Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF

Introduction

This hearing was scheduled to deal with a landlord's application for a Monetary Order for damage to the rental unit; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

The owner of the property, the named landlord, had an agent act on her behalf and represent her in this proceeding. In this case, the landlord's agent also managed the tenancy on behalf of the owner, including giving and taking possession of the rental unit under the tenancy agreement and filed the hearing documents. Section 1 of the Act defines "landlord" to include, in part:

> (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
>
> (i) permits occupation of the rental unit under a tenancy agreement, or
>
> (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement

[Reproduced as written]

I am satisfied that the agent appearing on behalf of the owner meets the definition of landlord under the Act. Accordingly, any reference to landlord in this decision includes the owner or the owner's agent.

The landlord served the tenant with the landlord's originally filed Application for Dispute Resolution by way of courier service, as permitted by the Director during the postal dispute, on July 6, 2016. The landlord had obtained the tenant's mailing address from the person authorized by the tenant to represent him at the move-out inspection. The tenant acknowledged receipt of the original Application several months prior to this hearing. No evidence accompanied the original Application but a Monetary Order Worksheet was prepared indicating the landlord was seeking compensation totalling of $2,200.00 for four items.

The landlord submitted an Amendment to an Application for Dispute Resolution and evidence in support of all of the landlord's claims to the Residential Tenancy Branch on November 22, 2016. The landlord sought to increase the monetary claim to $4,429.14. The Amendment and evidence was sent to the tenant via registered mail on November 23, 2016 and the tenant received them on November 24, 2016.

The tenant stated that he was shocked to receive an increased claim and evidence less than two weeks prior to the hearing date and questioned whether he should engage the services of a lawyer in the circumstances. The landlord was asked to explain the reason for the delay in serving the tenant with the Amendment and the landlord's evidence. The landlord indicated that it took some time to compile the evidence and that she had been dealing with an eviction.

The Rules of Procedure provide that an applicant may amend their application provided the Amendment is received by the respondent not less than 14 days before the scheduled hearing date. Evidence is to be served at the time of serving the original Application where possible but if evidence is not yet available the evidence is to be served as soon as possible but not less than 14 days before the hearing. Where the words "not less than" are used to calculate a deadline, the Rules of Procedure provide that the first and last day are not counted. Accordingly, in this case, the last day for the tenant to receive the Amendment and the landlord's evidence was November 22, 2016. Putting the documents in the mail on November 23, 2016 would in no way meet the deadline to serve the tenant with the Amendment and the evidence not less than 14 days before the hearing. Further, I found the landlord did not provide an exceptional circumstance that prevented her from meeting her obligation especially considering the landlord had originally filed in early July 2016. Therefore, I informed the parties that I would not permit the Amendment or admit the landlord's evidence package.

In light of the above, I presented the landlord with the option to withdraw the Application, with leave to reapply, or to proceed with the Application that was originally filed but without the benefit of any documentary or photographic evidence. The landlord stated

that she wanted to proceed with the original claim and confirmed that she understood I would make this decision based upon verbal testimony only and that I would not be considering the documentary or photographic evidence.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation form the tenant as originally claimed?
2. Is the landlord authorized to retain all or part of the tenant's security deposit?
3. Disposition of the security deposit.

Background and Evidence

The tenancy started September 1, 2014 and the tenant paid a security deposit of $650.00 and a key deposit of $50.00 to the landlord. The tenant was required to pay rent of $1,300.00 on the first day of every month. In April 2016 the tenant gave a notice to end the tenancy effective May 31, 2016.

Below, I have summarized the landlord's claims against the tenant and the tenant's responses.

Rent for June 2016 -- $1,300.00

In seeking compensation for the month of June the landlord submitted that the tenant was overholding until June 5, 2016 and the rental unit was not cleaned and it was damaged at the end of the tenancy. The landlord testified that the tenant was required to vacate the rental unit by 1:00 p.m. on May 31, 2016 but when the landlord entered the unit on May 31, 2016 she found the tenant's possessions were still in the unit and the unit had not been cleaned. The landlord testified that the tenant's possessions were in the unit until June 5, 2016. The landlord testified that she entered the unit daily between May 31, 2016 and June 5, 2016 and commenced cleaning efforts. The landlord acknowledged that she moved the tenant's possessions around and another person was also in the unit assisting her with cleaning efforts.

The landlord also stated that after the tenant gave notice to end tenancy, in April 2016, she had a photographer enter the rental unit for purposes of taking pictures for a rental advertisement but that the unit did not show well because it needed cleaning and there were objects in the rental unit. The landlord testified that she did not advertise the rental unit until the end of July 2016, when it was "in proper condition" and the unit was re-rented as of August 1, 2016.

The tenant testified that he asked for the landlord's permission to occupy the rental unit an additional five days and the landlord gave him permission since the unit had not been re-rented. The tenant stated that there was no discussion about paying rent for June 2016 and since it was not re-rented and he only requested five days additional days the request was "no big deal". The tenant indicated he was shocked when he returned to the property to find the landlord in his unit in early June 2016. The tenant submitted that he did not give the landlord consent to enter the rental unit the landlord illegally entered the rental unit between May 31, 2016 and June 5, 2016.

The landlord denied giving the tenant permission to occupy the rental unit an additional five days and submitted that she had tried contacting him a number of times to set up a move-out inspection for May 31, 2016.

Cleaning -- $300.00

The landlord testified that she and her husband cleaned the rental unit and that they charge the owner of the property a "flat rate" of $300.00 regardless of how long they spend cleaning.

The tenant submitted that there were two cleaners in the unit in early June 2016 and that when possession was returned to the landlord on June 5, 2016 the unit was reasonably clean.

Door closer -- $300.00

The landlord submitted that there is a door closer on the entry door to the rental unit and at the end of the tenancy it was detached from the door. The landlord submitted that a new closer was purchased at a cost of $45.00 and approximately $35.00 was spent on labour to install the new closer. The landlord submitted that the former door closer could not be fixed and that it was only three years old.

The tenant acknowledged that the door closer became detached from the door. The tenant attributes this to wear and tear over the years and being attached to an entry door that has a hollow core. The tenant stated that he tried to reattach the door closer but the screws would just pull out of the door.

Keys -- $140.00

The landlord submitted that the tenant failed to return the keys to the rental unit; the building door; and, the mailbox. New locks were installed at a cost of $140.00.

The tenant acknowledged that he neglected to return the keys to the landlord on June 5, 2016. The tenant stated that he attempted to contact the landlord by email and telephone in an effort to return the keys but the landlord did not respond to him.

As for the key deposit paid to the landlord, the landlord stated that it was for a key for the exercise room in the strata building. The landlord acknowledged that she issued a receipt for the key deposit to the tenant for the payment but claimed that she gave the money to the Strata and that it is upon the tenant to request a refund from the Strata.

Analysis

Upon consideration of the verbal testimony, I provide the following findings and reasons as to the landlord's claims against the tenant.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided in section 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 whatever was reasonable to minimize the damage or loss.

As the applicant, the landlord bears the burden of proof in this case. The burden of proof is based on the balance of probabilities. It is important to point out that 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.

In this case, it was undisputed that the tenancy came to an end pursuant to a tenant's one month notice to end tenancy given in April 2016. According to section 37(1) of the Act, the tenant was required to vacate the rental unit by 1:00 p.m. on May 31, 2016 unless the parties agree otherwise. The tenant claims that he obtained the landlord's permission to occupy the rental unit an additional five days; however, I find the disputed verbal testimony is not sufficient to satisfy me that he had permission. Accordingly, I accept that the tenant was in breach of the Act by failing to vacate when he was required to under the Act. Although I find the tenant failed to vacate when he was required, I also find the landlord grossly violated the Act by taking possession of the unit

when she entered the unit repeatedly, moved the tenant's possession around and started cleaning the unit starting May 31, 2016.

Section 57 of the Act provides for what happens if a tenant does not vacate when they are required to. Section 57(2) prohibits the landlord from taking possession of the rental unit without a Writ of Possession but section 57(3) permits the landlord to claim compensation from the tenant for the overholding. Sections 57(2) and (3) are reproduced below:

> (2) The landlord must not take actual possession of a rental unit that is occupied by an overholding tenant unless the landlord has a writ of possession issued under the Supreme Court Civil Rules.
>
> (3) A landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

[Reproduced as written]

In order to obtain a Writ of Possession, the landlord must first apply for an Order of Possession by filing an Application for Dispute Resolution with the Residential Tenancy Branch. The landlord did not do that in this case. Rather, the landlord took it upon herself to enter the unit, start cleaning and moving the tenant's possessions around which I find constitutes taking possession of the rental unit. Since I have found the landlord illegally took possession of the rental unit starting May 31, 2016 I decline the landlord's request to recover rent from the tenant for June 2016.

The landlord also suggested that there was a loss of rent due to the lack of cleanliness and damage in the rental unit. As for the efforts to photograph the rental unit in April 2016 it is important to note that the tenant was still legally occupying the rental unit at that time. Accordingly, it should have been expected that his possessions would have been in the unit since he had that legal right. If a tenant fails to maintain reasonable standards of cleanliness during the tenancy, the landlord's remedy is eviction under section 47 of the Act but not to claim loss of rent after the tenancy ended. Rather, loss of rent may be claimed if the tenant fails to leave the rental unit reasonably clean and/or damaged at the end of the tenancy, which I address further below in this decision. I find the landlord's decision to refrain from advertising the unit to prospective tenants in April or May 2016 was the landlord's decision and the cost associated to that decision is that of the landlord.

Under section 32(3) and 37(2) of the Act, a tenant is required to leave a rental unit reasonably clean and undamaged; however, sections 32(4) and 37(2) also provide that reasonable wear and tear is not considered damage. Section 37(2) also requires that the tenant return all keys or means of access to the landlord at the end of the tenancy.

The landlord asserted that the tenant did not sufficiently clean the rental unit when he moved out whereas the tenant submitted that there were two cleaners in the unit in early June 2016 and the rental unit was returned to the landlord in a reasonably clean condition. The disputed verbal testimony does not satisfy me that the landlord is entitled to compensation of $300.00 as claimed. Furthermore, if the landlord did perform cleaning tasks in the rental unit between May 31, 2016 and June 5, 2016 as she claimed, she did so illegally because she did not have the right to enter the unit and start cleaning. Therefore, I dismiss the landlord's claim for cleaning.

The landlord asserted that the tenant damaged the door closer; however, the tenant pointed to wear and tear and installation of a door closer on a hollow core door as the reason the closer became detached. I find the tenant provided a reasonably likely version of events and I find the landlord's verbal testimony did not satisfy me that the tenant's actions or neglect resulted in damage to the door closer. Therefore, I dismiss the landlord's claim for damage to the door closer.

It was undisputed that the tenant failed to return keys to the rental unit, building door, and mailbox which I find to be breaches of section 37 of the Act. I find the landlord's request for $140.00 to replace the locks to be within reason and I award the landlord that amount.

Given the landlord's limited success in this Application, I make no award for recovery of the filing fee.

In light of all of the above, I dismiss all of the landlord's claims against the tenant with the exception of the cost to replace the locks, or $140.00.

I authorize the landlord to deduct $140.00 from the tenant's $650.00 security deposit and I order the landlord to return the balance of the security deposit, in the amount of $510.00, to the tenant without further delay. In keeping with Residential Tenancy Branch Policy Guideline 17: *Security Deposit and Set-Off* I provide the tenant with a Monetary Order in the amount of $510.00 to ensure payment is made.

As for the key deposit, a key deposit is a refundable fee that a landlord may charge a tenant under section 6 of the Residential Tenancy Regulations. Section 6 provides that

a tenant's entitlement to a refund is dependent on whether the key(s) are returned. In this case, the fee was paid by the tenant to the landlord for the exercise room key. Accordingly, I find the tenant's entitlement to a refund is between the landlord and the tenant and not the tenant and the Strata, as suggested by the landlord. I reject the landlord's position that it is upon the tenant to request a refund from the Strata. If the key deposit was forwarded to the Strata by the landlord as she claimed, I find it more likely that the Strata would refund the deposit to the payer of the fee, which would be the landlord. However, I make no order for the landlord to refund the key deposit to the tenant by way of this decision as I am uncertain as to whether the tenant returned the key to the exercise room considering he did not return the other keys to the property. Therefore, if the tenant has in fact returned the key to the exercise room, I leave it upon the tenant to decide whether he wishes to pursue the landlord for return of the key deposit by way of making his own Application for Dispute Resolution.

Conclusion

The landlord has been awarded compensation of $140.00 and is authorized to deduct this amount from the tenant's security deposit. I have ordered the landlord to return the balance of the security deposit, in the amount of $510.00, to the tenant without further delay. The tenant has been provided a Monetary Order in the amount of $510.00 to ensure payment is made.

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: December 16, 2016

Residential Tenancy Branch