Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

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

- a monetary order for unpaid rent and for damage to the unit 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;
- authorization to recover their filing fee for this application from the tenants pursuant to section 72; and
- an "other" remedy.

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

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their pet damage and security deposits pursuant to section 38;
- a monetary order for the cost of emergency repairs to the rental unit pursuant to section 33;
- authorization to recover their filing fee for this application from the landlords pursuant to section 72; and
- an "other" remedy.

All named parties attended the hearing. The landlords' agent HS attended the hearing. The tenants were represented by their advocate. All 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.

Neither party detailed the scope of their claim for an "other" remedy. The only remedies sought by either party were monetary.

Preliminary Issue – Service

The landlords did not serve the tenants with their photographs or a copy of the receipt for the carpet replacement. The landlord PS submitted that he was told that the government agent would serve the tenants. The landlord PS submitted that the landlords would be prejudiced by the exclusion of this evidence. The landlord PS submitted that the photographs merely provide greater detail than the evidence provided by way of the tenants' video recording. The tenants submitted that they would not be able to make submissions in respect of the photographs without first examining them. The tenants did not consent to the admission of the landlords' evidence.

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be received by the respondent not less than 14 days before the hearing.

In this case, the tenants have not received copies of all of the landlords' evidence. It is the landlords' responsibility to know the rules of procedure and to abide by those rules. As the tenants have not been able to examine all of the landlords' evidence, I refuse to admit the landlords' documentary evidence that was not served on the tenants as to do so would unduly prejudice the tenants.

Service of the landlords' evidence (as noted above) was the only issue of service raised by the parties.

Issue(s) to be Decided

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

Are the tenants entitled to a monetary award for compensation for damage or loss under the Act, regulation or tenancy agreement? Are the tenants entitled to a monetary award for the return of a portion of their pet damage and security deposits? Are the tenants entitled to a monetary order for the cost of emergency repairs to the rental unit? Are the tenants 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 tenants' claim and the landlords' claim and my findings around each are set out below.

This tenancy began 1 May 2014 and ended 31 May 2015. Monthly rent of $1,800.00 was due on the first. At the beginning of the tenancy, the landlord collected a security deposit in the amount of $900.00 and a pet damage deposit in the amount of $250.00. There was no condition inspection report created at the beginning of the tenancy although a walk through was conducted.

The rental unit is located on a property that contains the landlords' working farm.

The landlord PS testified that the tenant caused three holes in the walls from doorknob damage. The landlord testified that there were stains on the walls. In the tenants' video some discolouration is visible on the wall. As well, there is a tear in the drywall that is visible. The landlord PS testified that it was necessary to repaint the entire home. The landlord PS testified that the rental unit was last repainted in 2013.

The landlord PS testified that the carpet was last replaced in 2008. The landlord PS testified that the carpet in one room had to be replaced. The tenants' video shows that the carpet is wrinkled.

The landlord PS testified that the tenants left the pot lights dangling. In the tenants' video recording the pot lights can be seen not sitting flush with the ceiling. The landlord PS testified that the ceilings with the pot lights are approximately three meters high.

The landlord PS testified that the tenants removed a door. The closet where the door should be is visible on the tenants' video recording.

The tenant AK testified that the rental unit was a "disaster" when the tenancy began. In particular, AK noted that there were cigarette stains and cat urine in the carpet. AK testified that the tenants had to spend a lot of time cleaning. The tenants provided a video recording of the rental unit at the end of tenancy. The video is of poor quality and is taken at a distance. The tenant AK testified that any damage visible in the video recording was pre-existing.

The tenant AK testified that his childhood friend used to live in the rental unit and the

flooring and walls were the same as they were during the tenancy. AK estimated that his childhood friend occupied the rental unit in approximately 2000.

The tenant testified that the tenants had request for repairs ignored. The tenants did not provide any written requests for any repairs. The only request for repairs provided was in respect of a dishwasher and lights from the beginning of the tenancy. The landlord PS testified that the dishwasher was repaired the next day.

The tenant AK testified that the landlord KS would come to the house and knock on the door to ask for help with various tasks. The tenant AK testified that KS entered into the rental unit to demand rent. AK testified that KS was demanding money and shouting. The tenant AK testified that TU was in the rental unit at that time. The landlord PS testified that the landlord KS knocked on the door on 4 April 2015 to inquire after April's rent. There was some confusion in the landlords' evidence as to whether or not KS actually entered into the rental unit.

The tenants fixed the garage door and installed a ventilation fan in the bathroom. The landlord PS and the agent HS testified that the tenants were never given permission to incur these costs.

The tenant AK testified that they provided their forwarding address by email on or about 5 June 2015.

The tenants claim for their wages for missing work to attend the hearing and costs associated with providing evidence for this hearing.

The landlords provided various documents in support of their claim:

- A receipt for paining dated 9 June 2015 in the amount of $2,000.00.
- An estimate for replacement of the flooring for the rental unit in the amount of $1,900.00.
- An invoice for water for January and February 2015 in the amount of $35.21.
- An invoice for water for March and April 2015 in the amount of $46.06.
- A printout of an interior door with a cost of $99.00.
- A printout of a pot light with a cost of $20.07.

The landlords claim for $4,160.55. The landlords have set out the following specific claims:

Item	**Amount**
Utilities January to April 2015	$81.27

Painting	2,000.00
Flooring	1,900.00
Interior Door	99.00
Four Light Units	80.28
Total Monetary Order Sought	**$4,160.55**

The tenants claim for $4,161.86:

Item	**Amount**
Missed Work	$939.48
Digital Evidence	22.38
Loss of Quiet Enjoyment	2,000.00
Deposits	1,150.00
Filing Fee	50.00
Total Monetary Order Sought	**$4,161.86**

Analysis

Section 67 of the Act provides for payment of compensation on proof of loss. 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.

Landlords' Claim

Subsection 37(2) of the Act specifies that when a tenant vacates a rental unit, the tenant must leave the unit reasonably clean and undamaged except for reasonable wear and tear.

The landlords allege that the tenants have breached subsection 37(2) of the Act by returning the rental unit to the landlords in a non-compliant state. The tenants say that the damage that was there was damage that existed at the beginning of the tenancy.

Section 21 of the *Residential Tenancy Regulation* (the Regulation) establishes that the condition move-in inspection report is strong evidence to the state of the rental unit at the time the tenancy began. The landlords failed to complete a condition inspection report and in doing so have denied themselves the best possible evidence for the condition of the rental unit at the beginning of the tenancy.

Failure to complete a condition move-in inspection report does not meant that the landlords are incapable of meeting their evidentiary burden, but it does mean that the landlords must provide other evidence that shows the state of the rental unit at the beginning of the tenancy: This could include a statement from a prior occupant of the rental unit, the landlords' testimony, or photographs of the rental unit prior to occupancy.

The landlords have only provided their testimony and the testimony of their agent to say both that the damage as exists and that it was caused during the course of the tenancy. This testimony conflicts with the tenants' testimony. The tenants say that the damage existed prior to the tenancy beginning and was not caused by the tenants.

Where testimony conflicts and there is little no supporting evidence for either party's testimony, I am required to make a finding of credibility. In this case, I prefer the evidence of the tenant AK over that of the landlord PS and the agent HS. I prefer the tenant AK's evidence as I found his testimony to be more plausible. On this basis, I find that the tenants did not breach subsection 37(2) of the Act.

The tenancy agreement clearly provides that the tenants are responsible for the water utility. The landlords provided invoices for four months of water utility totaling $81.27. I find that by failing to pay this amount the tenants have breached their tenancy agreement with the landlord. I find that the landlords have proven their loss in the amount of the water utility invoices. On this basis, the landlords are entitled to a monetary award in the amount of $81.27.

Tenants' Claim

The tenants seek compensation for their attendance at the hearing. The tenants have also claimed for the cost of the storage device used to provide the tenants' electronic evidence. These expenses are best characterised as the "costs" of these proceedings.

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. Furthermore, I find that costs are

not properly compensable pursuant to section 67 of the Act as the landlords' purported contravention of the Act is not the proximate cause of the expense.

I find that the tenants are not entitled to compensation for the tenants' costs as these expenses are not compensable under the Act.

The tenants have applied for the cost of emergency repairs.

Section 33 of the Act allows tenants, in specific circumstances, to recover amounts from the landlord that the tenants have paid in order to make emergency repairs to the rental unit. Section 33 of the Act describes "emergency repairs" as those repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purposes of:

- repairing major leaks in pipes or the roof,
- damage or blocked water or sewer pipes or plumbing fixtures
- the primary heating system
- damaged or defective locks that give access to the rental unit
- the electrical systems
- in prescribed circumstances, a rental unit or residential property

The tenants were seeking repair costs with respect to a garage door and a ventilation system. These are not "emergency repairs" within the meaning of the Act. As such the tenants are not entitled to recover these costs on the basis of the emergency repairs provision. There are no other provisions in the Act that provide for the recovery of amounts by the tenants for repairs they completed.

The tenants have made a claim for $2,000.00 for loss of quiet enjoyment. The tenants allege that the landlord KS entered into the rental unit once without notice, the tenants allege that the landlord KS would stop by the rental unit to ask the tenants for assistance as well as knock on the door, and the tenants say that their request for repairs were ignored.

Pursuant to section 28 of the Act, a tenant is entitled to quiet enjoyment of the rental unit. Quiet enjoyment includes:

- reasonable privacy;
- freedom from unreasonable disturbance;
- exclusive possession of the rental unit, subject to the landlord's rights contained in section 29; and

- use of common areas for reasonable and lawful purposes, free from significant interference.

Section 29 of the Act addresses a landlord's right to enter a rental unit. It states that a landlord must not enter a rental unit for any purpose unless one of the following applies:

(a) the tenant gives permission at the time of entry or not more than 30 days before the entry; or

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the purpose for entering, and the date and time of entry.

The tenants say that they experienced a loss of quiet enjoyment because of the landlords request for assistance. The tenant AK testified as to various requests that the landlord KS would make about repairs. The tenants have not provided evidence that they ever complained to the landlords about these requests. I find that these requests were not of such a nature as to amount to a breach of the tenants' right to quiet enjoyment.

Further, the tenants seek compensation for the landlord walking on the residential property. Section 29 only addresses the right to enter the rental unit. The rental unit is defined in section 1 of the Act to mean the living accommodation. Residential property is broader and includes the rental unit as well as the parcel of landlord on which the rental unit is contained. I find that the landlords were entitled to be on the residential property without notice.

The tenants testified that the landlord would knock on the doors. I find that knocking on a door is not a breach of the tenants' right to quiet enjoyment. Knocking on a door is a normal way of discovering whether or not someone is home. The tenants have not shown that the knocking was of such a frequency or at unusual times such as to represent a breach of their quiet enjoyment. Further, there is no indication that the tenants ever complained to the landlords about this conduct so as to mitigate the loss.

I find that the tenants have not proven a breach of their right to quiet enjoyment on the basis of the landlord walking on the property or knocking on the door.

The landlords admit that KS attended at the rental unit to ask for payment for April's rent. On the basis of the evidence before me, I find that KS did enter into the rental unit when he found the door unlocked. I find that this was without notice and without permission from the tenants.

It is not particularly easy to quantify the loss to tenants for a single unlawful entry—the tenants have not attempted to do so. Where no significant loss has been proven, but there has been an infraction of a legal right, an arbitrator may award nominal damages. As the tenants have failed to prove any quantifiable loss arising from the illegal entry or itemized their loss in respect of this particular breach, I award the tenants $50.00 as nominal damages as compensation for the landlords' breach.

The tenants claim for compensation for repairs that the tenants say were not completed. I was not provided with details of these repairs or any written demands for repairs. On the basis of this lack of evidence, I find that the tenants have failed to show that there was a breach of the Act or that the tenants were entitled to any compensation.

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or receipt of the tenant's forwarding address in writing.

Section 88 of the Act sets out how documents may be delivered. Email is not an acceptable method of service pursuant to section 88 of the Act. As the tenants provided their forwarding address by email to the landlord, the tenants have not provided the landlords with their forwarding address in a manner that complies with the Act. As such, the tenants' claim for return of their security deposit is premature.

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

> 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—in fact it is more likely than not that the landlords' right to the security deposit was extinguished first by their failure to complete a condition inspection report. As there is a balance remaining on the tenants' security deposit, I order that the balance of the tenants' security deposit shall be returned to the tenants.

Filing Fee

As both parties experienced partial success in their applications, I order that the parties bear the expense of their own filing fees.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $1,118.73 under the following terms:

Item	**Amount**
Breach of Section 29	50.00
Return of Security Deposit	$1,150.00
Offset Landlords' Monetary Award	-81.27
Total Monetary Order	**$1,118.73**

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: December 15, 2015

Residential Tenancy Branch