Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CAPREIT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MND, MNSD, FF

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

- an order of possession for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent and for damage, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits (collectively "deposits") in partial satisfaction of the monetary award, pursuant to section 38;
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord's agent, MS ("landlord") and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord said that he was the site manager for the "landlord company" named in this application and that he had authority to speak on its behalf as an agent at this hearing. "Witness SR," who is the operations manager for the landlord company, testified on behalf of the landlord and both parties had an opportunity to question the witness. This hearing lasted approximately 79 minutes in order to allow both parties to fully present their submissions.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing package, including an amendment to the application (collectively "Application") and the landlord confirmed receipt of the tenant's written evidence, with the exception of one coloured photograph. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was duly served with the landlord's Application and the landlord was duly served with the tenant's written evidence, with the exception of the one photograph. I did not consider the tenant's one photograph in this decision, as the tenant did not confirm the date of service on the landlord and the landlord did not receive it. In any event, I did not find the blurry photograph to be of assistance to the tenant's position.
Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's application to correct the spelling of the tenant's surname and to correct the rental unit number in the landlord's amendment form. The tenant consented to these amendments during the hearing.

At the outset of the hearing, the landlord confirmed that the landlord did not require an order of possession, as the tenant had already vacated the rental unit. Accordingly, this portion of the landlord's application is dismissed without leave to reapply.

Issues to be Decided

Is the landlord entitled to a monetary order for unpaid rent and for damage?

Is the landlord entitled to retain the tenant's deposits in partial satisfaction of the monetary award?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on June 1, 2011 and ended on March 13, 2016. Monthly rent in the amount of $932.31 was payable on the first day of each month. A security deposit of $445.00 and a pet damage deposit of $445.00 were paid by the tenant and the landlord continues to retain these deposits. A written tenancy agreement was signed by both parties and a copy was provided for this hearing. Move-in and move-out condition inspection reports were completed for this tenancy. The tenant did not agree to any deductions for unpaid rent, late fees, or elevator damage in the move-out condition inspection report. The landlord said that the landlord company purchased the building around August 27, 2013 and assumed this tenancy along with the deposits paid by the tenant.

The landlord seeks $3,251.85 for damage to the rental building elevator that he says was caused by the tenant's guest on March 13, 2016, while the tenant was vacating the rental unit. The landlord provided a copy of an undated, unsigned and anonymous statement, which he said he received at his office on March 14, 2016 from someone who claims to have witnessed this incident. The landlord said that the elevator was new as of the fall season in 2015 and that the tenant's guest damaged it by prying it open and pulling it off its tracks. The landlord submitted coloured surveillance photographs for the elevator during this incident, an invoice for the repair work in the amount of $3,097.00 and another invoice from the landlord company of $154.85 for the 5% GST tax paid on the above repair invoice.

The tenant disputes the landlord's claim, saying that neither she nor her guest were negligent in their use of the elevator. She testified that she was present during this incident, that her guest was loading the elevator with items, the door was closing and it came off its tracks. She said that her guest became stuck in the elevator and had to pry the door open in order to get out. The tenant noted that she called the landlord immediately to report the problem and pointed to one of the landlord's coloured photographs, where she can be seen using a cellular phone. The tenant said that the landlord advised her that she would receive a call back after the incident but she never did. The tenant said that she was required to use the stairwell to move the remainder of her items after the elevator broke down.

The landlord seeks unpaid rent of $430.07 from March 1 to 14, 2016, and $25.00 for a late fee for March 2016 rent. He stated that the landlord was not pursuing a full month's rent for March 2016 against the tenant because she moved out early. The landlord said that the tenant owes rent for the above period during which she was entitled to occupy the unit.

The tenant disputed the landlord's claims saying that the tenancy agreement was frustrated because her unit was uninhabitable after a fire occurred on February 27, 2016, in the unit two floors below the tenant's unit. The landlord said that the only unit that was uninhabitable was the one that had the fire in the actual unit and that all other residents returned to their units after the fire. The tenant said that she only returned to her unit to retrieve her belongings and did not occupy the unit. The tenant stated that she became aware that she could return to her unit on March 1, 2016, as she heard the news from other people in the building, while the landlord said that he informed the tenant although he could not recall the exact date. The tenant said that she did not receive air quality reports indicating that it was safe to return to her unit, after requesting them from the landlord. The landlord said that the reports were available for the tenant to view but the tenant said that she was not aware of this availability.

The tenant said that when she entered her unit on March 1, 2016, there was soot on her once-white walls, an outline of soot where she kept food, as well as an awful campfire-like smell throughout the unit. The tenant provided a medical note from her doctor saying that she was unfit for work as of March 8, 2016 forward, but did not indicate why or that it was due to smoke inhalation or the effect from her unit. The tenant did not reference this note during her verbal submissions during the hearing.

The tenant provided a copy of a letter she gave to the landlord, dated March 1, 2016, indicating her intention to vacate the unit. The tenant said that she asked for alternative accommodation in another unit but the landlord said that nothing was available as all

units were full. The tenant said that she was forced to vacate the rental unit early and expend significant moving costs and disruption to her life.

Analysis

Unpaid Rent and Late Fee

Section 44(1)(e) of the *Act*, states that the tenancy ends if the tenancy agreement is frustrated. I find that this tenancy agreement was not frustrated by the fire in another unit. I find that the tenant did not meet the high burden of proof as outlined in Residential Tenancy Policy Guideline 34, to show that there was a frustration of the tenancy agreement such that it was impossible to fulfill its terms.

I find that the landlord provided air quality reports from a reputable company, as part of its written evidence, indicating that the particulate matter was below the permissible exposure limit and it was safe for the tenant to return to her unit as of March 1, 2016. I find that the tenant returned to her rental unit on March 1, 2016, and determined herself that it was unsafe, when she is not an expert in this matter. Both the landlord and witness SR, together with a restoration company, confirmed that they entered the unit on March 1, 2016, that no restoration work was required, they did not notice any soot except for outside on the tenant's bedroom window, which was then replaced, and they noticed a smell in the unit but also the building generally. I find that although there may have been a miscommunication between the parties regarding entering the unit and the air quality reports, the unit was safe and habitable for the tenant to live there. Accordingly, I find that the tenant is required to pay rent for the period that she was entitled to occupy the rental unit, even if she did not live in the unit, as she had not ended her tenancy and her belongings were still in the unit.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which both parties agreed was the first day of each month. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Both parties agreed that the tenant failed to pay rent for March 2016 to the landlord. However, the landlord only seeks prorated rent of $430.07 from March 1 to 14, 2016, the period during which the tenant occupied the unit until the move-out condition inspection was performed. Therefore, I find that the landlord is entitled to $421.04 in

rental arrears from March 1 to 14, 2016, calculated as the monthly rent of $932.21 divided by 31 days in March 2016, multiplied by 14 days.

As per sections 7(1)(d) and 7(2) of the *Regulation*, I find that the landlord is entitled to $25.00 in late fees for March 2016, as the tenant did not pay rent for the above month and this amount was indicated in the tenancy agreement for late fees.

Elevator Damage

When a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim on a balance of probabilities. To prove a loss, the landlord must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenant in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I dismiss the landlord's Application for a monetary order of $3,251.85 for damage to the elevator, without leave to reapply. I find that the landlord failed to meet part 2 of the above test to show that the tenant and her guest were wilful or negligent, causing elevator damage when the tenant was vacating. I accept the tenant's testimony, as she was present during the elevator incident and the landlord was not, that the tenant's guest got trapped in the elevator because there was a malfunction with the elevator first. I find that the tenant's guest had to find a way to get out of the elevator for his own safety and had to pry open the elevator door to do so. I find that the tenant reported the issue immediately to the landlord and she used the stairwell to move the remainder of her items. I find that the landlord's surveillance photographs confirm the above information and show that the tenant's guest did not "stuff the elevator full" as indicated in the landlord's written statement from an anonymous author.

Other Claims

As the landlord was mainly unsuccessful in this Application, I find that it is not entitled to recover the $100.00 filing fee from the tenant.

During the hearing, the landlord agreed to pay the tenant $100.00 pursuant to a signed written agreement between the parties, dated for March 4, 2016, to compensate for food and incidentals from February 28 to 29, 2016. The landlord verbally requested that the $100.00 be deducted from any monetary award issued to the landlord.

The landlord continues to hold the tenant's deposits totalling $890.00. I find that the tenant did not authorize any deductions from the deposits in writing. No interest is payable on the deposits during this tenancy. In accordance with the offsetting provision of section 72 of the *Act*, I find that the landlord is entitled to retain $446.04 from the tenant's deposits in full satisfaction of the monetary order granted to the landlord at this hearing. I order the landlord to return the remainder $443.96 from the deposits to the tenant along with the $100.00 as agreed to by both parties, for a total return of $543.96.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $543.96 against the landlord. The landlord must be served with this Order as soon as possible. Should the landlord 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.

The landlord's application for an order of possession, a monetary order for damage and to recover the $100.00 filing fee is dismissed without leave to reapply.

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: May 04, 2016

Residential Tenancy Branch