Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNSD FF

Introduction

This hearing convened by teleconference on November 7, 2016 for 61 minutes during which I heard submissions relating to service of evidence; the terms of the tenancy agreement and submissions from the Landlord regarding payments received at the start of the tenancy. The hearing time expired and the matters were adjourned. An Interim Decision was issued November 7, 2016 which included, among other things, orders to re-serve evidence. As such, this Decision must be read in conjunction with my November 7, 2016 Interim Decision.

The hearing reconvened on February 8, 2017 for 167 minutes, during which both parties were reminded that their solemn affirmation from November 7, 2016 was in still force and effect. I heard submissions from the female Landlord and female Tenant. The male Tenant requested that the female Tenant represent him as his agent and he disconnected from the hearing. No submissions were made by the male Landlord. Therefore, for the remainder of this decision, terms or references to either the Landlords or the Tenants importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

As per my November 7, 2016 Interim Decision the Tenants were issued the following orders:

> *The Tenants were Ordered to reserve their documentary evidence and up to 4 single digital photographs upon the Landlords and the RTB. That evidence must be served to each party no later than* ***November 25, 2016*** *and must consist of the exact same evidence (written/photographic/ email/text message/usb/c.d. and/or any other format); paginated if in printed form; and served in the exact same order and format to the Landlords and the RTB, in accordance with section 88 of the Act, as copied to the end of this interim decision.*

Upon review of the evidence reserved upon the Landlords and the Residential Tenancy Branch (RTB) I concluded the Tenants had not served that evidence as ordered. The package received at the RTB did not have 4 separate photographs loaded on the USB stick and the 38 page package titled Dispute Resolution File was not resubmitted to the RTB; as was reserved upon the Landlords. In addition, a new addendum and different narrative had been reserved upon the Landlord and not the narrative that what was

originally submitted to the RTB. As such, I determined the Tenants breached my Orders as the package they submitted to the RTB on November 15, 2016 was not the exact same evidence (written/photographic/ email/text message/usb/c.d. and/or any other format); and was not served in the exact same order and format to the Landlords and the RTB.

When reviewing the aforementioned, the Tenant confirmed receipt of my Interim Decision with the Notice of Reconvened Hearing. It was clear to me the Tenant was aware that she had not followed my orders as outlined in the Interim Decision. In addition, I found the Tenant's responses when reviewing those evidence submissions to be argumentative and curt. Notwithstanding the foregoing, the Landlord stated she was prepared to respond to the Tenants' submissions. As such I considered only those relevant submissions which I was certain were received by the Landlords and by the RTB, in accordance with the Rules of Procedure. For clarity, I considered the Tenants' 38 page document dated October 1, 2016 and the 148 electronic photographs.

The Tenant confirmed receipt of the Landlords' submissions and no issues or concerns were raised. Accordingly, I considered all relevant submissions from the Landlords as evidence for these proceedings.

Both parties were provided with the opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Although I was provided a considerable amount of evidence, including verbal testimony; written and digital submissions; with a view to brevity in writing this decision, I have only summarized the parties' respective positions below.

Issue(s) to be Decided

1. Have the Landlords proven the Tenants had breached the *Act,* Regulation or tenancy agreement?
2. If so, have the Landlords proven entitlement to monetary compensation for that breach?

Background and Evidence

The parties entered into a written fixed term tenancy agreement which commenced on October 13, 2015 and was set to end on April 12, 2016. Rent of $1,600.00 was payable on the 13th of each month.

The rental unit was described as being a fully furnished; 3 levels; 2 bedroom plus study; 2400 square foot; single detached house. The house was built in 2007 and underwent renovations shortly after it was purchased by the Landlords in 2011. The lower level had carpet flooring; the middle level had cork flooring; and the upper level had hardwood flooring. I heard the Landlord state they went south every winter and would rent out the house; leaving their personal possessions in the house for their tenants to use.

No written condition inspection report forms were completed at move in or move out. The tenancy agreement was signed on August 31, 2015. The Tenants were emailed a copy of the itemized list of the Landlord's possessions on October 6, 2015 prior to their possession on October 13, 2015. The Tenants did not dispute that list of possessions during the tenancy.

On August 24, 2015 the Tenants paid $500.00 via email transfer which was added to their $2,700.00 September 25, 2015 payment totalling $3,200.00. That amount was originally applied to their first and last's month's rent (2 x $1,600.00).

Each Tenant agreed to the terms of the tenancy agreement by placing their initials on every page and by signing and dating the last page on August 31, 2015. That tenancy agreement stated, in part, as follows:

> 10. *The Tenant shall give written notice to the Landlord within 14 (FOURTEEN) days after the commencement date, of any structural defects in the Premises, or any defects in the sanitary installations and equipment, electrical installations and equipment, furnishings, appliances, keys, locks, doors, windows, wash-basins and taps. The absence of such notice shall constitute prima facie proof of the absence of any defects or missing articles and the good condition of the Premises. Any notice given by the Tenant shall not place any obligation on the Landlord to effect any repairs but will serve only to record the state of repair.*
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> 15. *Tenant shall repair or replace, at the Tenant's expense, all loss or damage to any of the listed furniture, carpets, draperies, appliances and other household goods, and personal effects of Landlord, whenever such damage or loss shall have resulted from Tenant's misuse, waste or neglect of said furnishings and personal effects of Landlord.*
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> [Reproduced as written p 2 of agreement]

On November 30, 2015 the Landlords' Agent conducted an inspection of the rental property. During that inspection the Agent took 55 photographs and no damages were observed or noted at that time.

In December 2015 a dispute arose between the parties relating to the Landlords' holding last month's rent of $1,600.00. During that time the Landlords determined they needed to collect a $500.00 pet deposit. The Tenants had a large Great Dane dog and had acquired a kitten during the tenancy without the Landlords' approval.

Based on the foregoing, the Tenants paid $500.00 on December 13, 2015 which the Landlords considered payment for the pet deposit and the $1,600.00 last month's rent was applied to the December 13, 2015 rent. On March 13, 2016, the Tenants short paid their last month's rent; paying $1,100.00 and unilaterally decided the $500.00 deposit

would be applied to their last month's rent. As a result, no security or pet deposits or any other money was being held by the Landlords when this tenancy ended.

Sometime between March 11, 2016 and March 15, 2016 the Landlords received a telephone call from the Tenants giving them notice to end the tenancy effective April 1, 2016; ten days prior to the end date of the fixed term and prior to the Landlords scheduled arrival. That telephone call was followed up with an email notice. On March 23, 2016 the Landlords received an email with the Tenants' forwarding address.

The Landlords now seek $5,706.07 compensation which is comprised of an itemized list of items grouped into categories by the Landlords as follows: (1) $940.22 cleaning; (2) $4,187.12 Damages ($2,284.30 personal items damaged plus $1,902.82 rental unit/appliance damage); (3) $512.32 missing furnishings; and (4) $66.40 unpaid utilities.

The Landlords' arguments, included in part, as follows:

- The tenancy agreement did not provide for pets; the Tenants did not disclose they had a Great Dane puppy until October 5, 2016, eight days before the start of the tenancy. The Tenants did not seek permission to acquire a kitten during the tenancy.

- Many of the Landlords' personal possessions had been damaged or were missing completely. The Tenants displayed a pattern that when something broke they moved it or hid it.

- The rental unit was left dirty and damaged including, among other things a cracked fridge shelf and interior door handles that were chewed or dented.

- The Landlords submitted evidence from the Tenants' social media page displaying the Dog on their furniture and linens; the cat inside their expensive basket; and the condition of the rental unit during Christmas 2015.

- The Tenants photographic evidence was not taken close enough to items to be able to see that actual condition or damage that was left.

The Tenants' arguments included that it was the Landlords who breached the *Act* first. Their remaining arguments are summarized, in part, as follows:

- The tenancy agreement was silent about a pet deposit and the Landlords were told prior to the start of the tenancy the Tenants had a dog.

- They are not responsible for the cost of any personal items because the Landlords failed to complete a condition inspection or the condition report form. She asserted the damages were all pre-existing.
- While the Tenants did receive the list of personal items prior to the tenancy the Tenants and Landlords did not "mutually review" that list of personal items.
- Some items claimed by the Landlords, such as the queen air mattress, were not listed on the personal items list.
- The Tenant questioned the date the photographs were taken based on the date the Landlord uploaded them to her social media page.
- Previous tenants had cats and the Landlords had a dog; all of which could have caused the damages.
- The Landlords confirmed their furniture was 9 ½ years old.
- The Tenant alleged the Landlords' witness's statement was unreliable; however, no submissions were made to support that allegation.
- The Landlord did not provide receipts to prove when items were originally purchased and no receipts were submitted to prove replacement of those items.
- Tenants' photographs do not show damages and the Tenant denied using the Landlords' linens as they used their own linens.
- The Tenant refused to speak to photographs displaying their dog on the linens or on the couch and argued those were not photographs submitted by the Tenants.
- The Tenants paid $519.64 on April 27, 2016 plus $51.96 on May 2, 2016 towards the hydro bill.

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing; documentary evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

I agree with the Tenants that the Landlords were in breach of the *Act* when they collected last month's rent and failed to complete a condition inspection report form at move in or at move out. However, I do not accept the argument that the Landlords were barred from seeking damages to the rental unit due to those breaches.

Rather, sections 24 and 36 of the *Act* stipulate that a landlord who fails to complete a condition inspection report form with the tenant would extinguish their right to claim damages against the security or pet deposit; meaning the landlord would have to return the deposit(s) and seek a monetary order through dispute resolution for damages. As no deposits were being held by the Landlords as of the end of this tenancy the extinguishment provision does not apply here. As such, the Landlords were entitled to file an application for Dispute Resolution to seek monetary compensation for their losses.

I favored the evidence of the Landlords that the rental unit and their possessions had been in good condition at the start of the tenancy and were damaged, missing, and/or dirty at the end of the tenancy. I favored the Landlords' submissions over the Tenant's submissions as the Tenant submitted adverse photographic evidence proving the condition of the rental unit at the start of the tenancy; in addition to the social media and agent's evidence submitted by the Landlords. Further, I found the Landlords' evidence to be forthright, consistent, and credible. The Landlords readily acknowledged that they collected last month's rent; they did not complete condition inspection report forms; and they did not itemized quantities of every item left in the house; some of which were in breach of the *Act.* In my view the Landlords' willingness to admit fault when they could easily have stated things happened differently lends credibility to all of their evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Tenants' explanations of the condition the rental unit was left in at the end of the tenancy and the circumstances of why they vacated prior to the end of the fixed term tenancy to leave town prior to the Landlords' return to be improbable. Rather, I find the Landlords' explanation that the Tenants avoided having to conduct an inspection due to the condition the rental unit had been left in to be plausible given the circumstances presented to me during the hearing.

I then considered that section 21 of the Regulations provides that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary. In absence of a completed condition inspection report form and in the presence of the volumes of evidence before me, I accept the Landlords' submissions as being a preponderance of evidence to prove the condition of the rental unit at the start and at the end of the tenancy.

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

As per the aforementioned, I find the Tenants left the rental unit and the Landlords' possessions damaged; dirty; with some possessions missing; in reach of section 37 of the *Act.*

I make that finding, in part, after giving minimal evidentiary weight to electronic dates applied to the digital evidence. As explained during the hearing, I find digital dates unreliable as they can be altered or edited. Instead, I considered the contents of the photographs and related those contents to the testimony and documentary evidence submitted by each party.

Secondly, I found the Tenants' photographic evidence to be questionable as many of the photographs displayed images of different angles, or scenes where damaged areas were cut off and not visible. Furthermore, some of the Tenants' photographs clearly displayed the basket fully intact with a lid and others showing no lid and uneven edges at the rim. The Tenant's response that she could not speak to photographs showing her daughter and/or her dog on the furniture or on the Landlords' bedding simply because they were not photographs submitted by her, reduces the credibility of the Tenant's submissions. In addition, the Tenants clearly took numerous photographs of every area at the start of the tenancy, which one could only assume was to protect their own interests, as well as to show their contacts on social media the beautiful condition of the property they had just rented.

Thirdly, I accept the Landlord's submissions that the damaged door knobs were clearly the result of the Tenants' Great Dane biting them. I conclude that damage, along with the evidence of other noted damages, was sufficient to prove the Tenants' failure to monitor their dog and could be considered a total disregard for the Landlords' property.

Fourthly, I do not accept the Tenants' submissions that they were released of any responsibilities for the condition of the rental unit at the end of this tenancy or because they did not "mutually review" the personal item list. There was sufficient evidence the Tenants agreed to all of the terms of the tenancy agreement, some of which are noted above. Rather, I find the Landlords are entitled to compensation for damages as outlined below.

Section 7 of the *Act* provides as follows in respect to claims for monetary losses and for damages made herein:

> 7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> 7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 provides that the party making the claim for damages must satisfy each component of the following: the other party failed to comply with the *Act,* regulation or tenancy agreement; the loss or damage resulted from that non-compliance; the amount or value of that damage or loss; and the applicant acted reasonably to minimize that damage or loss. I concur with this policy and find it is relevant to the Landlord's application for Dispute Resolution.

As noted above, Policy Guideline 16 stipulates the applicant must prove the value of the damage or loss; it does not stipulate the applicant must have completed the repairs or replaced the damaged items prior to making their claim. Therefore, I do not accept the Tenants' assertion they are not required to compensate the Landlords based on an estimate.

I did however consider that awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to reduce the replacement cost by the depreciation of the original item.

In the absence of a specific useful life of personal items I also considered Residential Tenancy Policy Guideline 16 which states that an Arbitrator may award "nominal damages" which are a minimal award. These damages may be awarded as an affirmation that there has been an infraction of a legal right in absence of the actual value.

Section 67 of the Residential Tenancy *Act* states that without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

As per the foregoing and in consideration that neither the *Act* nor the Policy Guidelines stipulated the useful life of many of the personal items claimed the Landlords, I grant the Landlords' application based on my experiences as an Arbitrator and pursuant to section 67 of the *Act,* as follows:

(1) **$627.50** Cleaning comprised of $50.00 labour for carpet cleaning based on the evidence that the Landlords owned a carpet cleaning machine; plus $577.50 house cleaning;
(2) **$1,144.59** rental unit damage: comprised of $833.51 for depreciated flooring cost and labour (60% of $1,389.19 claimed); plus $33.00 drywall; and $278.08 fridge damages;
(3) **$994.74** personal items damaged: award of 40% of $2,486.85 claimed to account for depreciation and nominal awards for damaged personal items.
(4) **$204.93** personal items missing: award calculated at 40% of $512.32 claimed to account for depreciation and nominal awards for missing personal items.

In regards to the Landlords' claim of $66.40 towards the hydro bill, I find the Tenants' calculations that they owed $519.64 plus 5% conservation rate plus 5% GST to be reasonable given the manner in which the hydro bill had been itemized. As such, I find the Tenants had paid the hydro in full and the Landlords' claim for unpaid utilities is dismissed, without leave to reapply.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Landlords have partially succeeded with their application; therefore, I award recovery of the **$100.00** filing fee, pursuant to section 72(1) of the Act.

The Tenants are hereby ordered to pay the Landlords the total amount of **$3,071.76** ($627.50 + $1,144.59 + $994.74 + $204.93 + $100.00), forthwith.

In the event the Tenants do not comply with the above order, the Landlords have been issued a Monetary Order in the amount of **$3,071.76** which may be enforced through Small Claims Court upon service to the Tenants.

Conclusion

The Landlords were partially successful with their application and were awarded a $3,071.76 Monetary Order.

This decision is final, legally binding, 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: February 16, 2017

Residential Tenancy Branch