Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MNSD, MNDC; CNC, MNDC

Introduction

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

- an order of possession for cause pursuant to section 55;
- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; and
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38.

The landlord claims for $2,410.05:

Item	Amount
July Rental Loss	$900.00
Lost Wages (as amended at hearing)	310.40
Damage to Driveway	414.75
Damage to Countertops	$784.90
Total Monetary Order Sought	**$2,410.05**

This hearing also dealt with the tenants' application pursuant to the Act for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67.

The tenants claim for $3,100.00:

Item	Amount
Overpaid Rent Mar 2013 to Jan 2015	$550.00
Overpaid Rent Feb 2014 to Jun 2015	$2,550.00
Total Monetary Order Sought	**$3,100.00**

Both tenants appeared. The landlord appeared. All parties in attendance 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. Neither side elected to call any witnesses.

I confirmed with each party the totality of the evidence before me. Neither party raised any issues with service. Both parties provided late evidence. The landlord amended her application less just over one week before the hearing. Neither party raised any objection to the late evidence or late amendment at the hearing.

Preliminary Issue – Scope of Proceedings

On 18 June 2015, the parties attended a previous hearing before this Branch. The hearing was in relation to the landlord's application seeking an early end to the tenancy.

At that hearing, the parties reached a settlement and agreed to end the tenancy. The settlement agreement was recorded as a decision of this Branch:

> *The parties mutually agreed to end the tenancy on June 30, 2015. The Landlord is issued with an Order of Possession for this date and is allowed to deduct the agreed amount of $25.00 from the Tenants' security deposit to recover the filing fee.*

The parties confirmed that the tenancy ended on or before 30 June 2015. As the tenancy has ended the issues regarding the 1 Month Notice are moot. The parties each consented to withdrawing the portions of their claim in relation to the 1 Month Notice.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for 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?

Are the tenants entitled to a monetary award for losses arising out of this tenancy?

Background and Evidence

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

The tenant ME began a tenancy with the landlord on or about 15 January 2010. The current tenancy ended on or before 30 June 2015. Monthly rent of $900.00 was paid on the first. The landlord holds a security deposit in the amount of $350.00 and a pet damage deposit in the amount of $300.00.

When the tenant ME began occupation of the rental unit he was living with his partner CB. The tenancy agreement that I was provided with was between the tenant ME, CB and the landlord. This written tenancy agreement provides that utilities are included in rent. The landlord made

annotations on the original tenancy agreement, which she submits constitute a condition move-in inspection report. At some point during the initial tenancy CB vacated the rental unit. The parties agreed that CB was not a party to these applications.

The landlord, ME and CB did not complete a condition move in inspection at the beginning of the tenancy. The landlord and the tenants did not complete a condition move in inspection when the tenant AS moved in.

The tenant ME testified that the landlord was complaining about utility cost increase. The tenant ME testified that he offered to contribute $50.00 more per month for utilities. The landlord asked if the tenant ME wanted this agreement in writing: the tenant ME declined. The tenant ME now submits that by failing to commit this increase to writing, the rent increase is invalid.

In or about February 2014, the tenant AS began occupying the rental unit. At that time, the tenants began paying $900.00 in rent. The tenant ME testified that this amount was to compensate for the increased utility use. The tenant ME testified that the relationship was fine between the parties at this time. The tenant ME testified that he was not aware of the rule that mutual rent increases need to be agreed to in writing. Neither party raised any issue with AS being named as a tenant in the 1 Month Notice or the landlord's application. The tenant AS is named as a tenant in the tenants' application.

The parties agree that the tenants papered the window of the rental unit with a printed copy of the Act. At some point after the first hearing on 18 June 2015, the printed Act was replaced with copies of statements regarding this dispute.

The landlord provided me with a photograph of the details of the dispute papering the door to the rental unit.

The tenant ME admits to placing the papers in the windows. The tenant ME testified that the papers were placed over the windows to provide privacy. The tenant AS testified that she did not think that the landlord respected their privacy. The tenants both testified that all the papers were removed by 24 June 2015. The tenant ME testified that the Act and details relating to this dispute were not chosen, but were rather convenient as they were available to use.

Both tenants testified that they were never given notice of any entry by the landlord and did not deny any request. The tenant AS testified that the tenants did not do anything active to discourage the rerental of the unit. The tenant ME submits that the landlord filed for compensation for July's rent loss too early as she could have not known on 26 June 2015 (the date of her application's filing) that there would be any loss.

The landlord testified that she advertised the rental unit as available on an internal health workers' website, a social media site, and through her friends. The landlord admitted that she did not post the rental unit as available to view before 1 July 2015. The landlord testified that

she did not consider it reasonable to be able to show the rental unit with the windows papered. The landlord testified that she showed the exterior of the rental unit to a prospective tenant on or about 21 June 2015. The landlord testified that she saw no purpose to the content of the paper posting other than retaliation. The landlord admits that she never made any request to show the interior of the rental unit to any prospective tenants.

I received a written statement from LD. LD wrote that she came to view the residential property to discuss renting the unit. LD wrote that she saw the paper covering the rental unit windows and doors. LD wrote that it was the Act. LD wrote that she found the presence of the papers "disturbing" and "uncomfortable". LD wrote that the landlord told her the landlord was uncertain whether she would be able to show the rental unit before the tenants vacated. LD wrote that she was unable to secure a tenancy for 1 July 2015 in the rental unit.

On or about 29 June 2015, the parties conducted a condition move out inspection. The RCMP attended to supervise. A condition move out inspection report was created by the landlord. The report is in the approved form. The landlord testified that she added the notation "damaged – knife marks" after the inspection occurred and that she added this notation into the wrong field of the condition move out inspection report. The tenant ME indicated on the report that he did not agree with the report because a "report [was] never done before or after move in." The tenant ME also notes "driveway damage unavoidable – poorly designed".

The landlord provided me with photographs of the damage. The photographs show a gouge across the driveway. The landlord testified that the gouge is about four feet long and one inch deep. Scraped up asphalt is visible in the photograph. The photograph of the counter shows knife-hatch marks in the surface. The damage appears to be that which would occur if one used the surface as a cutting board.

The landlord testified that on 28 June 2015 the tenants were in and out of the drive way moving out. The landlord testified that she went down to the beach with her daughter at approximately 1630. At that time the landlord saw the tenants with a rental moving truck. The landlord testified that she came back from the beach to find the truck stuck at the bottom of the driveway. The landlord believes that the damage was caused by the hitch, but admits that at the time the truck was stuck, the hitch of the truck was not touching the driveway. The landlord admits that she did not see or hear the damage occur.

The tenants submit that if the truck did damage the driveway the damage was unavoidable. The tenant ME explained that he placed the notation regarding this damage on the condition move out inspection report because he thought he might have done the damage, but after considering it he did not believe that the truck caused the damage to the asphalt. The tenant ME testified that the drive way is very steep. The tenant AS testified that she was in the truck and did not see or hear any damage.

The landlord provided me with a quote for repairing the driveway. The quote is in the amount of $414.75. The landlord testified that she only solicited one quote. The landlord testified that the company providing the quote was the company that installed the driveway. The landlord testified that at the time she used the company to install the driveway: this company provided the best value.

The landlord testified that the damage to the kitchen countertop was not there when the tenant ME began occupancy of the rental unit. The landlord testified that the house is 11 or 12 years old. The landlord testified that she did not notice the damage to the countertops until the day after the condition move out inspection occurred. The landlord testified that the hatch marks on the counter were the type one would expect to see in a cutting board.

The tenant ME testified that he did not cut on the counter, but says that the former tenant CB may have caused this damage. The tenant AS testified that the damage to the countertop was there when she moved into the rental unit.

The landlord provided me with a quote for repairing the countertop. The quote is in the amount of $784.90. The landlord testified that the repair required the replacement of the whole top. The landlord testified that she only solicited one quote. The landlord testified that she chose this company as she believed that this company provided the best value.

I was provided with a letter dated 29 June 2015. The letter purports to set out the tenants' forwarding address. The forwarding address provided is the rental unit.

The landlord seeks her wages for two half days of missed work as a result of attending this hearing and the prior hearing.

Analysis

Landlord's Claim

The landlord seeks compensation for her rental loss for July. The landlord says that due to the tenants' persistence in papering the windows of the rental unit with materials related to this hearing she did not feel like she could show the unit. The landlord testified that she did show the unit to LD and that LD was made to feel uncomfortable by the postings.

There is no provision under the Act that prevents the tenants from posting materials to their windows. Section 91 of the Act permits me to apply the common law of landlord and tenant; however, I was not provided with any common law justification by the landlord that would permit me to find that intentionally interfering with the landlord's rerental fits within the common law of landlord and tenant. Accordingly, I have no ability to provide compensation for these actions by the tenants. This does not mean that I endorse the tenants' conduct. Further, nothing in this

decision prevents the landlord from seeking a remedy for any claim outside the scope of this Branch's jurisdiction against the tenants in a court of competent jurisdiction.

The landlord seeks compensation for the cost of repairing damage alleged to have been done by the tenants. In particular, the landlord seeks compensation for repair of a gouge in the asphalt driveway and compensation for replacement of a countertop.

The landlord submits that the notes on the original tenancy agreement are the condition move in inspection report. The *Residential Tenancy Regulation* (the Regulation) sets out various requirements of the form of a condition inspection report. The notations on the tenancy agreement do not meet the requirements established by the Regulation. The reason that this is important is because, pursuant to section 21 of the Regulation, the report creates strong evidence of the state of the rental unit at the beginning of the tenancy. By failing to create this report, the landlord has denied herself the best evidence of the condition of the rental unit. Further, by failing to complete this report the landlord has extinguished her right to claim against the security deposit for damages.

Subsection 32(3) of the Act requires a tenant to repair damage to the rental unit or common areas that was caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant. Caused means that the actions of the tenant or his visitor logically led to the damage of which the landlord complains.

In respect of the damage to the counter top, I find that the landlord has failed to provide sufficient evidence that the damage occurred in the course of this tenancy. In particular, the damage is of the nature that it may have gone overlooked. The landlord has failed to satisfy me, on a balance of probabilities, that the tenants caused the damage to the counter top. Accordingly, she is not entitled to recover the costs of repair.

In respect of the damage to the driveway, I find that the landlord has proven that the tenants caused the damage to the driveway. In particular, I prefer the landlord's evidence to that of the tenants as the tenant ME previously admitted that he caused the damage to the driveway on the condition move out inspection report, but denied responsibility for its repair because he viewed the damage as an inevitable byproduct of the driveway's poor design. Also, the driveway is an area of the residential property to which the landlord had regular access and she would be aware of the when damage occurred to that area of the property. As such, I find that the tenants caused the damage to the residential property.

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.

The landlord provided me with an estimate to repair the driveway damage in the amount of $414.75. I accept the landlord's evidence that, to this best of her knowledge, the company from which she received the estimate provides good value. The estimate is for a repair and not replacement of the area. I find that the landlord has proven her entitlement to the full amount of the asphalt repairs.

The landlord seeks compensation for her lost work time for attending the previous application and this application. I consider this to be in the nature of a "costs" award.

Section 72 of the Act allows for repayment of fees for starting dispute resolution proceedings and charged by the Residential Tenancy Branch. While provisions regarding costs are provided for in court proceedings, they are specifically not included in the Act. I conclude that this exclusion is intentional. As such, the landlord's claim for time off work for attending this hearing and the previous hearing is not compensable.

The tenants are correct that by failing to complete a condition move in inspection report in a form that complies with the Residential Tenancy Regulation, the landlord has extinguished her right to claim against the security deposit. Accordingly, dismiss the landlord's claim against the deposits; however, using the offsetting provisions in paragraph 72(2)(b), I order that the landlord is entitled to retain $414.75 of the deposit to offset out the monetary order.

Tenants' Claim

Section 41 of the Act sets out that rent may not be increased except in accordance with part 3 of the Act. Part 3 of the Act requires that rent increase must be dealt with in writing through a notice or written agreement. It is agreed to that neither of the increases to the rent amounts were documented in writing. For the purpose of section 41, I find that it is immaterial that the tenant ME induced the error by offering to pay $50.00 per month. The amounts were mutually agreed to; however, the tenants now take issue with the fact that it was not agreed to in writing.

I find that the 2013 rent increase was not compliant with the Act in that the landlord failed to get the tenant ME's consent in writing.

Subsection 43(5) allows tenants to recover rent increases that do not comply with the Act or regulations by deducting the noncompliant amount from rent or otherwise recover the increase. The tenants have applied to recover the overpaid amounts. Subsection 7(2) of the Act sets out that a party claiming compensation for damage or losses resulting from another party's noncompliance with the Act must do whatever is reasonable to minimise the loss.

I find that by discouraging the landlord from putting the agreement in writing the tenant ME has failed to mitigate his loss; however, I am also conscious that it is the landlord's obligation to put things in writing and thus the landlord bears partial responsibility for the failure to commit the mutually agreed to rent increase into writing. As such, I find that the tenant ME is only entitled to recover one half of the overpaid rent for the period March 2013 to January 2014: $275.00

The tenancy agreement with which I was provided was between the tenant ME, CB and the landlord. I find that the tenancy that began on or about 15 January 2010 ended in or about 1 February 2014 when the tenant AS began occupying the rental unit. The parties have agreed through their conduct that AS is a tenant. I find, on the evidence before me, that the current tenancy is between the tenants and the landlord.

I find that the terms of the current tenancy were negotiated by the tenant ME and the landlord when the tenant AS began occupation. I find that monthly rent for the tenancy is $900.00. As this was a new tenancy, there was not a rent increase, but a new set of terms. Accordingly, the tenants are not entitled to recover any amount from rent as claimed in relation to the change in rent from $800.00 to $900.00.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $510.25 under the following terms:

Item	**Amount**
Rent Increase	$275.00
Security and Pet Damage Deposits	650.00
Offset Landlord's Award	-414.75
Total Monetary Order	**$510.25**

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: August 14, 2015

Residential Tenancy Branch