



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF; MNSD, FF, O

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 tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

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

- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38;
- authorization to recover her filing fee for this application from the landlord pursuant to section 72; and
- an "other" remedy.

Both parties attended the hearing and 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 party elected to call witnesses.

Preliminary Issue – Scope of Application

At the beginning of the hearing I outlined what each party sought. While the tenant's application does not specifically set out that she seeks a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67 the details of dispute set out that the tenant is claiming

compensation in relation to her storage costs and double the security deposit. The landlord understood that the tenant was claiming for double the security deposit.

I find that the tenant set out in sufficient detail in her application for dispute resolution that she was seeking compensation for her storage costs and double the security deposit within the claim for an “other” remedy, as such, I amended the tenant’s application to include this issue.

Preliminary Issue – Service Applications and Evidence

The tenant admitted receipt of the landlord’s dispute resolution package. The landlord denied receiving the tenant’s dispute resolution package. The tenant testified that she served the landlord with the dispute resolution package by registered mail. I confirmed the mailing address with both parties. With the parties consent I retrieved the tracking information from Canada Post’s website. The tracking information provided a signatory name. The landlord testified that she did not know any person by that name.

On the basis of the two parties’ versions of events, I consider it more likely than not that the tenant’s dispute resolution package was delivered in error to an incorrect recipient. I informed the parties of their options: the hearing could be adjourned, or with the landlord’s consent, I would read the tenant’s evidence to the parties and we would continue on that basis.

The landlord expressed that it was her preference to continue with the hearing as scheduled. I read every page of evidence and submissions to the landlord. After reading the evidence and submissions I informed the landlord that it was her choice whether or not to proceed on the basis of the read-in evidence. I explained to the landlord that she would be prejudiced in that she would not be able to assess the evidence in person. The landlord elected to proceed on the basis of the read in statements.

Issue(s) to be Decided

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

Is the tenant entitled to a monetary award for the return of her security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her pet damage and

security deposits as a result of the landlord's failure to comply with the provisions of section 38 of the Act? Is the tenant entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement? Is the tenant entitled to recover the filing fee for this application from the landlord?

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 tenant's claim and the landlord's cross claim and my findings around each are set out below.

There is no written tenancy agreement for this tenancy. The landlord testified that on or about 21 October 2014 the tenant contacted the landlord about the rental unit. The landlord testified that on 22 October 2014, the tenant indicated that she wanted to rent the unit from the landlord. The landlord testified that she asked the tenant to take 24 hours to think about the tenancy. The landlord testified that the tenant said that the rent was too expensive. As a result the landlord offered a lower rent for the tenancy. The parties entered into an oral tenancy agreement that purported to establish a tenancy. The rental unit was a furnished unit.

The tenant also expressed concern about the heating for the rental unit. The tenant testified that she was told on 23 October 2014, that the rental unit would be heated with propane heat. I was provided with this text message exchange:

T: *...we didn't expect hydro to be that much. Would you consider renting it for \$950.00?*

LL: *I'd be happy to lower it to \$1000. We realize heating is expensive and is something we are going to address. Putting a hole in the roof right now isn't an option so we are looking into high efficiency propane heaters for the time being.*

T: *When do you think you guys would put heaters in?*

LL: *The heaters for when you move in.*

T: *Ok perfect!*

On 28 October 2014, the tenant provided a \$500.00 security deposit to the landlord.

On 1 November 2014, the tenant told the landlord that she did not want a wood stove for heat:

T: *...sorry for the late reply about the heat, I think we would rather the propane heaters if that's okay with you guys*

LL. *Ok thanks. That works*

The tenant testified that she was told the heating would be electric heat on 16 November 2014.

The landlord testified that the keys to the rental unit were given to the tenant on 16 November 2014. The landlord testified that on this day the tenant and landlord did a walkthrough of the rental unit together. No condition move in inspection report was created on this day. The tenant testified that she carried over a few of her belongings on 17 November 2014, but she did not bring over anything large. The tenant denies that she did any damage to the stairs.

On 18 November 2014, the tenant told the landlord she would not be moving in to the rental unit. In that communication, the tenant indicates that the heating change from propane to electric (among other concerns) resulted in the tenant determining that she was unable to commence the tenancy.

The landlord alleges that the tenant damaged the front stairs by moving her belongings. The stairs are 21 years old and are made of wood.

The tenant provided her forwarding address to the landlord on 12 January 2015. The landlord acknowledges receiving the address.

I was provided with a receipt for two months of storage costs in the amount of \$157.50.

The tenant claims for \$1,157.50:

Item	Amount
Return of Security Deposit	\$500.00
Subsection 38(6) Compensation	500.00
Storage Costs	157.50
Total Monetary Order Sought	\$1,157.50

The landlord claims for \$1,500.00:

Item	Amount
Retain Security Deposit for Stair Damage	\$500.00
One Month Rent	1,000.00
Total Monetary Order Sought	\$1,500.00

Analysis

Breach of Tenancy Agreement

The tenant submits that she had no obligations under the tenancy agreement when the landlord failed to provide propane heating as agreed. The landlord submits that propane heating was never promised and that the tenant is liable for her obligations under the tenancy agreement.

Anticipatory breach occurs when a party repudiates her contractual obligations before they fall due. For this type of breach to be found it must be established that:

1. there is conduct which amounts to a total rejection of the obligations of the contract; and
2. lack of justification for such conduct.

The innocent party can accept the repudiation and the effect is to terminate the contract. If the innocent party accepts the repudiation she is free from her obligations under the contract; however, the repudiating party is still liable for damages for her breach.

I find that the type of heating was a term that was material to the tenancy agreement. The tenant made it clear on several occasions that her agreement to enter into the tenancy was contingent on the issue of heating being remedied. I find that on 16 November 2016, and prior to the commencement of the tenancy, the landlord indicated that she intended to breach the tenancy agreement by failing to provide propane heat as agreed. I find that the landlord lacked justification for this complete rejection of her obligations under the tenancy agreement. I find that by doing so the landlord repudiated the tenancy agreement. I find that the tenant accepted the landlord's repudiation when she failed to pay rent when due and told the landlord that she was accepting the repudiation on 18 November 2014.

As such, the tenant has no obligation to pay rent under the tenancy agreement. The landlord is not entitled to her claim for \$1,000.00 in rent.

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 or tenancy agreement, 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 tenant is entitled to her losses that she incurred as a result of the landlord's repudiation of the tenancy agreement. I find that as a result of the landlord's repudiation of the tenancy agreement, the tenant incurred damages. In particular, the tenant had to make alternative arrangements to store her belongings. I find that the tenant is entitled to her cost of storing these belongings. The tenant provided an invoice that indicates a cost of \$157.50. I find that the tenant has proven her entitlement to this amount.

Damage to Stairs

The landlord claims that the tenant damaged the external wood stairs. The landlord submits that the damage was not there when she provided the keys to the tenant. The landlord provided me with a photograph of the damage. The photograph shows damage to the edge of one of the stairs. The tenant denies causing the damage and says that she did not move anything into the house that would cause this type of damage.

There are no condition inspection reports in respect of this tenancy. By failing to create any reports, the landlord has denied herself the best evidence of the condition of the rental unit as at 17 November 2014. The landlord asks me to accept her evidence as to the condition of the stairs as at 17 November 2014 and then asks me to draw the inference that it was the tenant that damaged the external stairs. I find, on a balance of probabilities, that this is insufficient evidence to show that the tenant caused damage to the stairs.

Furthermore, I am mindful of *Residential Tenancy Policy Guideline* "40. Useful Life of Building Elements". This guideline provides me with direction in determining damage to capital property. This guideline sets out that the useful life expectancy of wood decking is twenty years. The landlord testified that the stairs are over twenty years old. As such, even if there has been damage caused by the tenant, the damage would not be compensable given the age of the decking.

The landlord's claim for damage to the stairs is dismissed.

Return of Security Deposit

Section 38 of the Act sets out relevant rules dealing with security deposits:

- (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...
- (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...

The landlord did not complete a condition move-in or move-out inspection with the tenant. Accordingly, her right to claim against the security deposit was extinguished by this failure pursuant to both subsection 24(2) and 36(2). As the landlord's right to claim against the security deposit was extinguished, the only action available on receipt of the tenant's forwarding address was to return the tenant's security deposit within fifteen days. The landlord did not return the deposit. The tenant has proven her entitlement to the return of her deposit and compensation pursuant to subsection 38(6) of the Act.

Filing Fee

As the tenant has been successful in her application, she is entitled to recover her filing fee from the landlord. As the landlord has not been successful, she is not entitled to recover her filing fee from the tenant.

Conclusion

The landlord's claim is dismissed without leave to reapply.

I issue a monetary order in the tenant's favour in the amount of \$1,207.50 under the following terms:

Item	Amount
Return of Security Deposit	\$500.00
Subsection 38(6) Compensation	500.00
Storage Costs	157.50
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	\$1,207.50

The tenant is 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: September 3, 2015

Residential Tenancy Branch

