Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AWM ALLIANCE REAL ESTATE GROUP LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND MNDC MNSD FF
MNDC MNSD FF

Preliminary Issues

Upon the review of each application for Dispute Resolution the Tenant confirmed that he had initially filed this application to recover double his pet and security deposits plus recovery of the balance owed on a monetary award granted in a previous hearing / decision.

After further review of the above, I find that there is no provision under the *Residential Tenancy Act* (the Act) to allow this matter to be reconvened before me. As to do so would constitute res judicata. Furthermore, enforcement of a monetary award does not fall within the jurisdiction of the Act.

Res judicata is a doctrine that prevents rehearing of claims and issues arising from the same cause of action between the same parties after a final judgment was previously issued on the merits of the case.

Based on the aforementioned, I declined to hear the matters pertaining to the Tenant's request for recovery of the balance owed on a previous monetary award.

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed on August 12, 2014, to obtain a Monetary Order for: damage to the unit, site, or property, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; to keep all or part of the pet and security deposits; and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed August 6, 2014, to obtain a Monetary Order for the return of double his security and pet deposits and to recover the cost of the filing fee from the Tenant for this application.

The hearing was conducted via teleconference and was attended by the Landlord and the Tenant. Each party gave affirmed testimony and confirmed receipt of evidence served by each other. Neither party raised concerns regarding the service and / or receipt of evidence.

At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Has the Landlord proven entitlement to a monetary award for damage or loss?
2. Has the Tenant proven entitlement to a monetary award for the return of double his security and pet deposits?

Background and Evidence

The undisputed evidence was that the Tenant entered into a fixed term tenancy that began on July 1, 2013, and was set to end on June 30, 2014; at which time the Tenant was required to vacate the rental unit. Rent of $1,550.00 was due on or before the first of each month and on June 19, 2013 the Tenant paid $775.00 as the security deposit and on August 15, 2013 the Tenant paid $387.50 as the pet deposit. Both parties were in attendance at the condition inspections and signed the condition inspection report forms on June 19, 2013 for the move in inspection and on July 12, 2014 for the move out inspection.

The rental property was described as being an old detached single family home that had an upper rental suite and a self-contained basement suite. The upper rental suite had possession of approximately ¼ of the basement, and the self-contained basement suite was the remaining ¾ of the basement.

The Landlord asserted that she received the Tenant's forwarding address by email shortly after the inspection on July 12, 2014. She did not know the exact date and was not certain the method in which she received the forwarding address. The Tenant submitted that he provided his forwarding address to the Landlord prior to the end of his tenancy and again during the move out inspection on July 12, 2014.

The Landlord testified that during the course of the tenancy, through random inspections, they determined that the Tenant had allowed smoking to occur inside the

rental unit, in breach of the tenancy agreement. The Landlord argued that despite their email requests to Tenant to stop the smoking inside the rental unit, the smoking continued. As a result, the Landlord advised the Tenant they would not be renewing his tenancy and he would have to vacate the unit on June 30, 2014, in accordance with the tenancy agreement.

The Landlord stated that shortly before June 30, 2014 she called the Tenant and left him a message to call her and arrange the move out condition inspection. She said that when she did not hear back from the Tenant by June 30, 2014, she began sending him emails to arrange a date and time for the inspection. The Landlord confirmed that she had driven by the rental unit but had not stopped in and had not posted a notice of entry to determine if the Tenant had moved out.

The Landlord stated that after several days they were able to arrange to meet with the Tenant on July 12, 2014, at which time they completed the inspection in the presence of the Landlord and her inspector. The Landlord argued that the Tenant remained in possession of the keys between June 30, 2014 and July 12, 2014; therefore, she was of the opinion that the tenancy did not end until July 12, 2014, when the keys were returned to her. The Landlord confirmed that she did not issue the Tenant two dates and two times to arrange the move out inspection and she did not serve the Tenant a final notice of inspection. She stated that it is their process to allow tenants time to complete their move and cleaning and rely upon the tenants to advise the Landlord when they are ready for the inspection.

The Tenant disputed the Landlord's submission and argued that he had vacated the property by June 30, 2014. He acknowledged that he had left a few articles inside the garage that were recycling but that the delay in returning the keys falls upon the Landlord because she refused to meet with him to conduct the inspection outside of her business hours. The Tenant stated that he would not answer the Landlord's telephone calls if she called while he was at work due to privacy concerns but he did respond to the Landlord's emails, which is supported by his evidence which included emails.

The Tenant asserted that his email evidence proves that the Landlord would not initially agree to a time after 5:00 p.m. or agree to a date to meet to conduct the inspection. The Tenant noted that they had agreed to meet on a date prior to July 12, 2014, at 6:00 p.m. and that he attended the unit and waited there until 6:18 p.m. and no one on behalf of the Landlord attended the rental unit.

The Landlord pointed to the condition inspection report she provided in evidence and noted that both her and the Tenant put their initials by the statement written at the bottom of that form which states " **Smoke smell being reviewed by July 16 / -com. To tenant on recom [sic]".* The Landlord submitted that the Tenant was informed that the Landlord would need to have a professional inspect the property to determine how to eliminate the heavy smoke smell and that she would advise the Tenant on what the recommendations were which are the basis for her claim for damages.

The Landlord testified that her application was filed using estimates and they have since had the repair work completed for a lower cost. The Landlord pointed to her documentary evidence, to support her claim for damages, which included, among other things, copies of: the tenancy agreement; the condition inspection report form; a before photo taken June 19, 2013; after photos taken July 12, 2014; receipts for repairs; random inspection reports dated September 22, 2013 stating “every door and window in the house was open tenant says his sons had a big party last night” and July 08, 2014 which states “house smells heavily of cigarette smoke contrast to other visits where every door and window have been open” ; and written statements from contractors who had completed work prior to and after this tenancy.

The Landlord now seeks $4,958.82 monetary compensation as follows:

1. $2280.07 for painting all interior house surfaces including: Ceilings, Walls, trims/doors and baseboards in a manner recommended for a house with smoke damage to suppress the smell and odors. Plus deep carpet cleaning on all carpets except for one bedroom carpet;
2. $1,550.00 for loss of July 2014 rent due to the Tenant’s delay in returning the keys and due to the Tenant’s breach of the tenancy agreement by allowing smoking in the rental unit; and
3. $1,128.75 for the installation of the new carpet and underlay required for the bedroom in which the Tenant’s son occupied.

The Landlord argued that the rental unit had undergone renovations just prior to this tenancy where they had repainted the entire rental unit one year prior to July 2014 and installed new carpets one and a half years prior. The Landlord pointed to a letter submitted in evidence that was written by the painters which states:

> *This house required this paint work to be done to reduce smoke damage in the house. This home had been painted the year prior and the severe damage from smoke is not repairable without using a sealant paint.*

The Tenant disputed the Landlord’s claim for painting and argued that the walls had been washed so no smoke or nicotine was weeping from the walls. He submitted that they used the fireplace often to assist with heating the house and it was the smell of smoke from the fireplace that was left inside the rental unit and not smells from cigarettes or marijuana being smoked inside the unit.

The Tenant asserted that the move out condition inspection report form had been altered after he had signed it. He confirmed that the statement referenced by the Landlord that was written on the bottom of the condition inspection form had been initialed by him; however, all of the comments about smoke smell in each and every room were not written on the form at the time he signed it. He submitted that the Landlord had written those comments after he signed the form in order to have him be responsible for painting of every surface in the house, which he believes he is not responsible for. The Tenant stated that he does not believe the written submissions and

complaints from the Landlord's inspectors, contractors, and neighbors as his son was not allowed to smoke throughout the entire house. He later submitted that he was not home every time the contractors came to the house.

The Tenant pointed to photographs provided in his evidence and argued that the paint job had not been completed or was not done properly as there were visible dark sections on the ceiling ten weeks after they moved into the rental unit. He also provided pictures that were taken a month or two after they moved in which displayed cracks, painted over wallpaper and curling edges of the kitchen linoleum.

The Tenant testified that he had not had the carpets cleaned at the end of his tenancy and that he had agreed to allow the Landlord to have the ozonator treatment completed because he thought it would be the same price as regular steam cleaning. He argued that he would not have approved that treatment if he had known it was going to cost $400.00 to have completed.

The Tenant argued that the Landlord's photos are of two different bedrooms and not the same bedroom as she suggested. He stated that the first photo provided in the Landlord's evidence was the master bedroom as there was a telephone/cable box beside the outlet, and the second photo which displayed the cigarette burns on the carpet was his son's bedroom. He acknowledged that his son did smoke in his own bedroom and that he did leave burns in the carpet. As such, the Tenant was not disputing the Landlord's claim to replace the carpet and underlay in his son's bedroom; however, he did not agree to pay for any painting.

The Landlord was given an opportunity to respond to the Tenant's submissions to which she stated she had nothing further to add. I then asked the Landlord to confirm that she had received the Tenant's forwarding address during the move out inspection. She stated that she recalled discussing the Tenant's new address during the move out inspection but that she could not confirm the exact date she received the address by email.

The Landlord stated that the random condition inspection reports that were complete during the tenancy were not provided to the Tenant prior to submitting them into evidence. She said those reports were completed for their own records for insurance purposes. The Landlord stated that they did not issue the Tenant written warnings about smoking inside the rental unit; rather, they decided to communicate in a casual manner, by email, because the tenancy was scheduled to end on June 30, 2014, and they had already informed the Tenant they would not be entering into a subsequent tenancy.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Section 7 of the Act provides as follows in respect to claims for monetary losses and for damages made herein:

7. Liability for not complying with this Act or a tenancy agreement

7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

As such, the party making the claim for damages must satisfy **each** component of the test below:

1. Proof the loss exists,
2. Proof the damage or loss occurred solely because of the actions or neglect of the Respondent in violation of the Act or an agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act and did whatever was reasonable to minimize the damage or loss.

In deciding both applications before me, I must first turn my mind to determining the date when this tenancy ended and the date which the Landlord received the Tenant's forwarding address.

Section 45 (1)(b) of the Act stipulates that the tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy.

Section 44(1)(d) of the Act provides that a tenancy ends when the tenant vacates or abandons the rental unit.

The undisputed evidence was that the Landlord advised the Tenant via email that they would not consider entering into a subsequent tenancy agreement and therefore, the tenancy would end at the end of the fixed term, on June 30, 2014, as stipulated in the tenancy agreement. The Tenant submitted that he had vacated the property by June 30, 2014, leaving some materials in the garage to be recycled. The Landlord argued that the tenancy did not end until July 12, 2014, because that is when they conducted the move out inspection and received the keys back from the Tenant.

Section 17 of the Regulation provides that it is the landlord who must initiate scheduling of the condition inspection as follows:

17 (1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

In the absence of any evidence that the Landlord served the Tenant with written notice of two dates and two times to conduct the move out inspection or a final notice of inspection for June 30, 2014, I find the Landlord provided insufficient evidence to prove the Tenant over held or intentionally remained in possession of the rental unit; rather, the evidence supports the delay in obtaining possession was caused by the Landlord's inattentive or laid back behavior which caused the delay in scheduling the move out inspection. Accordingly, I find this tenancy ended **June 30, 2014,** pursuant to sections 44 and 45 of the Act.

Neither party could confirm the exact date that the Tenant emailed his forwarding address to the Landlord; however, both confirmed that they discussed the Tenant's forwarding address during the move out inspection. Therefore, I find the Landlord was in receipt of the Tenant's forwarding address on **July 12, 2014.**

In regards to the disbursement of the security and pet deposits, section 38(1) of the *Act* stipulates as follows:

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and
(b) the date the landlord receives the tenant's forwarding address in writing, the landlord must do one of the following:
(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24

(1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) 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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit ***may be used only for damage caused by a pet*** to the residential property, unless the tenant agrees otherwise. [my emphasis added]

As noted above, I found the tenancy ended June 30, 2014, and the Landlord received the Tenant's forwarding address on June 12, 2014. Therefore, the Landlord was required to return the Tenant's security and pet deposits in full or file for dispute resolution no later than July 27, 2014. The Landlord did not file their application until August 12, 2014 and there is no evidence that the damages were caused by a pet.

Based on the above, I find that the Landlord has failed to comply with Sections 38(1) and 38(7) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply, the landlord may not make a claim against

the security and pet deposits and the landlord must pay the tenant **double the security and pet deposits.** Accordingly, I find that the disbursement of the security and pet deposits, as will be ordered below, will be considered in the amount of **$2,325.00** (2 x $775.00 + 2 x $387.50 + $0.00 interest).

Based on the above, the Tenant has been successful with their application for the return of double their security and pet deposits. As such, I further award the Tenant their filing fee in the amount of **$50.00** for a total award to the Tenant of **$2,375.00** ($2,325.00 + $50.00).

The Landlord now seeks compensation for loss of July 2014 rent due to the delay in obtaining possession of the rental unit and due to the time required to repair the rental unit. As noted above, I found it was primarily the Landlord's actions, or lack thereof, which caused the delay in scheduling the move out inspection. Furthermore, the Landlord had knowledge of the presence of cigarette smoke inside the rental unit as early as July 08, 2014. Therefore, had the Landlord done her due diligence, she could have arranged to have the unit inspected in a timely fashion and the required repairs conducted in a more timely fashion. Accordingly, I dismiss the Landlord's claim for loss of July 2014 rent, without leave to reapply.

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 37(2) of the Act provides 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; and must return all keys to the Landlord.

The undisputed evidence was there had been smoking inside the Tenant's son's bedroom, which caused damage to the carpet. The evidence of damage to the carpet was so compelling that the Tenant did not dispute the Landlord's claim to replace the bedroom carpet and underlay. Accordingly, I grant the Landlord's claim for the replacement of the carpet and underlay in the amount of **$1,128.75.**

It was undisputed that the Tenant did not have the carpets cleaned at the end of the tenancy and that he had initially agreed to the ozonator treatment. Given the circumstances presented to me during this hearing, I accept that the deep cleaning treatment was required to restore the remaining carpet to a reasonable state. Accordingly, I grant the Landlord's claim for carpet cleaning in the amount of **$400.00.**

Section 21 of the Regulations provides that In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The Landlord's claim for painting every surface in the entire rental unit; the extent to which smoking occurred inside the rental unit during the tenancy; and the damage caused by that smoking, was in dispute. Notwithstanding the Tenant's argument that the smoke smell was the result of them using the fireplace, I accept the Landlord's submissions that the smell was the result of smoking cigarettes and/or marijuana inside the rental unit and that the smell permeated throughout the entire house, as supported by the Landlord's documentary evidence.

I accepted the Landlord's submissions over the Tenant's because it was undisputed that smoking was occurring inside the rental unit, in breach of the tenancy agreement, and it was undisputed that there had been a large party(s) inside the rental unit. Furthermore, the Landlord submitted evidence from the neighbors, heating contractor, painter, and her inspector, which all speak to the presence of parties, cigarette and/or marijuana smoke damage and/or windows and doors being left wide open, at different times during the course of this tenancy. Accordingly, I find the Landlord has met the burden of proof to establish that the Tenant breached sections 32 and 37 of the Act, by leaving the rental unit smoke damaged at the end of the tenancy.

Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to reduce the replacement cost by the depreciation of the original item. In order to estimate depreciation of the interior painting I have referred to *Residential Tenancy Policy Guideline # 40* which provides that the normal useful life of interior painting is 4 years.

Upon review of the evidence before me, I accept that there was sufficient proof that the interior walls had been painted just prior to the start of this tenancy. That being said, I accept the Tenant's undisputed submission that the rest of the surfaces (ceilings, baseboards, trim, and doors) had not been fully or properly painted in recent years. In absence of evidence to prove the contrary, I find the paint on the ceiling, trims, doors, and baseboards, had exceeded their useful life, and the claim for painting those surfaces is dismissed, without leave to reapply.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Based on the above, I award the Landlord their claim for supplies and painting for all of the interior walls in the amount of **$800.00**. This amount was determined after consideration that the paint on the walls had depreciated ¼ of their useful life, and the painting invoice of $2,280.07 included the $400.00 for cleaning the carpet plus the costs for labor and supplies to paint all ceilings, trims, doors, and baseboards, which were not itemized as individual costs on the invoice.

The Landlord has partially succeeded with their application; therefore I award partial recovery of the $100.00 filing fee in the amount of **$50.00.**

Monetary Order – I find that the Landlords are entitled to a monetary claim as follows:

Bedroom carpet and underlay replacement	$1,128.75
Carpet cleaning & ozonator treatment	400.00
Supplies and painting of the walls	800.00
Filing Fee	50.00
Landlord's award	**$2,378.75**

These claims meet the criteria under section 72(2)(b) of the *Act* to be offset against each other as follows:

Landlord's monetary award:	$2,378.75
LESS: Tenant's award:	-2,375.00
Offset amount due to the Landlord:	**$ 3.75**

Conclusion

Both parties were primarily successful with their application which resulted in their monetary awards being offset against each other, leaving a balance owed to the Landlord of $3.75. Accordingly, the Landlord has been issued a monetary order in the amount of $3.75.

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: February 27, 2015

Residential Tenancy Branch