



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MND, MNSD, FF

Introduction

This hearing dealt with cross-applications under the *Residential Tenancy Act* (the “Act”). The tenants applied for return of the security deposit and for compensation for damage or loss arising from breach of the Act, regulations, or tenancy agreement. They had also applied for an order for substituted service but withdrew that request at the hearing.

The landlord applied to recover unpaid rent and for compensation for damage or loss to the rental unit, for compensation for damage or loss arising from breach of the Act, regulations, or tenancy agreement, and to recover the cost of the filing fee.

The matter was scheduled as a teleconference hearing on February 28, 2017. At that hearing, service of the parties’ respective applications and supporting evidence was confirmed and the hearing began and lasted one hour. At the end of one hour the parties had not yet finished presenting their evidence. The hearing was therefore adjourned and an interim decision was issued. The hearing was then continued for another hour on April 10, 2017.

Both parties appeared at the continuation of the hearing. The hearing process was again explained and the parties continued to provide affirmed testimony and to present their evidence orally and in written and documentary form. They had opportunity to make submissions to me and to respond to the submissions of the other party.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure. However, I refer only to the relevant facts and issues in this decision.

Issue(s) to be Decided

Has there been a breach of s. 38 of the Act by the landlord?

If so, are the tenants entitled to a monetary order for double the security deposit?

Are the tenants entitled to a monetary order for compensation or loss under the Act, regulation, or tenancy agreement?

Is the landlord entitled to a monetary order for damage to the rental unit, unpaid rent, or compensation for loss under the Act, regulation, or tenancy agreement?

Is the landlord entitled to recovery of the application filing fee?

Background and Evidence

The parties agreed that this tenancy began in May of 2011 and ended on March 31, 2015. The tenants paid the landlord a security deposit of \$285.00 at the beginning of the tenancy. That deposit remains in the landlord's possession. The parties entered into a series of short term tenancy agreements, copies of which were in evidence. Smoking inside of the rental unit was prohibited under the terms of the tenancy agreement. The last tenancy agreement provided that the tenancy ended on March 31, 2015, and that is indeed when the tenants vacated the rental unit.

The tenants provided the landlord with written notice of their forwarding address by including it on the condition inspection report. Different versions of the condition inspection report were in evidence. On one of the versions, the move-out inspection date is recorded as April 16, 2015. The tenants did not sign over a portion of the security deposit. The landlord did not apply to retain the security deposit.

Condition inspections were conducted and move-in and move-out. The landlord's summary at move-out is as follows: "Tenant still owes \$80.00 rent. Extensive cigarette smoke damage to all ceilings and mold damage from [low] heat and inadequate ventilation from windows/fan with extra people in apartment."

The tenants indicated on the move-out condition inspection report that they do not agree that the report fairly represents the condition of the unit "for reasons of landlord's ill responsibility in maintaining daily living, health standards, cleanliness and emergency situations and quiet enjoyment" (reproduced as written).

The landlord claimed that the tenants smoked in the unit although smoking was prohibited indoors. The tenants testified that they did not smoke inside of the unit but would sometimes smoke at the open front door. The tenants said that the prior tenant had been a heavy smoker and that there was no ceiling fan in the kitchen, with the result that cooking smoke and moisture built up in the residence. The landlord did not accept that the build-up could be the result of cooking or moisture, in part because she has owned the rental unit since 2003 and the build-up had not occurred before.

The landlord's evidence included a photograph of a piece of drywall removed around the time the tenants moved in contrasted against the walls in the tenants' apartment after they left, a

photograph of a wall-mounted heater with staining on the vent portion, and a photograph of a notice to the tenants dated June 26, 2014 cautioning them against further smoking inside the unit.

The move-out portion of the condition inspection report in evidence describes cigarette smoke staining on the ceilings of the entryway, kitchen, dining room, and living room. These are not documented in the move-in portion of the report. It also indicates that the dining room walls, the main bathroom skylight, and the heater grills in the bedroom are stained with smoke. It also describes a cigarette burn in the master bedroom at move-in.

The move-out report also records a strong smell of mildew upon entering and mold growth in the cabinets and doors and pantry. Some mold staining is documented in the move-in inspection report.

The landlord alleges the tenants refused to ventilate their suite with a quality exhaust fan that was provided to them in 2014. The landlord's evidence included a letter to the tenants calculating the hydro costs associated with running a fan: "So if you run the fan for 66 hours per week it would cost 15 cents at Step 1 or 23 cents at Step 2." It also included a letter dated December 9, 2014 in which the landlord is responding to the tenants' concerns about moisture in the unit. In the letter the landlord asks the tenants to use the bathroom fan, open the windows, and turn up the heat.

The tenants did not give evidence that they followed the landlord's recommendations around ventilation or heating. One of the tenants has a construction background and testified that he was advised by a construction worker working at the rental property that their rental unit was not sufficiently ventilated, and that the landlord did not add additional ventilation because of the cost. Two photographs of mold build up around a windowsill and in the corner of a room were provided.

Landlord's financial claims

(a) Replacing heaters

The landlord claims for the cost of replacing two discoloured heaters in the total amount of \$824.00. She testified that the heaters still worked but were discoloured. They were originally purchased in 2007. A receipt for the purchase of the original heaters was provided. The landlord has not yet replaced the heaters.

The landlord stated that in fact anything vinyl in the rental unit had been permanently stained with cigarette smoke and that she will also have to replace the tub surround.

In response, the tenants say that the damage to the heating units is only cosmetic and the landlord should not have to purchase new heating units.

(b) Cleaning

The landlord also claims for \$285.00 for “extensive scrubbing of all walls, cupboards, appliances and every surface in suite to remove cigarette smoke.” She testified that the tenants left sticky cigarette residue over anything plastic, including the electrical outlets.

The tenants say that the condition inspection report at move-out does not suggest this level of cleaning was required.

(c) Special sealant and application of same

The landlord also seeks \$254.56 for a sealant recommended for smoke stained surfaces and \$500.00 for hiring a painter to spray the sealant on ceiling and walls. Copies of receipts for the sealant were in evidence. The landlord has not yet hired a painter and has not provided a quote for the cost of painting.

In response to this claim the tenants observe that the \$500.00 estimate provided by the landlord for repainting includes the cost of priming the walls, which the landlord could do herself, and say that it is only the ceiling, which is textured, that requires spraying.

(d) Couch removal

A couch was left in the living room. This is noted on the condition inspection report and the tenants agreed that they had left the couch. The landlord claimed \$55.00 in dumping fees for the couch and other items left by the tenants. The tenants agree that they left this couch, but say that they sent someone to pick it up, and he was upset or intimidated by the landlord and left without doing so.

(e) Unpaid rent

The landlord claims \$84.00 in unpaid rent and provided a copy of a receipt dated March 1 recording the payment of \$550.00 for March rent, and noting: “still owe \$48.00 plus \$36.00 for January.”

Tenants' financial claims

(a) Non-functioning fridge/stove

The tenants' written claim included costs for spoilage for non-functioning appliances and mold and medical concerns and consistent cleaning for 2011-present. No receipts were in evidence and there were no further detail given. This claim is for \$450.00.

(b) Hydro/Electric

The tenants claim for “hydro electric” from “2011-present” for “landlord usage for repairs.” They also claim for May-September, 2014 “tradesmen/construction,” which they quantify by stating: “Based on \$89.00 mnthly @ 2% x 5 months.” This claim is for \$89.00.

(c) Outstanding invoices

The tenants claim \$160.00 for services rendered to the landlord for power-washing, construction clean-up, and outstanding laundry fees.

(d) Loss of quiet enjoyment

The tenants also claim \$3,000.00 for 2013-present, for “threats, fraudelency, stress . . . no responsibility, caught in fraudulent act, manipulate 12 year old for entry, violated an court from court, scapegoat/manipulate party on rental agreement” (reproduced as written).

The tenants also claim for disruptions that they say they suffered from May through November of 2014. They testified that the landlord installed two skylights in their unit, and replaced the roof on the entire home, and that the landlord did not clearly communicate with them when the work would be performed. They say that they had to cover their belongings with a sheet to protect them from construction, and put plastic on their carpets to protect them from the asphalt from the roof installation, which was being tracked in by others. They say that the construction was left unfinished, because the tradespeople did not return in a timely way, and that construction workers used their hydro and their bathroom.

The landlord agrees that there was construction but says that it occurred in February and took less than two weeks. Regarding the claim for hydro, the landlord says that she gave the tenants the opportunity to monitor any increase in hydro usage during construction. She also said she gave the other tenant in the building \$20.00 to compensate for the use of power by the construction team.

She says that she painted in September in the rental unit, and that she did give the tenants proper written notice of her intention to do so. The landlord has submitted notes from October recording her painting in the tenants’ unit, and a letter to the tenants dated October 30, 2014 setting out seven other dates in November between 9:00 am and 4:30 pm when she proposed to enter the unit to paint.

(e) Property repairs/required maintenance

The tenants claim \$100.00/year for 2012-2014 inclusive for work around the rental property for a total of \$400.00.

An addendum to the tenancy agreement in evidence from the landlord dated February of 2014 says that the tenants have agreed to keep the lawns mowed, gutters clean, and to pressure wash periodically and perform general maintenance of the outside states that rent has been reduced accordingly.

(f) Move-in cleaning

The tenants claim \$100.00 for work they did at move in. Nothing about this is indicated in the condition inspection report. The work is not included in the section for “repairs to be completed at start of tenancy” or in the comments on the condition at move-in.

(g) Leaking window

Lastly, the tenants claim \$200.00 from “entry-present” for “bedroom – stain, wetness, mold, etc./anti-mold fungal items/anti-bacterial/bedding destroyed, pillows, covers.” Two photographs were submitted by the tenants – one of a window with substantial condensation and mildew on it, and another of the corner of a room substantially affected by moisture and mold.

Analysis

Landlord’s liability for security deposit

The Act contains comprehensive provisions dealing with security and pet damage deposits. Section 38 requires that the landlord handle the security deposit as follows:

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.

(Emphasis added)

The tenants did not agree in writing that the landlord could retain any portion of the security deposit. The landlord did not apply within 15 days of the end of the tenancy or receipt of the tenants' forwarding address to retain a portion of the security deposit. Accordingly, I find that he landlord has breached s. 38 of the Act.

The security deposit is held in trust for the tenant by the landlord, who may not simply keep it without establishing the right to do so or obtaining the tenant's agreement. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the landlord must file an application within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

Having made the above findings, I must order, pursuant to sections 38 and 67 of the Act, that the landlord pay the tenants the total sum of **\$570.00**, comprised of double the security deposit (2 x \$285.00).

Tenant's liability for damage to rental unit

The landlord is awarded **\$928.56** for the reasons set out below.

(a) Replacing heaters

The landlord has not suffered a loss based on the discoloration of these heaters. She has not replaced them and she has not established on the evidence that the discolouration affects the amount she can charge for the rental unit. Residential Tenancy Branch Policy Guideline #40 estimates the useful life of incremental units as 15 years, meaning any amount awarded for the heaters, purchased in 2007, would necessarily be discounted by the remaining years of useful life in any event. I therefore make no award for this claim.

(b) Cleaning

Although the tenants say that the condition inspection report at move-out does not establish extensive cigarette smoke damage, I find that it does. Several of the line items in the report detail smoke damage. I further find that the smoke damage was not recorded in the move-in report, although one cigarette burn from the previous tenant was noted. I find that the tenants did smoke in the unit based on the documentary evidence submitted by the landlord, including the condition inspection report, the warning letter to the tenants about smoking indoors, and the photographs of smoke damage to the interior of the rental unit. I award the **\$285.00** claimed for cleaning for this reason.

(c) Special sealant and application of same

A receipt for the special sealant was in evidence, and I award the landlord **\$254.56** for that cost. The landlord has not provided an actual quote for the cost of applying the sealant. Repainting would be required in any event, and there is insufficient evidence from the landlord to allow me to find that the walls as well as the ceiling require sealant. Accordingly, I award the landlord **\$250.00** of the \$500.00 claimed for the cost of professional application of the sealant on the ceiling only.

(d) Couch removal

The tenants agree that they left this couch. I find that it was their responsibility to remove it. I award the **\$55.00** claimed.

(e) Unpaid rent

I also award the **\$84.00** claimed for unpaid rent based on the receipt in evidence for same and the tenants' failure to disprove this claim.

Landlord's liability

The tenants are awarded **\$285.00** of their claim for the reasons set out below:

(a) Non-functioning fridge/stove

I make no award for this claim. No receipts were in evidence and no details were given. Additionally, if these were significant concerns one would expect the tenants to bring this claim when the concerns arose. According to the tenants' written submissions these concerns began in 2011. It is not clear how long they lasted.

(b) Hydro/Electric

The tenants were unable to explain how they arrived at the amount claimed. They had not provided evidence of their hydro costs or their increased hydro costs due to construction. They only testified that their hydro bill was \$89.00 monthly. Accordingly I make no award for this claim.

(c) Outstanding invoices

The tenants claim for services rendered to the landlord for power-washing, construction clean-up, and outstanding laundry fees, but the tenants provided no receipts or invoices. More importantly, if there was any agreement with the landlord as to compensation for services rendered, that agreement would be outside of the scope of the tenancy agreement. It would be

a different agreement. I also note that the written agreement in evidence providing for a reduction in rent in exchange for these sorts of services.

(d) Loss of quiet enjoyment

The tenants could not explain how they arrived at the \$3,000.00 amount for loss of quiet enjoyment between 2013-present. Although I accept that their relationship with the landlord was sometimes strained, they did not convince me that she committed fraud or caused them stress serious enough to be compensable.

I accept that there was some construction (skylights and re-roofing) in and around the rental unit and that it disrupted the tenants. The landlord says that it lasted approximately two weeks. The tenants allege it lasted five months. The tenants offered no evidence in support of the duration of this work. I find that it lasted approximately two weeks.

I also accept that there was painting in the tenants' unit for a number of non-sequential days that collectively amounted to approximately another two weeks. In total, then, I find that the tenants were disrupted for a month over the duration of their tenancy, and award them 50% of the value of one month's rent as compensation for loss of quiet enjoyment: **\$285.00.**

(e) Property repairs/required maintenance

I decline to make any award for this claim for the reasons set out in (c), above.

(f) Move-in cleaning

There was insufficient evidence to establish this claim, which was also not supported by the condition inspection report. I also decline to award this amount for the reasons set out in (c).

(g) Leaking window

Lastly, the tenants claim \$200.00 from "entry-present" for "bedroom – stain, wetness, mold, etc./anti-mold fungal items/anti-bacterial/bedding destroyed, pillows, covers." Two photographs were submitted by the tenants – one of a window with condensation and mildew on it, and another of the corner of a room substantially affected by moisture and mold.

The photographs establish that mold was an issue in this particular room. However, the tenants have not testified that they followed the landlord's recommendations and requests about controlling the moisture in the unit. Controlling mold is a shared responsibility. The tenants have not testified that they did indeed open windows and use fans and turn up the heat, as requested. I am therefore unable to find that the landlord was at fault for the level of moisture and mold growth in the unit and cannot make an award in favour of the tenants for this claim. I

also note the tenants have failed to provide any supporting receipts and have not brought this claim earlier although they say it has been an issue since 2011.

Summary of outcomes

The landlord has breached s. 38 of the Act and must therefore return the tenants' security deposit in the total amount of **\$570.00**. No interest is owing on this amount over the period of this tenancy. The landlord is entitled to a monetary order for damage to the rental unit and unpaid rent in the total amount of **\$928.56**. The tenants are entitled to a monetary order in the amount of **\$285.00**.

Based on the figures, the tenants owe the landlord **\$73.56**.

As both parties have been successful on their own applications, neither party will recover the application filing fee from the other.

Conclusion

The landlord is given a formal order for **\$73.56**. The tenants must be served with a copy of this order as soon as possible. Should the tenants fail to comply with it, it may be filed in the Small Claims division of the Provincial Court and enforced as an order of that Court.

This decision is final and binding on the parties, except as otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act.

Dated: April 20, 2017

Residential Tenancy Branch