Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD MNDC FF

Introduction

This was a cross application. Both parties attended the hearing and each confirmed receipt of each other's Application for Dispute Resolution by registered mail. The tenant also provided evidence that he served the landlord in writing with his forwarding address by email and registered mail. Although the tenant said it appeared the landlord had refused the registered mail with the forwarding address, the landlord agreed he received it. I find the Canada Post tracking information is that the forwarding address was mailed on March 3, 2017, it was available for pick up on March 8, 2017 but refused by the landlord. I find the landlord is deemed to have received the forwarding address of the tenant in writing on March 8, 2017 pursuant to section 90 of the Act. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing. I find the forwarding address is deemed to be received on March 8, 2017 pursuant to section 90 of the Act. The landlord applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

a) Compensation for damages;
b) To recover unpaid rent and the filing fee;
c) To retain the security deposit to offset the amount owing.

The tenant applies in his Application for orders as follows:

d) An Order to return double the security deposit pursuant to Section 38;
e) Compensation for loss of their peaceful enjoyment because of mouse infestation and broken windows: and
f) To recover the filing fee for this application.

Issue(s) to be Decided:

Has the landlord proved on the balance of probabilities that the tenant owes rent and damaged the property beyond reasonable wear and tear? If so, to how much has he proved entitlement? Is he also entitled to recover the filing fee?

Has the tenant proved on the balance of probabilities that they are entitled to compensation for loss of their peaceful enjoyment and the return of double the security deposit according to section 38 of the Act? Are they entitled to recover filing fees?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to present evidence and make submissions. It was undisputed that the tenancy commenced October 1, 2015 on a fixed term to March 31, 2016, rent was $1700 a month payable at the end of each month and a security deposit of $1000 was paid. The parties agreed that the tenant was building a house and after the fixed term lease expired, they continued month to month. The parties describe the rental house as over 100 years old with a granite or rock foundation.

The tenant decided he could vacate in February 2017 and gave Notice on January 12, 2017 to vacate on February 15, 2017. He paid only one half of February rent and alleges the landlord agreed to this. He said he showed prospective tenants the home. The landlord said he agreed the tenant could move out but not to take less rent for February. He claims $850 for the balance of February rent due to insufficient notice pursuant to section 45 of the Act.

The landlord also claims damages from the tenant as follows:

- $540 for cleaning (18 hours). The tenant said they cleaned and left the house clean.
- $250 painting upstairs bedroom due to black foot marks; paint was one and a half years old at move-in.
- $300 to repair a hole in the wall caused by children kicking. The tenant said the hole was there at move-in. He tried to fix it but it appeared again due, he thinks to the old house settling.
- $300 to repaint stairs and stairwell; paint was one and a half years old.
- $500 to clean up the gardening debris due to tenant neglecting the yard which was his responsibility in the lease. The tenant said it was the middle of winter when he moved, the snow was deep in this community. He agrees there were two sleds left in the yard(which he picked up later) and some debris because it was all frozen in. The landlord said it should have been maintained before the snow and frost came.
- $168.65 for cleaning materials, light bulbs, new rings for the stove which were very dirty with burned on food debris. The tenant said they cleaned, he left a boxes of light bulbs for the living room and dining room fixtures as they had bulbs

that burned out a lot. He said the dirty rings were from mice feces burning in the stove rings because the landlord did not address the infestation adequately.

The parties are unable to find and provide a move-in report and they said a move-out report was not done. The tenant said there was no appointment for a move out inspection. He vacated on February 6, 2017 and left the key on the 14th. The landlord requested him to return and shovel the snow on the 14th and he did. He said he wanted to do some repainting but the landlord denied him access after he took the key.

The landlord said he relies on his 17 photographs which he was assured by Service BC were being forwarded for this hearing. They were not received as of the date of this hearing. He said he had copies so I gave him until July 1, 2017 (six business days) to send them to our office for consideration. The tenant said he already had a copy of the photographs but submitted they proved very little as they were not taken at the end of the tenancy but some months later. He said this is evident from the fact there is no snow in the photographs and there was deep snow when he left. The photographs were received by the office on June 26, 2017 and are considered as part of the evidence.

The tenant said he vacated the unit on February 6, 2017, returned keys on February 14, 2017 and provided his forwarding address in writing on March 1, 2017. The landlord filed his Application on June 6, 2017. The tenant said he gave no permission to retain any of his deposit and it has not been returned. He asks for double the deposit refunded pursuant to section 38 of the Act.

The tenant also alleges they were plagued by a mouse infestation which significantly disturbed their peaceful enjoyment. He said he saw the mouse problem before his tenancy began when he was painting and cleaning the house on September 15, 2015. Some photographs and emails are evidence of this. He told the landlord and the landlord replied by email that the neighbour's cat maybe brought in the mice. He said the basement was full of mice feces. He was only a few months in Canada and did not understand the landlord's and his obligations. He complained again in May 2016, on August 6, 2016 and on December 6, 2016 but the landlord did not arrange for treatment although he made some suggestions like setting some traps and keeping food covered. In January, the tenant said he was asked to show prospective new tenants the home but not to mention the mouse problem. He said he told the landlord he felt dishonest doing this. The landlord got a pest control company two days later and the mouse problem was cleared up immediately after treatment. The tenant asks for 30% rebate of rent for 9 months for the disturbance of their peaceful enjoyment (1700 x .3 = 510.90 mo x9 = $4590 rebate). He said they were stressed by the unsanitary conditions for

themselves and their children and could not enjoy a good lifestyle there. The landlord said the tenants left the doors open so the mice could enter and they had a compost bin that attracted mice. The tenant denies this and states many homes have compost bins like theirs and the bin had a lid.

The tenant also asks for a further rebate of 10% of rent for 4 months ($170 x 4 = $680) because the windows would not open properly and it got very hot. He requested the landlord on March 30 and May 2, 2016 to do something about it but the landlord did not come. The landlord said the windows are actually skylights and they are stiff. They are in an old house. He said he showed the tenant how to push them open but most people in the community have air conditioners and don't depend on opening windows. The tenant said one of the windows had to be opened with an allen key and the landlord warned they were fragile.

The tenant also asks for a refund of the overpayment of $150 for the security deposit.

In evidence are statements by the parties, registered mail receipts, the letter with the forwarding address dated March 1, 2017, photographs and many emails and text messages between the parties. On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

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Analysis:

The landlord requested I consider not accepting evidence that was submitted late after the 14 day window and said that text and email messages are not acceptable as evidence. I find Residential Tenancy Branch Rules of Procedure No. 11.1 to 11.5 give me a wide discretion in deciding which evidence I may accept and the time lines. Using this discretion, I have given the landlord an opportunity to send in photographs after the hearing and will with hold the Decision until his evidence is received. I find I have discretion to consider any relevant evidence such as the written reply of the tenant that was provided on June 13, 2017. I find Rule 4.1 provides that a respondent (the tenant) may submit evidence in response 5 days before the hearing and I find the tenant did this. In respect to text and email messages, I find Residential Policy Guideline (the Guideline) 42 contemplates the acceptance of text and email messages as evidence providing they are presented as authentic by the party.

In respect to the landlord's claim for unpaid rent, I find section 45 of the Act provides that the tenant must provide one full month's Notice to End tenancy according to sections 45(1) (a) and (b) of the Act and the Notice is effective on the day before the day that rent is due. I find the weight of the evidence is that the tenant did not provide a full month's notice. According to his lease, rent was payable on the 1st of each month.

He gave Notice January 9th and this Notice would not be effective until the end of February. He vacated in February paying only one half of one month's rent. I find he is responsible to pay the full rent for February so owes $850 to the landlord. I find the emails to which he refers in evidence are not conclusive that the landlord is forgiving the extra two weeks rent although they note acceptance of the tenant's choice to move out early.

Regarding the landlord's claim for damages, awards for compensation are provided in sections 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.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, 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.

Section 67 of the Act does *not* give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

The onus is on the landlord to prove on the balance of probabilities that there is damage caused by this tenant, that it is beyond reasonable wear and tear and the cost to cure the damage. I find the testimony of the tenant and the landlord is conflicting with regard to the damage to the unit. As explained to the parties during the hearing, the onus or burden of proof is on the party making a claim to prove the claim. When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails.

I find insufficient evidence to support most of the landlord's claim for damages and the tenant denies responsibility for most of the claimed damages. Move-in and move-out reports can provide significant evidence of damages caused by the tenant but in this case, none were provided in evidence. The tenant said he was not given an opportunity to do a final inspection with the landlord, possibly due to the deep snow at the time. I note section 36(2) of the Act provides that the right of the landlord to claim against the deposit is extinguished if he does not comply with section 35(2) and give the tenant at

least two opportunities for move-out inspection. However, although the landlord's claim against the security deposit is extinguished, he retains the right to claim for damages against the tenant.

I note no costs have been proven either by invoices or estimates. The Residential Policy Guideline 16 notes an arbitrator may also award "nominal damages", which are a minimal award. These damages may be awarded where there has been no significant loss or **no significant loss has been proven** [emphasis mine]. I use my discretion to award such damages where appropriate to the landlord's claim.

I find the weight of the evidence is that some cleaning was required. I find the landlord's photographs of the oven and stove indicate that these items were not cleaned and the tenant's email saying the dirt was from mice feces corroborates the landlord's evidence. However, insufficient evidence of cost of cleaning was provided as no invoices were provided for evidence. Actual cost is one of the elements that must be proven in a damage claim. Based on the limited evidence of the photographs, I find the landlord entitled to recover half of the amount he claims or $270.00 for cleaning.

I find insufficient evidence to support the landlord's claim for painting. Again no invoices or professional estimates were provided. However, I find the tenant in the hearing admitted he had intended to do some painting. I note the paint was approximately 34 months old at move out and Residential Policy Guideline 40 assigns a useful life for paint of 48 month; this is designed to account for reasonable wear and tear. I find the paint had only 29% of its useful life remaining He claimed $550 for re-painting. Based on this and the photographs, I award the landlord the nominal sum of $150 for painting

In respect to the landlord's claim for removing gardening debris, I find insufficient evidence to support his claim for $500. His photographs show two sleds which the tenant claims he picked up later and a small evergreen tree which is possibly the Christmas tree to which he refers. The tenant agreed there was some debris left although he alleges these photographs could not have been taken at move-out due to snow. Based on the limited photographic evidence and the tenant's agreement of leaving some debris, I find the landlord entitled to nominal compensation of $100 for removing debris.

I also find the landlord entitled to recover $100 for new rings for the stove as the weight of the evidence from both landlord and tenant is that the stove rings had burned on debris. Again no invoices are provided so I find him not entitled to recover the extra $68.65 for cleaning materials and light bulbs. He received an award for cleaning as noted above and I find the tenant's evidence credible that he left a box of light bulbs.

In respect to the tenant's claim, I find the *Residential Tenancy Act* provides:

Return of security deposit and pet damage deposit
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:
I 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.
(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
(b) after the end of the tenancy, the director orders that the landlord may retain the amount.
(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.

In most situations, section 38(1) of the Act requires a landlord, within 15 days of the later of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an application to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the security deposit (section 38(6)).

I find the weight of the evidence is that this tenancy ended legally at the end of February 2017. I find the tenant provided their forwarding address in writing to the landlord on March 1, 2017 by email and by deemed receipt of registered mail on March 8, 2017. I find the landlord filed his Application for Dispute Resolution on June 6, 2017 which is well beyond the 15 day limitation in section 38 of the Act. I find the tenant did not agree to the landlord retaining any of their deposit and they have not received any of the deposit back. I find the tenant entitled to recover double his security deposit of $1000.

The tenant also claims a refund of rent due to the mouse infestation significantly disrupting their peaceful enjoyment. I find the weight of the evidence is that the tenant informed the landlord prior to move-in September 2015 of the apparent mouse problem but appeared to accept the landlord's explanation that they must have been brought in

by a neighbour cat and the suggestion they get some traps. However, the weight of the evidence is that the tenant began complaining again in May 2016, again in August 2016, then in December 2016 and again in January 2017. I find the tenant's evidence credible that the mouse infestation cleared up immediately after the landlord engaged pest control in January 2017 and the landlord's action was linked to him seeking a new tenant. I find section 28 of the Act requires a landlord to protect the tenant's right to quiet enjoyment. I find the landlord failed to comply with section 28 as he neglected to adequately address the mouse infestation although notified. I find it credible that the landlord may have thought the problem was solved until May 2016 when the tenant complained of the problem again. I find the weight of the evidence is that the landlord neglected to adequately maintain the home as required by section 32 of the Act (quoted below). I find the age of the home and/or the granite foundation does not excuse the continuance of the mouse infestation which could be adequately addressed by pest control as illustrated when they were finally contacted. I find the tenant therefore entitled to a refund of rent from May 2016 when he pointed out the problem again until January 2017 (9 months). I find the claim of a refund of 30% of rent is excessive as this family with their children had the full use of the home, yard and amenities during this time. I find it more reasonable to award the tenant a refund of 15% of their rent for 9 months ($1700 x 15% = $255 x 9= $2295) for a total of $2295.

In respect to the tenant's claim for their difficulty in opening the skylight windows, I find section 32 of the Act provides a landlord must maintain residential property in a state of decoration and repair that complies with health, safety and housing standards and (b)*having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant* . I find the weight of the evidence is that this home was at least 100 years old and there is insufficient evidence that it did not comply with health, safety or housing standards. Given its age, I find insufficient evidence that the landlord did not maintain the windows. I find the skylights did open, although they were difficult. I dismiss this portion of the tenant's claim.

I find the overcharge of the tenant's security deposit is adequately addressed as he receives double the whole security deposit including the overcharge.

Conclusion:

I find the parties entitled to monetary awards as calculated below and to recover their filing fee for their applications.

Tenant –double security deposit	2000.00
9 months loss of enjoyment s. 28(15% rebate)	2295.00

Filing fee	100.00
Less 2 wks rent due to insufficient notice	-850.00
Less landlord allowance for cleaning	-270.00
Less landlord allowance for painting	-150.00
Less landlord allowance debris removal	-100.00
Less landlord allowance for stove rings	-100.00
Less landlord's filing fee	-100.00
Balance Monetary Order to Tenant	**2825.00**

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: June 27, 2017

Residential Tenancy Branch