



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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| <u>Dispute Codes</u> | OPR, MND, MNR, MNSD (Landlord) MNDC, MNSD, FF (Tenant) |
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Introduction

This hearing convened as a result of cross applications. In the Landlord's Application for Dispute Resolution the Landlord sought an Order of Possession based on a Notice to End Tenancy served November 5, 2014, a Monetary Order for: unpaid rent; loss of rent; compensation under the Act and the tenancy agreement; damage; and, cleaning of the rental unit, for an Order to retain the security deposit in partial satisfaction of the claim and to recover the filing fee for the Application. The Tenants sought a Monetary Order for compensation for damage or loss under the Act, regulation or tenancy agreement, for return of double their security deposit pursuant to section 38(6)(b) of the *Residential Tenancy Act*, and to recover the filing fee.

Only the Tenant S.W. appeared at the hearing. She confirmed that she was acting on her own behalf and as agent for the Tenant J.W. The hearing process was explained and she was asked if she had any questions. S.W. provided affirmed testimony and was provided the opportunity to present her evidence orally and in written and documentary form, and make submissions to me.

S.W. confirmed she served the Landlord with the Tenants' application material on April 7, 2015 by registered mail and provided the registered mail tracking number. Notably, the Landlord also had an Application set for this date. I find the Landlord was served with the Tenants' application materials and was aware of the hearing date.

As the Landlord did not attend the hearing, and the Tenants appeared and were ready to proceed, the Landlord's Application is dismissed without leave to reapply.

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.

Issues to be Decided

1. Are the Tenants entitled to monetary compensation from the Landlord?
2. Are the Tenants entitled to return of double the security deposit?
3. Should the Tenants recover the fee paid to file their Application?

Background and Evidence

The Tenants paid a security deposit of \$750.00 and a pet damage deposit of \$750.00 prior to moving into the rental unit on October 1, 2012.

The Tenants vacated the premises on November 15, 2014, the effective date of a 10 Day Notice to End Tenancy issued November 5, 2014. The Tenants provided the Landlord with a written notice of the forwarding address to return the security deposit to, and did not sign over a portion of the security deposit. Documentary evidence submitted by the Tenants confirms the Landlord received the Tenants' forwarding address.

S.W. testified that the Landlord did not perform an incoming or outgoing condition inspection report.

The Tenants claimed double the security deposit.

The Tenants also claimed \$300.00 for loss of quiet enjoyment. S.W. testified that the Landlord permitted a realtor, V.H., to act as the Landlord's agent, while the property was listed for sale. S.W. stated that V.H. permitted prospective buyers to attend the rental property at any time, and allowed them to access the yard, and look in the windows. S.W. further testified that V.H. attended with prospective buyers for showings without giving the Tenants proper notice. S.W. stated that she communicated her frustrations to the Landlord in this regard by text message; those messages were not in evidence. S.W. confirmed that this disruption occurred for the final six weeks of their tenancy.

The Tenant also sought the sum of \$600.00 for loss of use of the front yard for the two years of the tenancy. According to S.W. a tree was hit by lightning two weeks before the tenancy began and fell into the front yard of the rental unit. Although BC Hydro came to the property and cut up the tree, the tree remained on the property. Photos submitted by the Tenants confirmed that the tree waste occupied nearly all of the front yard. S.W. testified that the tree made it impossible to use the front yard. She further testified that the front yard was the only place on the rental property where the Tenants could have had a garden. S.W. stated that she repeatedly communicated with the Landlord about the existence of the tree and asked that it be removed. She says she also posted an ad on a local buy and sell website to try to deal with the wood; one person attended to remove wood for a building and another for cedar shakes. She testified that her husband attempted to deal with the wood as well, but the existence of rats and mold made this nearly impossible. Submitted in evidence were photos of the rats which the Tenant says

were in the tree waste pile. The Tenants sought the sum of \$300 representing \$25 per month for the loss of the front yard.

The Tenant also sought the sum of \$400.00 for the time associated with her cleaning of the rental unit when the tenancy began in September 2012 as well as the carpet cleaning of \$125.00 which she says was necessary because the previous tenants did not clean the rental unit. When asked whether she brought the cleaning costs to the attention of the Landlord at the outset of the tenancy, or during the tenancy, S.W. confirmed that she did not as she was afraid of the Landlord. She further testified that the Landlord refused to enter into a tenancy agreement which she said made her and her husband feel very vulnerable.

The Tenant also sought the sum of \$600.00 for items she says the Landlord damaged when he entered the rental unit on November 9, 2014 and threw the Tenants belongings and food on the back deck. The Tenant submitted that as the effective date of the 10 Day Notice was November 15, 2014 the Landlord had no right to enter the rental unit on November 9, 2014 and should not have removed their items from the rental unit. Introduced in evidence were photos of the Tenants items. S.W. confirmed that the items which were thrown on the outside deck by the Landlord included a stand up oscillating fan, a cd player, rubber storage totes full of belongings, food from the refrigerator and cupboards, and the Tenants' three year old daughter's clothes and toys. She testified that \$600.00 was a conservative estimate of the value of those items.

Analysis

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

There was no evidence to show that the Tenants 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 Tenants, to retain a portion of the security deposit.

Further, by failing to perform incoming or outgoing condition inspection reports the Landlord has extinguished their right to claim against the security deposit, pursuant to sections 24(2) and 36(2) of the Act.

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 Tenants 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.

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. 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 or interest.

Section 38(6) provides that if a Landlord does not comply with section 38(1), the Landlord must pay the tenant double the amount of the security deposit. The legislation does not provide any flexibility on this issue.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenants the sum of **\$3,000.00**, comprised of double the pet damage deposit (\$750.00) and security deposit (\$750.00).

Section 28 of the *Residential Tenancy Act* provides as follows:

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6: Right to Quiet Enjoyment provides as follows:

Every tenancy agreement contains an implied covenant of quiet enjoyment. A covenant for quiet enjoyment may be spelled out in the tenancy agreement; however a written provision setting out the terms in the tenancy agreement pertaining to the provision of quiet enjoyment cannot be used to remove any of the rights of a tenant established under the Legislation. If no written exists, common law protects the renter from substantial interference with the enjoyment of the premises for all usual purpose.

The *Policy Guideline* continues and provides examples of interferences by the Landlord which may form a basis of a claim of breach of the covenant of quiet enjoyment including:

- entering the rental premises frequently, or without notice or permission;
- unreasonable and ongoing noise;

- persecution and intimidation;
- refusing the tenant access to parts of the rental premises;
- preventing the tenant from having guests without cause;
- intentionally removing or restricting services, or failing to pay bills so that services are cut off;
- forcing or coercing the tenant to sign an agreement which reduces the tenants' rights; or,
- allowing the property to fall into disrepair so the tenant cannot safely to continue to live there.

I accept S.W. undisputed evidence as to the effect of the realtor/acting Landlord's listing of the property as well as the interference by prospective buyers. I find that in allowing the realtor and prospective buyers open access to the rental property, the Landlord is in breach of section 28 of the *Act* and has breached the covenant of quiet enjoyment. The Tenants have claimed the sum of \$300.00, representing \$50.00 for each of the six weeks they say this interference occurred and I accept this as a reasonable figure and award the Tenants the sum of **\$300.00** as claimed.

When making a claim for damages under a tenancy agreement or the *Residential Tenancy Act (Act)*, the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that a damage or loss occurred; that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

I find that the Landlord's failure to remove the tree waste also interfered with the Tenant's right to quiet enjoyment. I accept the undisputed evidence of S.W. that she attempted to mitigate the loss by soliciting third parties to remove the tree waste. I further accept her evidence that the existence of the tree waste rendered the front yard unusable.

Residential Tenancy Policy Guideline 1: Landlord & Tenant—Responsibility for Residential Premises provides that a "Landlord is responsible for ensuring that rental units and property...meet "health, safety and housing standards" established by law, and are reasonably suitable for occupation given the nature and location of the property." Under this same *Policy Guideline* in section "Property Maintenance", it is noted that a Landlord is generally responsible for major projects, such as tree cutting, pruning and insect control.

I find that the Tenants' request for \$600.00, representing \$25.00 per month for the two years the tree waste remained on the rental property, to be reasonable and I award them compensation in the amount of **\$600.00** as claimed.

I find that the Tenants have failed to meet the burden of proving their claim for \$400.00 for cleaning of the rental unit and \$125.00 for carpet cleaning when the tenancy began. I note that the S.W. conceded that she did not bring this to the Landlord's attention during the tenancy.

The Tenant failed to submit any evidence which would support this claim and accordingly I dismiss her claims for these sums.

I accept S.W. undisputed testimony that the Landlord entered the rental unit on November 9, 2014 and moved their items onto the exposed outside deck. The effective date of the Notice to End Tenancy was November 15, 2014 and the Landlord breached section 29 of the *Act* by entering the premises on November 9, 2014 and removing the Tenants' belongings. The photos submitted in evidence by the Tenant clearly show their belongings, including food and toys thrown on the outside deck. I accept S.W.'s undisputed testimony that the value of the items damaged by the Landlord on November 9, 2014 was **\$600.00** and I award her the Tenants this sum.

In sum, I award the Tenants a Monetary Order in the amount of **\$4,550.00** pursuant to section 67 of the *Act* comprised of the following:

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| Double the security and pet damage deposit paid $\$750.00 + \$750.00 = \$1,500 \times 2 = \3000.00 | \$3,000.00 |
| Breach of quiet enjoyment and interference caused by Landlord's agent and realtor and prospective buyers | \$300.00 |
| Breach of quiet enjoyment caused by Landlord's failure to remove tree wasted for two years | \$600.00 |
| Compensation for items damaged by Landlord when the Landlord entered rental unit on November 9, 2014 and removed Tenants' belongings | \$600.00 |
| Filing fee paid by Tenants | \$50.00 |
| TOTAL | \$4,550.00 |

The Tenants are given a formal Order in the above terms and the Landlord must be served with a copy of this Order as soon as possible. Should the Landlord fail to comply with this Order, the Order may be filed in the small claims division of the Provincial Court and enforced as an Order of that court.

Conclusion

The Landlord failed to attend the hearing and his application is dismissed without leave to reapply.

The Landlord failed to return the security and pet damage deposit as required and the Tenants are entitled to return of double the deposits paid.

The Tenants are entitled to monetary compensation pursuant to section 67 for the Landlord's breach of the covenant of quiet enjoyment, and for losses incurred by the Tenants when the Landlord entered the rental unit and removed their personal items.

The Tenants are awarded a Monetary Order pursuant to section 67 of the *Act* in the amount of \$4,550.00 including the \$50.00 filing fee.

This decision is final and binding on the parties, unless 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 23, 2015

Residential Tenancy Branch

