Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNR, MNDC, MNSD, RR, FF

Introduction

This hearing was convened in response to an application by the Landlord and an application by the Tenant pursuant to the *Residential Tenancy Act* (the "Act").

The Landlord applied on November 4, 2014 for:

1. An Order to retain the security deposit; and
2. An Order to recover the filing fee for this application - Section 72.

The Tenant applied on November 10, 2014, with an amendment made May 13, 2015 for:

1. A Monetary Order for the cost of emergency repairs – Section 67;
2. A Monetary Order for compensation - Section 67;
3. An Order for the return of the security deposit – Section 38;
4. An Order for a rent reduction – Section 65; and
5. An Order to recover the filing fee for this application - Section 72.

The Tenants and Landlords were each given full opportunity under oath to be heard, to present evidence and to make submissions.

Preliminary Matters

It is noted that the Landlord filed no documentary evidence other than a copy of a monetary order dated October 22, 2014. The Landlord did not raise any issues in relation to receipt of the Tenant's evidence package which I note contains a separately set out and clearly marked amendment as required under Rule 2.11 of the Residential

Tenancy Rules of Procedure. The amendment raised the total monetary claim to $24,398.05

Issue(s) to be Decided

Is the Landlord entitled to retain the security deposit?
Is the Tenant entitled to the monetary amounts claimed?

Background and Evidence

The following are undisputed facts: The tenancy started on April 1, 2014 and ended on October 31, 2015. Rent of $1,850.00 was payable monthly and at the outset of the tenancy the Landlord collected $1,850.00 as a security deposit. No move-in condition inspection was conducted or report completed. On July 7, 2014 a flood into the unit occurred caused by a break in the septic line.

The Tenant states that they provided their forwarding address in writing to the Landlord on October 24, 2014 during the move-out inspection as was agreed at a hearing that occurred on October 22, 2014. The Tenant states that as a result of the hearing the Landlord was given a monetary order and that the Landlord should have returned the security deposit as the Landlord said it would do after the move-out inspection. The Tenant states that the Landlord has not returned the security deposit and claims return of double. The Landlord states that they made an application for dispute resolution to claim against the security deposit based on the prior monetary order. The Landlord states that the application was made before the Landlord obtained a garnishee order from small claims court and that the Tenants have paid everything except approximately $1,000.00 into court. The Landlord claims $925.00.

The Tenant states that at the initial viewing the unit was still occupied and was a mess. The Tenant states that the Landlord had assured them at the time of signing the agreement that the unit would be professionally cleaned inside and that garbage left outside by the tenants would be removed. The Tenant states that the unit was not clean and the garbage was not removed at their move-in. The Tenant states that the

Landlord only apologized and told the Tenants to send him a list of defects. The Tenant states that no compensation was offered to the Tenants and that the Tenants spend several hours cleaning the unit and hauling garbage to one area outside the unit. The Tenant provided several witness letters in relation to the state of the unit at move-in. The Tenant states that a list of deficiencies was sent to the Landlord by text. The Tenant claims $800.00 in compensation.

The Landlord states that the unit, including the carpet, was cleaned before the Tenants moved in. The Landlord states that a couple of people were hired and that an invoice exists. The Landlord did not provide a copy of that invoice as evidence. The Landlord agrees that the garbage was never removed. The Landlord does not know why a move-in inspection was not conducted.

The Tenant states that when the unit was first viewed and before the tenancy agreement was signed no pump was running at the unit and that when they moved in they discovered a pump making a loud noise. The Tenant submits that the pump ran, likely in accordance with the rain, malfunctioned and on occasion smoked. The Tenant provided digital evidence of the pump. The Tenant states that after several weeks of texting the Landlord the Tenants were finally informed that the pump was a sump pump. The Tenant states that the Landlord made daily unannounced trips to the pump as the pump had to be started and stopped manually. The Tenants claim that the pump noise and daily intrusion by the Landlord caused a loss of quiet enjoyment for the length of the tenancy. The Tenants claim $450.00 per month for 7 months for a total of $3,150.00.

The Landlord states that the sump pump is located at the back stairs and that its operation is triggered only by water. The Landlord denies going to the unit daily and that his brother only went a few times to check on the pump.

The Tenant states that the deck was in need of repairs from the onset of the tenancy and when asked at move in when it would be repaired the Landlord said it would not be repaired. The Tenant states that plants were placed over the deck areas that appeared

the worst but in May 2014 her son fell through the deck three times. The Tenant states that the Landlord was informed of this and verbally agreed to fix the deck but did nothing. The Tenant states that after this they no longer were able to use the deck, they could not access the back yard safely and that the children were restricted to playing in the front. The Tenant claims $3,000.00 for the injuries to her son and $1,500.00 for the loss of use and enjoyment. The Tenant provided photos of the deck.

The Landlord states that the Tenant did inform the Landlord of one broken board on the deck when the plumber was there and that it was repaired. The Landlord denies that the deck is in disrepair and states that it is still being used.

The Tenant states that ants invaded their child's bedroom in June 2014 and that although an exterminator came out, the exterminator informed the Tenants that no treatment could take place until various environmental changes, such as the removal of bushes and trees touching the unit, were made to the exterior of the unit as treatment would otherwise be a waste of time. The Tenant states that the Landlord was informed and told the Tenants that "it was not happening". The Tenant states that her child refused to sleep in the bedroom and that the Tenant had to clear the areas. The Tenant states that it took her three weeks to clear the bushes. After the Tenant did this work the exterminator returned to treat the unit. The Tenant claims $160.00 for her work and $450.00 for the loss of use of the bedroom. The Tenant provided a copy of the exterminator's requirements and recommendations dated June 14, 2014.

The Landlord states that the exterminator did treat the unit a couple of days after the ants were reported and that the Tenants had to leave the home for the 4 to 6 hours during and after the treatment. The Landlord states that the exterminator was called Joe and was paid. The Tenant states that this is not the name of the exterminator who treated the unit after the Tenant did the work.

The Tenant states that at the outset of the tenancy the Landlord required them to obtain tenants insurance and that when asked as part of the insurance application questions

the Landlord told them that the unit was connected to the city sewer and water system. The Tenants then obtained the insurance. The Tenant states that a few days before the flood that occurred in July 2014 the pump began making louder noise and black fluid started to come up into the sinks and toilets. The Tenant states that they also discovered several cans of toilet and sink drainage fluid. The Tenant states that she called the Landlord at this time but no received no response.

The Tenant states that when the flood occurred the Tenants discovered that the unit was on its own septic system. The Tenant states that the basement was flooded, the flooring between the basement and upper level was flooded and the bathrooms' floors were flooded. The Tenant provided photos. The Tenant states that at the time of the flood they still had several boxes of household goods stored that had not been unpacked and that all of the stored belongings were damaged. The Tenant describes a loss of sentimental items, Christmas decorations and a bottle collection as well. The Tenant submits that while the Landlord attended immediately to repair the problem the Landlord did not want to make an insurance claim.

The Tenant states that their insurance agent told them that they were not covered for losses from the septic system as they were insured on the basis of the city system. The Tenant states that the Landlord told the Tenants that they could clean the unit and send him the bill including the damaged items for the Landlord to consider. The Tenant states that such a list was provided but no compensation has been received.

The Tenant states that the Landlord should have had the unit cleaned professionally and that after speaking with remediation companies about how to clean up after a sewage back-up, the Tenants continued to be concerned about the safety of the unit and the growth of mold. The Tennant states that it took 84 hours over 2 weeks to complete the cleaning. The Tenant provided photos of the unit at the time of the flood. The Tenant claims $4,932.00 to include the cleaning costs and loss of enjoyment of the unit following the flood to the end of the tenancy. The Tenant provided a list of articles

damaged or lost and claims $9,000.00. This amount represents the first three items set out on the monetary worksheet that total more than $9,000.00.

The Landlord states that the Tenants never asked about the sewer system and that the Landlord did not tell them about the system as it was not considered to be something the Tenants needed to know. The Landlord denies getting any texts from the Tenant in advance of the flood. The Landlord states that they were completely caught off guard by the flood and thereafter discovered that the septic system broke in the ground. The Landlord states that the system was last serviced about 9 months before the tenancy started. No documentation in relation to the servicing was provided however the Landlord provided the name of the company that did the work.

The Landlord states that the unit was inspected the day after the flood and that while there was a backup the amount is highly exaggerated. The sewer did not get into the walls and was only on concrete. The Landlord states that they agreed that the Tenants would be compensated for cleaning and that the Tenant was supposed to submit her loss of belongings claim to their insurance. The Landlord states that $500.00 is a reasonable amount to compensate the Tenants for their work to clean the unit.

The Tenant states that copies of the texts have been provided as evidence and that the texts are in relation to the discovery of several draino bottles along with the plumbing and pipe issues. The Landlord states that the Tenants do not have tenants insurance. The Tenant provided their insurance company name along with the name of the manager.

Analysis

Section 38 of the Act provides that 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.

Although at the time of the application the claim to retain the security deposit had merit as the Landlord started the enforcement of the monetary order through the small claims process, as monies towards the monetary order has been paid into that court by the Tenants, as the Landlord provided no documentation indicating the amount remaining owed and as the Landlord only provided an estimate of the amount still outstanding, I decline to make any order in relation to the Landlord's entitlement to retain any portion of the security deposit. As this is the sole claim in the Landlord's application, I dismiss the Landlord's claim for recovery of the filing fee.

Section 38 of the Act provides that within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit or make an application for dispute resolution claiming against the security deposit. Where a Landlord fails to comply with this section, the landlord must pay the tenant double the amount of the security deposit. As the Landlord originally had a valid claim against the security deposit due to the outstanding monetary order and considering that the Landlord made its application to retain the security deposit within 15 days receipt of the Tenant's forwarding address, I find that the Tenant is not entitled to return of double the security deposit. I find that the Tenants are entitled to return of the original amount of **$1,850.00** plus zero interest.

Section 7 of the Act provides that where a landlord does not comply with the Act, regulation or tenancy agreement, the landlord must compensate the tenant for damage or loss that results. Section 32 of the Act provides that a landlord must provide residential property in a state of decoration and repair that having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant. Although the Landlord states that the unit was cleaned at move-in the Landlord provided no supporting evidence such as a move-in condition report. Considering the Tenant's witness letters I find the Tenant's evidence to be more believable. Further, it is undisputed that the Landlord received a list of deficiencies at the beginning of the tenancy in response to the Landlord's request for one. This supports the finding that the unit was not in suitable condition at move-in and that the Landlord by implication agreed

to remedy the deficiencies. Given the Tenant's evidence of the amount of cleaning that was required I find that the amount claimed by the Tenant is reasonable and I therefore find that the Tenant is entitled to **$800.00** for cleaning the unit. This amount also compensates the Tenant for having the garbage left in the yard throughout the tenancy that the Landlord agrees was never removed.

Section 29 of the Act provides that a landlord's right to enter the rental unit, which includes the rental unit yard, is restricted and sets out exceptions such as after providing notice or in an emergency. Section 28 of the Act provides that a tenant is entitled to quiet enjoyment including, but not limited to, reasonable privacy and freedom from unreasonable disturbance. Based on the undisputed evidence that the Tenants were not informed of an active sump pump that would be present throughout the tenancy and accepting that the operation of the pump would present some disturbance, I find that the unit was initially misrepresented to the Tenant. Considering the Tenant's evidence of the noise caused by the pump and considering the evidence that the Landlord entered the yard and unit without right, I find that the Tenant has substantiated that the Landlord breached the Tenant's right to quiet enjoyment of the unit. However, I accept that the pump did not work constantly and that the Landlord was not there in a daily basis. I find therefore that the amount claimed by the Tenant is excessive. As a result I find that the Tenant has only substantiated a nominal amount of $100.00 per month for 7 months of the noise and intrusions by the Landlord for a total of **$700.00**.

Section 32 of the Act provides that a landlord must provide and maintain residential property in a state of decoration and repair that

> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Based on the undisputed evidence that the Tenant's child fell through the deck, considering the disrepair shown on the Tenant's photos of the deck, and considering

that the Landlord provided no evidence that the deck was inspected for safety, I find on a balance of probabilities that the Tenant has substantiated that the deck was not fit for use and that the Tenants lost the use of the deck from May to October 2014 inclusive. I consider $100.00 per month to represent a reasonably proportional amount of loss and that the Tenant is therefore entitled to **$600.00**. As the Tenant provided no evidence of injuries to the child as a result of falling through the deck I dismiss this claim.

Whether or not the Landlord was negligent in relation to the causation of the flood, given the lack of disclosure in relation to the sump pump, and the Landlord's evidence that the Tenants did not need to know about the sewer system, I find it likely that the Landlord would act evasively in relation to the Tenants' insurance. I find therefore that the Tenant has substantiated that the Landlord, either by negligent omission or false representation, caused the Tenants to have insufficient insurance coverage for their losses due to the back up of sewer. As a result I find that the Tenants are entitled to compensation for their lost belongings from the Landlord. Although the Tenant is claiming original costs or replacement costs on several items, as the Landlord provided no evidence to rebut the monetary amounts and estimates claimed by the Tenant, considering the detailed list of lost articles includes sentimental items and a large and unique bottle collection and accepting that it is difficult to put a value on sentimental items and unique collections, I find that the Tenant is entitled to the **$9,000.00** claimed.

Given the Landlord's agreement that the Tenants could carry out the clean-up and considering that the Landlord is responsible to maintain a unit, regardless of insurance coverage, I find that the Tenant is entitled to compensation for the clean-up. I also accept that the Tenants lost enjoyment of the unit during the flood and cleaning period. Despite no agreement on the amount to be paid for that work, I find the amount claimed by the Tenant for both the cleaning and the loss of enjoyment to be reasonable given the area that flooded. The Tenants are therefore entitled to the **$4,932.00** claimed.

Given the Tenant's evidence of the pest recommendations for repairs, the lack of any evidence from the Landlord such as a pest treatment bill, I find it likely that the Landlord

was provided a copy of these recommendations and that the unit was treated after the Tenant carried out the repairs. I do accept that the Tenants' quiet enjoyment of the unit was disturbed by the presence of the ants and that they lost use of a bedroom for three weeks. Although there was no agreement by the Landlord for the Tenant to carry out repairs and as this was not an emergency situation, the Landlord benefited from the Tenant's work as the Tenants' loss of use and enjoyment was reduced. As I find the amount claimed for the loss of one bedroom to be in excess of a reasonable and proportionate amount of the rent, I find that the Tenant has only substantiated a global and nominal amount of **$300.00** for their losses and their labour.

As a claim for a rent reduction can only be made for an ongoing tenancy, I dismiss this claim. As the Tenants' application has met with significant success, I find that the Tenants are entitled to recovery of the **$100.00** filing fee for a total entitlement of **$18,282.00**. This amount may be set off against any amount remaining unpaid under the earlier order in favor of the Landlord.

Conclusion

I grant the Tenant an order under Section 67 of the Act for **$18,282.00**. If necessary, this order may be filed in the Small Claims 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: June 5, 2015

Residential Tenancy Branch