Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the landlord: OPR MND MNR MNSD MNDC FF
For the tenant: MNDC MNSD FF

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the *Residential Tenancy Act* (the "*Act*"). The landlord applied for an order of possession for unpaid rent or utilities, for a monetary order for damage to the unit, site or property, for unpaid rent or utilities, for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, for authorization to retain all or part of the tenant's security deposit, and to recover the cost of the filing fee. The tenant applied for the return of double her security deposit, and to recover the cost of the filing fee.

On February 18, 2016, the hearing commenced and the hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. After 74 minutes the hearing was adjourned to allow more time to hear the evidence from the parties. An interim decision was issued dated February 19, 2016 and should be read in conjunction with this decision. On April 13, 2016, the hearing reconvened and after an additional 57 minutes the hearing was concluded. During the hearing the parties gave affirmed testimony, were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this decision.

Neither party raised any concerns regarding the service of documentary evidence.

Preliminary and Procedural Matter

At the outset of the hearing, the parties agreed that the tenant had vacated the rental unit. As a result, the landlord was withdrawing her request for an order of possession as the tenant had already vacated the rental unit.

Issues to be Decided

- Is either party entitled to a monetary order under the *Act,* and if so, in what amount*?*
- What should happen to the tenant's security deposit under the *Act?*
- Is either party entitled to the recovery of the cost of the filing fee under the *Act?*

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed term tenancy began on October 15, 2014 and required vacant possession as of October 15, 2015. The parties disputed the date the tenant vacated the rental unit. The tenant testified that she vacated the rental unit on May 31, 2015, while the landlord testified that the tenant vacated on May 30, 2015. The tenant paid a security deposit of $550.00 at the start of the tenancy which the landlord continues to hold. Monthly rent of $1,100.00 was due on the 15th day of each month.

The tenant is claiming for $1,968.21 comprised of recovery of $550.00 for the overpayment of June 1-15, 2015 rent, double the security deposit of $550.00 for a total of $1,100.00, and $318.21 for strata fees as she claims she was forced to move out earlier than when the fixed term tenancy ended. The landlord has claimed $1,367.45 which includes lawn and yard maintenance costs, carpet cleaning, agent costs, and an administration charge for breaking a fixed term tenancy.

Evidence for Tenant's Claim

The tenancy ended May 31, 2015 after the tenant provided her written notice dated April 20, 2015 that she would be vacating the rental unit on May 31, 2015. The landlord stated that she received the April 20, 2015 letter on April 27, 2015. The landlord wrote to the tenant stating that they had a fixed term tenancy and that she would be filing for arbitration to re-coup her costs associated with the tenant's decision to break her fixed term lease.

The landlord writes in her evidence that on July 3, 2015 she received the tenant's written forwarding address; a copy of which was submitted in evidence. In that letter, the tenant is requesting the extra $550.00 paid in rent for the period of June 1, 2015 to June 15, 2015. The landlord testified that she was able to secure new renters effective June 1, 2015. On July 30, 2015 the landlord mailed the tenant a "Security Deposit Refund Statement" that indicated that the tenant owed the landlord an additional $195.50 after the landlord withheld the tenant's security deposit of $550.00; however, the landlord did not file for arbitration claiming towards the tenant's security deposit until January 13, 2016. The tenant filed her application on August 17, 2015 for double the return of her security deposit, and to recover the overpayment of June 1, 2015 to June 15, 2015 rent in the amount of $550.00 and strata fees of $318.21.

The tenant was advised during the hearing that her claim for $318.21 for strata fees in her new residence was dismissed as the tenant provided her written notice to end the tenancy which is not a permitted way to end a fixed term tenancy under section 45 of the *Act.*

Regarding the completion of an incoming condition inspection report, the agent testified that she gave the condition inspection report to the tenant to fill out.

Evidence for Landlord's Claim

The landlord referred to many colour photos submitted in evidence to support that the tenant did not clean the carpets or the rental unit before vacating in May 2015. The landlord also supplied two documents in evidence, the first being in the amount of $271.95 from a carpet cleaning company and the second being a copy of a cheque in the amount of $150.00 for general cleaning of the rental unit paid to D.E. The landlord testified that the person paid for cleaning and his wife spent four hours cleaning the rental unit. The tenant claims she returned to the rental unit at noon on June 1, 2015 to clean the rental unit. The landlord stated that by that time the cleaning had already been completed as the tenancy had already ended.

The landlord was advised during the hearing that her claim for $100.00 for agent fees was dismissed as those costs are business-related costs of a landlord and there is no remedy under the *Act* to claim for those against a tenant.

Regarding the landlord's claim for lawn and yard maintenance, the landlord submitted a total of $745.50 in receipts and referred to the tenancy agreement which the parties agreed indicates "Tenant responsible for lawn mowing/yard maintenance." The parties disputed what the details of the yard maintenance were but there was no dispute that

the tenant never used the supplied lawnmower as the tenant admitted during the hearing that she never entered the shed or tried to open the lock on the shed which the landlord stated was not locked and was simply hanging there on the shed. The tenant stated that she was 73 years old and was not able to do the lawn mowing or yard maintenance other than some raking. The landlord and agent testified that before the tenancy agreement was signed the tenant indicated that she was a lawn-bowler and was active and would have no issues with lawn mowing and yard maintenance which is why the term was included on the tenancy agreement and that if the tenant had told them she could not have performed the lawn mowing or yard maintenance as stated in the tenancy agreement, the landlord would never have approved the tenant or signed the tenancy agreement.

Regarding the $100.00 administration charge the landlord claimed by the landlord, the landlord referred to section 38 of the tenancy agreement which reads in part that if the tenant moves out before the expiry date of the lease, then the tenant will be responsible for payment of rent for the full term of the lease plus an additional administration charge of $100.00 minimum or the loss of security deposit unless the landlord agrees in writing that the tenant can end the tenancy early.

Analysis

Based on the documentary evidence and the testimony of the parties, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on both parties to provide sufficient evidence to prove their respective claims and to prove the existence of the damage/loss and that it

stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the tenants. Once that has been established, the parties must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the other party did what was reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Tenant's monetary claim – There is no dispute that the tenant provided her written forwarding address and that the landlord had received it by July 3, 2015. The landlord did not return in full or claim towards the tenant's security deposit until January 13, 2016. The landlord continues to hold the tenant's security deposit of $550.00 which as accrued $0.00 in interest since the start of the tenancy. Section 38 of the *Act* applies and states in part:

> **Return of security deposit and pet damage deposit**
>
> **38** (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.**
>
> **(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.**
>
> **[my emphasis added]**

Based on the above, I find the landlord breached section 38 of the *Act* by failing to return the tenant's full security deposit within 15 days of date the landlord confirmed receiving the tenant's written forwarding address, July 3, 2015, which was later than the end of tenancy date which was May 31, 2015. The landlord had until July 18, 2015 to return the tenant's security deposit in full, which the landlord failed to do as I find the landlord extinguished her right to claim against the tenant's security deposit pursuant to section 24 of the *Act* by failing to complete a proper incoming condition inspection report as required by section 23 of the *Act*. Therefore, I grant the tenant double her original security deposit of $550.00 as follows:

- Security deposit of $550.00 doubles to **$1,1000.00**

In addition, as the landlord complied with section 7 of the *Act* by reducing her loss by security new renters effective June 1, 2015, I find the tenant is now owed $550.00 for June 1, 2015 to June 15, 2015 rent as the landlord has already received June 1, 2015 – June 15, 2015 rent from new renters and is not entitled to be unjustly enriched for that time period by also receiving rent from the tenant for the same time period.

As mentioned above, the tenant's claim for $318.21 in strata expenses has been **dismissed without leave to reapply** as I find the tenant provided notice to end the tenancy in a manner that is not provided for under section 45 of the *Act* and is not entitled to such a remedy under the *Act* as a result.

As the tenant's application had merit, I grant the tenant the recovery of the **$50.00** filing fee.

Landlord's monetary claim – I will first deal with the landlord's claim for $271.95 for carpet cleaning and $150.00 for suite cleaning. I am satisfied in having reviewed the colour photos submitted in evidence that the tenant breached section 37 of the *Act* which requires the tenant to leave the rental unit in reasonably clean condition, less normal wear and tear. I find the tenant extinguished her right to clean the rental unit herself by failing to reasonably clean the carpets and the rental unit before she vacated by the end of May 2015 and attempted to return on June 1, 2015 after the tenancy had ended. Therefore, I find the landlord has met the burden of proof and is entitled to $271.95 for carpet cleaning and $150.00 for suite cleaning for a total amount for this portion of the landlord's claim of **$421.95.**

The landlord has also claimed a total of $745.50 for lawn and yard maintenance costs due to the tenant not complying with the term as stated in the tenancy agreement. While I find that the term of the tenancy agreement should have been more detailed for the

benefit of both parties, I prefer the testimony of the landlord over that of the tenant as I find the tenant's version of events to be unreasonable and highly unlikely. In reaching this finding I have considered that the tenant testified under oath that she had never attempted to open the shed, which I find highly unlikely when she signed a tenancy agreement that included mowing the lawn and yard maintenance. Furthermore, I accept on the balance of probabilities that the landlord would not have rented to the tenant if the tenant had stated to the landlord that she was not physically capable of mowing the lawn or performing yard maintenance before signing the tenancy agreement. Therefore, I find the tenant breached the term of the tenancy and owes the landlord **$745.50** for lawn mowing and yard maintenance costs. I have considered the receipts submitted in evidence and find that the landlord has met the burden of proof for this portion of their claim.

As mentioned above, the landlord's claim for $100.00 for agent fees was **dismissed without leave to reapply** as I find that those costs are business-related costs of a landlord and there is no remedy under the *Act* to claim for those against a tenant. In other words, the decision to hire an agent to work for the landlord is the decision of the landlord and not the tenant.

Regarding the $100.00 administration charge the landlord claimed by the landlord, the landlord referred to section 38 of the tenancy agreement which reads in part that if the tenant moves out before the expiry date of the lease, then the tenant will be responsible for payment of rent for the full term of the lease plus an additional administration charge of $100.00 minimum or the loss of security deposit unless the landlord agrees in writing that the tenant can end the tenancy early. According to Residential Tenancy Branch Policy Guideline 4 – Liquidated Damages, a liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. The fact that the landlord calls the $100.00 amount an "administration fee" in section 38 of the tenancy agreement, I find to constitute a penalty and is unenforceable as a result under the *Act.* Therefore, this portion of the landlord's monetary claim is **dismissed without leave to reapply.**

As the landlord's application had merit, I grant the landlord the recovery of their **$100.00** filing fee.

I find the tenant has established a total monetary claim in the amount of **$1,700.00** comprised of $1,100.00 for the doubled security deposit, $550.00 in overpaid rent for June 1, 2015 to June 15, 2015, plus the recovery of the cost of the $50.00 filing fee.

I find the landlord has established a total monetary claim in the amount of **$1,267.45** comprised of $421.95 for cleaning costs, $745.50 for lawn mowing and yard maintenance costs, plus recovery of the cost of the $100.00 filing fee.

Based on the above, I find that the tenant has established a monetary claim which is **$432.55** greater than the landlord's monetary claim. As a result, I offset the two amounts owing, and **I grant** the tenant a monetary order pursuant to section 67 of the *Act*, for the balance owing by the landlord to the tenant in the amount of **$432.55.**

Conclusion

Both the landlord's and the tenant's applications had merit.

I find that the tenant has established a monetary claim which is $432.55 greater than the landlord's monetary claim. I have offset the two amounts owing, and the tenant has been granted a monetary order pursuant to section 67 of the *Act*, for the balance owing by the landlord to the tenant in the amount of $432.55. This order must be served on the tenants and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: April 25, 2016

Residential Tenancy Branch