts.

Based on the evidence before me I am not convinced that the landlord changed the locks before September 22. Even if he had, the evidence indicates that he was very anxious to have the rental unit cleaned out. It is my opinion that the real barrier to the tenants obtaining their personal property was their own situation – poor health, no driver's licence or motor vehicle, very little money – not the refusal of the landlord to allow access. The following factors led me to this conclusion:

- The male tenant's evidence corroborates the landlord's evidence that the landlord tried repeatedly to call the tenants.
- There was no evidence that the tenants tried to contact the landlord in any way, other than serving applications for dispute resolution, after September 4.
- The landlord met the tenants on all four dates agreed upon and let the tenants into the suite on three occasions in November.
- Ultimately the landlord allowed the tenants to remove their personal property without them paying any money to him.
- In his appearances before me the landlord's main priority was to get his rental unit cleared out. He was very insistent on this point.
- The landlord had a compelling economic reason for wanting the tenants to remove their belongings. He was losing far more in rent than the contents of the unit were ever going to yield if sold.

Further, I note that the landlord did not just haul the tenants' personal property to the dump as many other landlords would have – improperly – done.

Accordingly the tenants' application for damages is dismissed.

The landlord did not appear to know that the legislation provides two mechanisms for landlords in his situation. First of all, he could have taken his order of possession to the Supreme Court, obtained an order, hired a bailiff, and taken possession of the rental.

The bailiff would have emptied the suite in accordance with the legislation. The cost of the bailiff would have been less than the rent lost since September 1.

Secondly, the *Residential Tenancy Regulation* sets out the procedure for landlords whose tenants have abandoned personal property in a rental unit. The regulation is very specific about the circumstances that must exist before property can be considered to be abandoned so landlords should check the law carefully before proceeding. However, if the circumstances are such that the property may be considered abandoned a landlord may dispose of the items immediately if their market value (not replacement value) is under $500.00 or, if the property is more valuable than that, to hold it for sixty days in secure storage before disposing of it. The *Regulation* states that if a tenant claims his or her personal property before it is disposed of the landlord may require the tenant to pay the landlord for his or her reasonable costs of removing and storing the property as well as any other amounts payable by the tenant to the landlord under the legislation or the tenancy agreement.

So on the one hand the landlord could have mitigated his losses by enforcing his order of possession. On the other hand, while leaving the personal property in the rental unit the landlord reduced his and therefore the tenants' costs of packing, removing and storing the items, even though this resulted in a loss of rental income to the landlord.

The landlord claimed $500.00 per month for storage. No information was provided on the off-site storage costs in this community. From the landlord's photographs taken in September it appears that a small storage unit would have been adequate. Based upon the knowledge I have gained over the years of hearing these types of applications I allow the landlord general damages of $437.50 for storage, calculated at $175.00 per month for 2.5 months.

As the tenants have had many opportunities to retrieve their personal property and have, in fact, gotten most of it, no order for the return of the tenants' personal property will be made.

As the landlord had some success on his application I find that he is entitled to reimbursement from the tenants of the $50.00 fee he paid to file his application.

Section 72(2) provides that whenever a tenant is ordered to pay an amount to the landlord the amount may be deducted from any security deposit or pet damage deposit due to the tenant.

In this case, the parties do not agree on the amount of security deposit held by the landlord. The onus of proof lies on the landlord, who could have filed a copy of the receipt for the security deposit paid by the tenants. Because the landlord did not meet his onus of proof I am going to accept the tenants' statement that they paid $487.50 as a security deposit and I order that the landlord may retain the entire amount in satisfaction of this claim.

Conclusion

a. With two exceptions, all of the claims by the landlord and the tenants have been dismissed, for the reasons set out above.

b. The landlord's claim for cleaning is dismissed, with leave to re-apply.

c. The landlord is granted a monetary order for storage costs and filing fee in the total amount of $487.50. An order allowing him to keep the security deposit, which I found to be $487.50, in full satisfaction of the claim has been made.

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: December 11, 2014

Residential Tenancy Branch