Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WALL FINANCIAL CORPORATION
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

The landlord was represented by its agent. The tenant BN (the tenant) appeared. The tenant confirmed he had authority to act on behalf of both tenants. Both parties were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant elected to call one witness, SM.

The agent testified that the landlord served the tenants with the dispute resolution package on 7 January 2015 by registered mail. The landlord provided me with Canada Post customer receipts that showed the same. The tenant did not dispute service. On the basis of this evidence, I am satisfied that the tenants were served with the dispute resolution package pursuant to section 89 of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, damage, and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

While I have turned my mind to all the documentary evidence, and testimony, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 1 September 2013. The parties entered into a fixed-term tenancy agreement on 3 August 2014. The fixed-term tenancy ended 28 February 2014, after which time it continued on a month-to-month basis. Monthly rent of $835.00 was payable on the first. Heat and hot water were included in the rent. The landlord collected a security deposit of $417.50 at the beginning of the tenancy, which it continues to hold.

On 2 December 2014 the tenant EN signed a document titled "Late Notice to Vacate". In that notice the tenant EN acknowledged that the tenants would be responsible for rent for January 2015 if the "suite [was] not re-rented as a result of submitting Late Notice to Vacate." On the bottom of the notice was the handwritten notation, "leaving for the reason of lack of heat/hot water throughout…"

The tenants vacated the rental unit 30 December 2014.

The landlord provided me with a copy of the move-in/move-out inspection report. There is nothing remarkable about the move-in inspection report. On the condition move-out inspection report the notation "S" appears beside the various incidents of "carpet". The notation "R" appears beside the various incidents of "drapes". According to the legend for the report "S" means "Carpet Shampoo Required", "D" means "Dirty" and "R" means "Requires Cleaning". The move-out inspection report notes that the unit was repainted, the carpets were cleaned and the drapes were cleaned.

The landlord provided me with a copy of an invoice for carpet cleaning dated 7 January 2015. The invoice is in the amount of $78.75.

The landlord provided me with a copy of an invoice for drape cleaning dated 6 January 2015. The invoice in respect of work completed on the rental unit is in the amount of $25.00.

The tenant testified that since 1 September 2013 there were problems with the heat and hot water. The tenant testified that the heat would shut down and that when the boilers were not working there was no heat or hot water. The tenant admitted that the tenants never put any of their complaints in writing. The tenant testified that an anonymous letter was left in the lobby of the building regarding the heat and hot water. The tenant submitted that this notice constitutes written notice of the issues. The tenant estimated that he would call the landlord approximately twice per week about the problem. The tenant estimated that the problems occurred two to three times per week over the winter.

The agent testified that the boiler for the building is old and that when the landlord would arrange for a replacement part, the boiler would sometimes break again. The agent testified that the landlord has not left tenants without heat and hot water. The agent testified that the tenants would have told her if something was broken and submits that the tenants' failure to make their own application is evidence that nothing was wrong with the rental unit.

The tenant testified that on 4 December 2014 someone made a complaint call to the head office regarding the heat and hot water. The tenant submitted that agents of the landlord believed that the tenants made this complaint and chose not to rent the rental unit as retribution for this call.

The tenant testified that the tenants went to look at a new rental unit on 30 November 2014. The tenants went that day at 1530 to the office to provide their notice. At that time the office was closed. The tenant submits that because of the office closure, the tenants were unable to deliver their notice to end tenancy that day.

The tenant testified that the tenants have always given proper notice to end their past tenancies so after they were unable to deliver their notice on 30 November 2014, the tenants reconciled themselves with staying another month; however, on 1 December 2014 the tenants had no heat so they decided that they had to move.

The tenant testified that the tenants had people call the landlord to inquire as to the availability of two-bedroom rental units. Each time the landlord's employees informed the callers that there was no current availability for two-bedroom rental units. The tenant testified to the following telephone calls:

- On 4 December 2015 the caller (the tenant EN's mother) was told that there were no apartments available for either 1 January 2015 or 1 February 2015.
- On 7 December 2014 the caller (the tenants' son) was told that there were no two bedroom rental units available;
- On 8 December 2014 in the afternoon a coworker of the tenant EN called the landlord and there was no answer;
- On 10 December 2015 in the afternoon the caller was told that there were no two bedroom rental units available;
- On 11 December 2014 the caller was told that there were no rentals and no showings for two bedrooms;
- On 15 December 2015 the witness called the landlord; and
- On 22 December 2015 the witness called the landlord.

The witness testified that she telephone the landlord's office to inquire about available two bedroom units. Each time the witness was told that there was no availability and to phone back. The witness testified that she phone three times and each time was told that there was no availability. The witness testified that she phoned the landlord's office near the beginning of December, around the 14th or 15th of December and around the 22nd of December. The witness testified that on the phone call of 14 or 15 December the employee of the landlord said that no one had given notice. The witness did not know the name of the employee with whom she spoke.

The tenant testified that the agent at the building to which the tenants were moving referred four parties that were looking for two-bedroom units to the landlord. The tenant admitted that he had no way of knowing whether or not these prospective parties followed up on the referral.

The agent testified that no one called to inquire about a two bedroom. The agent testified that she would have re-rented the rental unit if she could. The agent took offense to the tenant's suggestion that she intentionally prevented the rerental of the rental unit. The agent testified that the office was not closed on 30 November 2014 although states that she could have stepped away.

The tenant testified that the condition move out inspection as scheduled for 31 December 2014. The tenant testified that the tenants found that workers had entered

the rental unit at 0900. The tenants called the police at that time as the tenants believed that the landlord's agents had wrongly entered the rental unit.

The tenant testified that the drapes were clean. The tenant admits that the carpets were not professionally cleaned.

The agent testified that the landlord advertises its rental units by way of standing advertisements both online and in a local newspaper.

The landlord provided me with a copy of an internet advertisement. The advertisement is for two bedroom apartments. The advertisement states that the rental unit is available 1 July.

The landlord provided me with a copy of the advertisement proof for the local newspaper. That advertisement ran from 2 December 2014 to 30 December 2014 and again from 6 January 2015 to 29 January 2015. The advertisement was a generic ad in respect of one, two and three bedroom units.

The landlord seeks a total monetary order in the amount of $986.25:

Item	**Amount**
Unpaid January Rent	$835.00
Carpet Cleaning	78.75
Drape Cleaning	25.00
Carry Forward Credit	-2.50
Filing Fee	50.00
Total Monetary Order Sought	**$986.25**

The landlord provided me with a copy of an authorization to retain the security deposit. In that agreement the tenant EN agrees that the landlord may retain the amount it incurred for carpet cleaning, but disagrees with the purported charges for drape cleaning and January's rent loss.

Analysis

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant abandons the rental unit.

Subsection 45(3) of the Act allows a tenant to end a tenancy for breach of a material term:

> 45 (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service 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.

The tenants did not provide written notice of the failure in respect of the material term to the landlord. The anonymous letter in the lobby does not satisfy this requirement. Accordingly, the tenants could not give notice pursuant to subsection 45(3) of the Act.

At the time of the tenants' notice the tenancy agreement was a month-to-month tenancy. Subsection 45(1) of the Act sets out that:

> A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
>
> (a) is not earlier that one month after the date after the landlord receives the notice, and
>
> (b) is before the day in the month...that rent is payable under the tenancy agreement.

The tenants gave notice on 2 December 2014 to vacate effective 31 December 2014. The tenants' rent was payable on the first. The earliest effective date of the tenant's notice given 2 December 2014 was 31 January 2015. It is not relevant that the landlord's office was not open on 30 November 2014: the Act does not create a positive obligation on the landlord to maintain an on-site office; and, furthermore, 30 November 2014 was a Sunday. On the basis of this evidence, I find that the tenants failed to provide notice as required under the Act.

The landlord submits that the tenants' failure to provide proper notice pursuant to subsection 45(1) resulted in a rental loss to the landlord for January 2015.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

As the tenants failed to provide notice that complied with the Act as that notice was two days later than required, I must then consider whether the landlord has sufficiently mitigated its damages.

The landlord's advertisements provided are general advertisements that are continuously posted. I find that these advertisements show a general intent to rent units within the residential property, but not necessarily the tenants' unit.

There are conflicts in the testimony I received in the hearing from various parties. Most problematic is the conflict regarding whether or not the landlord's employee told callers that there were no two-bedroom rental units available: Where the tenant's, witness's and agent's testimonies conflict, I prefer the testimony of the witness and tenant. I prefer the tenant's and witness's testimony as their testimonies were consistent with each other and thus corroborated. I do not believe that the agent is providing false evidence intentionally; rather, the agent is only capable of providing evidence that is within her own knowledge and cannot definitively say without consulting other staff members whether any call was received by any staff member. I put no weight in the tenant's allegation that the agent intentionally frustrated the rerental or acted in bad faith. This is likely a case of miscommunication. Thus, I find that the tenants' agents called the landlord and that the landlord's employee(s) repeatedly informed the callers that there were no two-bedroom rental units available.

On the basis of the tenant's and witness's evidence, I find that prospective tenants were not being alerted as to the availability of a two bedroom rental unit. By failing to advise callers that a two-bedroom rental unit was available for January 2015 the landlord failed to mitigate its damages and is thus not entitled to recover any amount from the tenants for lost rent.

Subsection 32(2) of the Act requires a tenant to maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. *Residential Tenancy Policy Guideline*, "1. Landlord & Tenant – Responsibility for Residential Premises" states:

> Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year.

This tenancy lasted over one year. The landlord provided me with a receipt for carpet cleaning in the amount of $78.75. The tenants admit their liability in respect of this expense. Accordingly, I find that the landlord is entitled to recover this amount from the tenants.

Residential Tenancy Policy Guideline, "1. Landlord & Tenant – Responsibility for Residential Premises" provides guidance on the level of cleaning required for drapes:

> **INTERNAL WINDOW COVERINGS**
>
> 1. If window coverings are provided at the beginning of the tenancy they must be clean and in a reasonable state of repair.
> 2. The landlord is not expected to clean the internal window coverings during the tenancy unless something unusual happens, like a water leak, which is not caused by the tenant.
> 3. The tenant is expected to <u>leave the internal window coverings clean</u> when he or she vacates. The tenant should check with the landlord before cleaning in case there are any special cleaning instructions. The tenant is not responsible for water stains due to inadequate windows.
> 4. The tenant may be liable for replacing internal window coverings, or paying for their depreciated value, when he or she has damaged the internal window coverings deliberately, or has misused them e.g. cigarette burns, not using the "pulls", claw marks, etc.
> 5. <u>The tenant is expected to clean the internal window coverings at the end of the tenancy regardless of the length of the tenancy where he or she, or another occupant smoked in the premises.</u>
>
> [emphasis added]

The tenants dispute that the drapes needed cleaning and advised the landlord of this disagreement on the authorization form. The tenant testified that the drapes were clean. The landlord has provided a receipt for the cleaning, but has not provided any photographic evidence that the drapes required cleaning. The condition move-out inspection report does not detail that the drapes were “dirty” but that they “required cleaning”. There is no requirement under the Act or policy guidelines that a tenant must clean the drapes, merely that the drapes must be clean. The only positive requirement on a tenant to clean the drapes is where they are dirty or the tenant smoked. I find that the landlord has failed to show on a balance of probabilities that the drapes required cleaning in order to bring the drapes into compliance with subsection 32(2) of the Act. The landlord is not entitled to recover this cost.

The landlord has been successful in proving entitlement to $78.75 out of its total claim of $938.75. The landlord seeks to recover its filing fee from the tenants. Subsection 72(1) permits an arbitrator to make a discretionary award of repayment of a filing fee from one party to another. Generally this repayment is ordered where a party has been successful in its application. In this case, as the landlord has experienced marginal success in its application. Accordingly, I am excising my discretion to refuse to award recovery of the filing fee.

The landlord is entitled to retain $78.75 from the tenants’ security deposit of $417.50.

Residential Tenancy Policy Guideline, “17. Security Deposit and Set off” provides guidance in this situation:

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
   - a landlord’s application to retain all or part of the security deposit, or
   - a tenant’s application for the return of the deposit

   unless the tenant’s right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

There is no evidence before me that indicates that the tenants' right to the security deposit has been extinguished. As there is a balance in the amount of $338.75, I order that the balance of the tenants' security deposit shall be returned to the tenants forthwith.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $338.75 under the following terms:

Item	**Amount**
Security Deposit	$417.50
Carpet Cleaning	-78.75
Total Monetary Order	**$338.75**

The tenants are provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and 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 subsection 9.1(1) of the Act.

Dated: May 27, 2015

Residential Tenancy Branch