Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MND, MNR, MNSD, MNDC, FF
Tenants: MNDC, MNSD, O

Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking monetary orders.

The hearing was conducted via teleconference and was attended by the landlord and the male tenant.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for overholding; court costs and bailiff fees; cleaning of and repairs to the rental unit; and costs for postage and copies of documents for this proceeding; for all or part of the security and pet damage deposits and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 38, 55, 57, 67, and 72 of the *Residential Tenancy Act (Act).*

It must also be decided if the tenants are entitled to a monetary order for return of the security and pet damage deposits and for compensation for the landlord to failing to provide cable during the tenancy, pursuant to Sections 27, 38, 67, and 72 of the *Act*

Background and Evidence

The tenants submitted a copy of a tenancy agreement signed by the parties on December 31, 2013 for a month to month tenancy beginning on January 1, 2014 for a monthly rent of $885.00 due on the 31st of each month with a security deposit of $442.50 and a pet damage deposit of $250.00 paid.

The tenancy ended after the landlord obtained an order of possession effective June 1, 2016. The landlord submits the tenants failed to move out on June 1, 2016 and that she was forced to hire a bailiff and have them removed on June 9, 2016. The tenants do not dispute this.

Page 2 of the tenancy agreement contains clauses relating to what is included in the rent. Specifically clause 3(b) stipulates:

> "What is included in the rent: *(Check only those that are included and provide additional information, if needed)* The landlord must not terminate, or restrict a service or facility that is essential to the tenant's use of the rental unit as living accommodation, or that is a material term of the tenancy agreement."

Following the above statement is a list of a number of services and facilities with check boxes – in each box the landlord has placed either a positive check mark "√" or an "x".

The tenants submit that when they signed the tenancy agreement the landlord told them that cable was included in the rent. They also submit the check box beside the word cablevision on the tenancy agreement had been left blank and it was not until they received a copy of the tenancy agreement from the landlord that she had marked the box with an "x".

The tenants submit the landlord never provided them with cable during the course of the tenancy and seek $2,040.00 in compensation for the landlord failing to provide this service. The tenants determined the amount of the claim based on the cost to obtain the service during the tenancy.

The landlord submits that she did not change anything on the tenancy agreement; that she has provided both tenants with a copy of the agreement and she has proof of the original tenancy agreement "shows that 'Cablevision' was 'not' included'." [reproduced as written]. The landlord did not explain what proof she had and she did not provide a copy of a written tenancy agreement.

The tenants also submit they provided the landlord with their forwarding address on June 9, 2016. The tenants submit the landlord refused to complete a move out inspection with them at the end of the tenancy. The tenants seek return of the security deposit of $442.00 and the pet damage deposit of $250.00.

The landlord submits that she had not received the tenants' forwarding address until July 7, 2016 when she received the tenants' Application for Dispute Resolution. The landlord's written submission states: "I have found out their new address. They have stayed an extra 10 days without rent, so I have now decided to keep damaged deposit as well as pet deposit. Their pets damaged walls, floors." [reproduced as written]. The landlord submitted her Application for Dispute Resolution seeking to claim against the security and pet damage deposits on November 22, 2016.

The landlord submitted the tenants did not want to complete the move out inspection. There is no evidence before me that the landlord provided written final notice of opportunity to attend a move out inspection.

The landlord submits the tenants did not move out of the rental unit until June 9, 2016 so she received no rent for the unit for the month of June 2016. As a result the landlord claims $933.32 for the month of June 2016. The landlord submitted that rent had been

increased previously and this was second rent increase after rent was set in a March 2016 hearing at $900.00.

The landlord testified that the rental unit was not re-rented until September 2016, after renovations were completed. The landlord also testified that near the end of June 2016 she moved another of her tenants into the unit while renovations were completed in her rental unit.

The landlord also submitted that the tenants failed to pay a rent increase for the months of January, February, March, April, and May 2016. The landlord claims $93.00. During the hearing the landlord clarified why her claim differed from the $60.00 agreed upon amount in the decision dated May 16, 2016 recording the settlement agreement between the parties.

The landlord stated that at the hearing in May 2016 she had not included the amounts unpaid for the months of April and May 2016. So she sought to include an additional $33.00 for these two months. The tenant acknowledged that they had agreed to pay the landlord $60.00 and thought the landlord would take it out of the security deposit.

The landlord submits that the tenants also caused “severe” damage and garbage cleanup was required. The landlord seeks $945.25 for replacement flooring; $1,080.87 for repairs and interior clean up; $600.00 for garbage removal. In support of this claim the landlord has submitted several photographs and receipts/estimates. The landlord has not submitted Condition Inspection Reports that record the condition of the rental unit at either the start or the end of the tenancy.

The landlord testified that one of the photographs she has submitted showed the condition of the floor prior to the start of the tenancy but she could not confirm which of the photographs showed this.

The tenant submits that they did not cause any damage to the rental unit during the tenancy. The tenant submits and the landlord confirmed that some of the damage to the property was caused by the bailiffs when attempting to remove some of the furniture.

The tenant submits also that the bailiff could not get two of their couches out of the rental unit and so the tenants went away to arrange a way for them to move the couches but when they returned the couches were cut up and moved into the garage with garbage from other tenancies that had ended and rental units that were under renovation.

The landlord also seeks compensation for the bailiff fees and court costs to pursue the Writ of Possession obtained through the Supreme Court of British Columbia. The landlord seeks $1,000.00 for bailiff costs and $120.00 for court costs. The landlord has submitted a copy of a receipt for the court costs and for the deposit for the bailiffs. The landlord did not submit a copy of the final invoice from the bailiff confirm actual costs but

she testified that she received a refund of approximately $264.00 from the bailiff in August 2016.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 27 of the *Act* states a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation or providing the service or facility is a material term of the tenancy agreement. The section goes on to state that the landlord may restrict or terminate a service or facility that is not essential or a material term if the landlord gives 30 days' written notice of the termination or restriction, and reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Regardless of the contention of both parties whether or not cable was included in the tenancy agreement at the time it was signed I find that cable was included in the rent as per the tenancy agreement. I make this finding because the instruction on the tenancy agreement itself stipulates to "*Check only those that are included"* when completing clause 3(b). The fact that the landlord has checked off all the boxes with some form of "check" all of the items are included in the rent.

Despite using different types of check marks – the positive check mark "√" and the "x" without providing any type of clarifying statement on the tenancy agreement itself I find the landlord checked off the box indicating that cable is included in the rent.

However, estoppel is a legal rule that prevents somebody from stating a position inconsistent with one previously stated, especially when the earlier representation has been relied upon by others.

Since the tenants did not seek to rectify this situation during the tenancy I find the tenants cannot now seek compensation for something that they had not attempted to correct during the tenancy. I find the tenants are estopped from entitlement for any compensation for the landlord's failure to provide the service. I dismiss this portion of the tenants' claim.

Section 35 of the *Act* requires that the landlord and tenant must complete an inspection of the condition of the rental unit before a new tenant begins to occupy the rental unit on

or after the day the tenant ceases to occupy the rental unit or on another mutually agreed upon date. The landlord must offer the tenant at least 2 opportunities with the second offered time being offered in writing and in the approved form.

Section 17 of the Residential Tenancy Regulation stipulates that the landlord must offer a first opportunity to schedule the condition inspection by proposing one or more dates and times. If the tenant is not available at the time proposed the tenant may propose another time that the landlord must consider. If the time proposed by the tenant is not acceptable the landlord must propose a second opportunity by providing the tenant a notice in the approved form. The approved form is available on the Residential Tenancy Branch website.

Section 36(2) stipulates that unless the tenant has abandoned the rental unit, the right of the landlord to claim against the deposits for damage to the residential property is extinguished if the landlord has not complied with the requirements of Section 35 of the *Act* and Section 17 of the Regulation; or does not participate in the inspection or having completed the inspection does not complete a Condition Inspection Report and give a copy to the tenant within 15 days after it is completed and the landlord receives the tenant's forwarding address.

In the case before me, I find that despite the landlord's claim that the tenants did not participate in a move out inspection the landlord has failed to comply with the requirements of Section 17 of the regulation to provide a written notice of the final opportunity to complete an inspection.

As a result, I find the landlord has extinguished her right to claim against either deposit and she has no authourity to withhold the return of the deposits, pursuant to Section 36(2).

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

As the landlord has extinguished her right to claim against either deposit and she failed to submit her Application for Dispute Resolution to claim against the deposit until several months after she states she received the tenant's forwarding address I find the landlord has failed to comply with Section 38(1) and the tenants are entitled to double the amount of both deposits for a total of $1,385.00, pursuant to Section 38(6).

Section 37 of the *Act* states that when a tenant vacates a rental unit at the end of a tenancy the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear and give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

Regardless of the landlord's failure to comply with the requirements set out in Section 36 of the *Act*, the landlord maintains right to make a claim for damage but must provide some evidence of the condition of the unit at the start of the tenancy. As the landlord has failed to provide any evidence of the condition of the rental unit at the start of the tenancy, I find the landlord cannot establish that there was any damage caused by the tenants at all.

Furthermore, if some of the damage was caused by the bailiff during the execution of the Writ of Possession, I find that the tenants had no control over the bailiffs and if the bailiffs caused damage the tenants cannot be held responsible.

In addition, when one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

In this case, the tenants dispute the landlord's claim that all of the garbage in the garage came from the tenants rental unit and that part of that garbage was the tenants' cut up couches that they intended to remove despite the bailiff's difficulty and was not intended to be left behind.

I find the landlord has failed to provide any evidence that the garbage left in the garage was solely the responsibility of these tenants; that there was any need for repairs or cleaning of the interior of the rental unit; or that any flooring required replacement.

Based on the above, I find the landlord has failed to establish that the tenants failed to comply with their obligations under Section 37 of the *Act* in relation to cleaning and repairs. I therefore dismiss the portion of the landlord's claim in the amounts of $945.25 for flooring replacement; $1,080.87 for repairs and interior cleaning; and $600.00 for exterior cleaning.

I accept the testimony of both parties that despite receiving an Arbitrator's order to vacate the property by June 1, 2016 they did not do so until June 9, 2016 after the landlord was required to obtain a Writ of Possession and hire a bailiff. As a result, I find the tenants are responsible for the court costs and the costs incurred by the landlord for the bailiff.

From the landlord's submissions I am satisfied the court costs amount to $120.00 and that despite paying a deposit of $1,000.00 to the bailiff her total cost was reduced by $264.00 when she received the refund from the bailiffs. As such, I find the landlord is entitled to $736.00 for bailiff costs.

In regard to the landlord's claim for rent for the month of June 2016, I accept the landlord is entitled to rent as the tenants failed to vacate the rental unit until after rent was due in the month, subject to the landlord's obligation to mitigate their losses.

I am not satisfied that the rental unit could not be re-rented for the month of June 2016. I find the landlord has failed to provide any evidence as to why they would not have attempted to re-rent the unit even before the tenants had vacated the rental unit or that it was not inhabitable. In fact, the landlord let another tenant stay in the unit for a period of the month June 2016.

As a result, I find the only funds the landlord is entitled for any period of the month of June 2016 is for the period when the tenants were overholding.

Section 57 of the *Act* defines overholding as tenant who continues to occupy a rental unit after the tenant's tenancy is ended. Section 57(3) states that 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.

As the tenants were overholding for 9 days I find the landlord is entitled to 9 days in amount based on the per diem rate of rent as per the tenancy agreement. While the landlord submitted that she instituted another rent increase after the March 23, 2016 hearing that set rent at $900.00, I find that she was not allowed to institute a second rent increase in the same year.

As such, I find that rent for the month of June 2016 was $900.00. As a result, I find the per diem rent rate to be $30.00 and the landlord is entitled to $270.00 for the tenants' overholding.

In regard to the landlord's claim for $93.00 for rent owe for the period of January, February, March, April and May 2016 I find that the parties agreed on May 16, 2016 that the tenants would pay $60.00. Despite the landlord's testimony that that agreement did not include April and May I note that the parties agreed to this amount after both April and May rent was owed. As such, I find the landlord cannot now change her mind as to how much she seeks to claim. I grant the landlord is entitled to $60.00.

To the landlord's final claim for the costs of faxing; photocopies and registered mail, I find that these are costs associated with the landlord pursuing a claim against the tenant. The *Act* does not provide for the recovery of such costs. I dismiss this part of the landlord's claim.

In relation to recovery of the $100.00 filing fee for the landlord's Application I find the landlord is entitle to recover only a portion of this fee as she was largely unsuccessful in her claim. I grant the landlord is entitled to $25.00 of the $100.00 fee.

Conclusion

Based on the above, I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **$941.00** comprised of $120.00 court costs; $736.00 bailiff

fees; $60.00 agreed upon rent owed and $25.00 of the $100.00 fee paid by the landlord for this application.

I find the tenants are entitled to monetary compensation pursuant to Section 67 in the amount of **$1,385.00** comprised of $885.00 double the amount of the security deposit owed; and $500.00 double the amount of the pet damage deposit owed.

As a result, I grant a monetary order to the tenants in the amount of **$444.00**. This order must be served on the landlord. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: January 04, 2017

Residential Tenancy Branch