Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MND, MNSD, MNDC, FF

Introduction

This hearing dealt with monetary cross applications. The landlord applied for a Monetary Order for unpaid rent; compensation for damage to the rental unit; and, authorization to retain the security deposit and pet damage deposit. The tenants applied for a Monetary Order for damages or loss under the Act, regulations or tenancy agreement. The hearing was held over two dates and an Interim Decision was issued after the first date. The Interim Decision should be read in conjunction with this decision.

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.

At the reconvened hearing the landlord questioned whether the Applications for Dispute Resolution could be considered cross applications since the claims against each other are unrelated. I acknowledge that the claims are unrelated and I informed the landlord that I would prepare this decision with separate sections outlining the landlord's claims separately from the tenant's claims but that some facts regarding the tenancy are over-lapping and there are efficiencies in one Arbitrator hearing both cases. The landlord appeared satisfied with my response and was prepared to proceed with the remainder of the reconvened hearing.

Although I have been provided a considerable amount of evidence and submissions, both orally and by way of documentary and photographic evidence, with a view to brevity in writing this decision I have only summarized the parties' respective positions.

Issue(s) to be Determined

1. Has the landlord stablished an entitlement to compensation from the tenants for the amounts claimed unpaid rent and damage?
2. Is the landlord authorized to retain the tenants' security deposit and pet damage deposit?
3. Have the tenants established an entitlement to compensation from the landlord for the amounts claimed for loss of use of the rental unit and an early end to the tenancy?

Background and Evidence

The tenancy started on March 15, 2016 and the tenants paid a security deposit of $800.00 and a pet damage deposit of $800.00. The tenancy was set to be a one year fixed term ending on March 14, 2017. The tenants were required to pay rent of $1,600.00 on the 15th day of every month.

A move-in inspection report was prepared and a copy of it was given to the tenants.

On August 1, 2016 the parties executed a written agreement to end the tenancy effective September 14, 2016. The tenants put a stop payment on the rent cheque dated August 15, 2016 and vacated the rental unit at the end of August 2016.

A move-out inspection had been scheduled for 11:00 a.m. on September 14, 2016; however, the landlord wanted to see the condition of the unit on September 7, 2016 and when she sought consent from the tenants the tenants gave her permissions and informed the landlord that they had left the keys to the rental unit on the counter. The landlord noted the condition of the rental unit on September 7, 2016 in the absence of the tenants. Both parties considered September 7, 2016 as the date the tenants gave up possession of the rental unit to the landlord.

Landlord's claims

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

1. Unpaid rent due August 15, 2016: $1,600.00

The tenants put a stop payment on the last rent cheque and the landlord seeks recovery of unpaid rent. The tenants stated that they put a stop payment on the cheque because they considered the security deposit and pet damage deposit would be applied to the last month's rent and because they anticipated there would be a dispute over money.

2. Countertop replacement: $1,332.58

The landlord submitted that the countertops supplied to the tenants at the start of the tenancy were older but in good, solid condition, as evidenced by the property inspection report prepared just before the landlord purchased the house in December 2015. After purchasing the property the landlord performed a number of repairs but determined that is was unnecessary to replace the countertop because they were in good condition. The tenants applied an epoxy product overtop the countertops after a discussion with the landlord but without getting the landlord's permission. During the tenancy the landlord saw the countertops after the epoxy application but did not say too much about it because it had already been done and because the tenants spoke of trying to make it smoother. However, at the end of the tenancy the countertops were still very rough at the edges and in other areas it had pooled unevenly. The landlord looked into remediating the product the tenants applied but determined it would be more expensive than replacing the countertops. The landlord spent $1,080.58 for new countertops, plus $252.00 for labour to install them. The landlord argued that this was an expenditure that would not have been made at this time had the tenants not applied the product and left it in rough condition.

The tenants submitted that the countertops provided to them at the start of the tenancy were very old, dated looking and scratched; whereas, after they applied the epoxy the countertops were finished, clean and more modern looking. The tenants had shown the epoxy kit to the landlord before applying the product and during the discussion they received the landlord's permission orally. The landlords saw the countertops after the epoxy was applied and the landlord did not indicate the countertops would require replacement. The tenants used the countertops after the epoxy was applied for nearly six months. The tenants incurred the cost to improve the countertops and are not responsible to pay for new countertops.

During the first hearing, I referred to awards for damages being restorative and that often depreciation is taking into account when making a claim for damage. I pointed to Residential Tenancy Policy Guideline 40 where it provides that countertops have an

average useful life of 25 years. The landlord acknowledged that the new countertops are more modern looking and they are preferable to the former countertops. I encouraged the landlord to consider a more reasonable claim than 100% of the replacement cost. At the reconvened hearing, the landlord maintained her position and seeks 100% of the cost of the new countertops from the tenants.

3. Paint and filler: $77.10 and $6.13

The landlord submitted that the tenants had painted the kitchen with grey and black colours and the tenants did attempt to paint the kitchen back to white but because she used such dark colours more coats of white paint had to be applied by the landlord. Other walls in the rental unit required filling where the tenants had hung artwork or been rubbed by a large piece of furniture. The rental unit had been recently painted prior to the start of the tenancy. The landlord pointed out that she only seeks recovery of the paint and filler materials and that she did not charge for labour.

The tenants submitted that they had applied two coats of white paint over the grey and black colours to bring the kitchen back to a white colour. The tenants also painted the walls white in the living room. The tenants are unaware of any damage they caused that would require filling since they did not hang artwork on the walls.

Tenants' claims

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

1. Loss of use and enjoyment: $3,000.00

The tenants submitted that they rented the subject property, a house with large yard, because they have two large dogs. When they rented the house the landlord assured them the backyard would be cleared of the overgrown brush (thorns, branches and vines) and this was evidenced by the move-in inspection report. The landlord did not accomplish this during their tenancy and the area was largely unsafe to leave their dogs. In an attempt to use the space, the tenant put up a very small fenced area for the dogs and placed rocks and fake grass down in an effort to suppress the weeds.

The tenants determined $3,000.00 is reasonable compensation for loss of use of the backyard space as follows. The tenants were paying rent of $1,600.00 for the rental unit whereas rental units in the area that do not have yard space rent for $900.00 to $1,100.00 per month. Since they did not have much yard space for their dogs it was

akin to living in a unit without a yard and they had to walk their dogs frequently. Using $1,100.00 the tenants were of the position they were over paying $500.00 per month for the rental unit since it had very little usable yard space and since they were deprived of the yard space they expected to receive they seek to recover $500.00 per month for six months of their tenancy.

The tenants acknowledged that they had a front yard but stated that the majority of the yard space is in the back yard.

The tenants raised the issue of the backyard clearing to the landlord in an email sent approximately one month after the tenancy started. The tenants stated that they had another conversation with the landlord about the backyard clearing when the landlord attended the property to deal with an issue with the dryer. The landlord again indicated that the backyard issue would be addressed but this did not happen before the tenancy ended.

The landlord considers the tenant's claim for compensation to be in retaliation for the landlord making claims against them. The landlord was of the position that there was an agreement for the tenants to install removable fencing; however, there was no discussion that clearing the backyard was criteria for the tenants to rent the house. Nevertheless, the landlord had agreed to help or assist the tenants in clearing out the backyard. The landlord stated that two former parking areas were cleared of brush and the tenants could have used that area for their dogs but the tenants chose to use it to place outdoor furniture for their own use. The landlord acknowledged that the weeds were difficult to control and the tenants permitted the yard area the landlord had cleared to become overgrown again.

As for emails exchanged between the parties, the landlord stated that she had informed the tenants that she would "help" them clear the yard. On April 16, 2016 the tenants wrote that they were happy with the house. Further, when the tenants indicated they wanted to end the tenancy, the tenants cited financial difficulties but did not indicate that a lack of clearing in the backyard was an issue. Nor, did the tenants indicate to the landlord that the tenants were of the position the landlord was over-charging for the unit.

The landlord submitted that using an apartment rent as a comparison is not reasonable as it would not be suitable for two large dogs. The landlord points out that the tenants moved to another house that has a small yard which requires the tenants to walk their dogs, implying that a large yard was not imperative for the tenants.

2. Early end of tenancy: $375.00

The tenants returned possession of the rental unit early on September 7, 2016 as agreed upon with the landlord as opposed to September 14, 2016. The tenants are of the position that they should not be held responsible to pay rent for the last week and implied that the landlord re-rented the unit early.

The landlord denied re-renting the unit early and stated that she re-rented the unit effective September 15, 2016 as the tenancy was set to end September 14, 2016 and it was not until September 7, 2016 that she became aware the rental unit was vacant. The tenants chose to move out at the end of August 2016 and the landlord is not obligated to reimburse a week's worth of rent to the tenants.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

- That the other party violated the Act, regulations, or tenancy agreement;
- That the violation caused the party making the application to incur damages or loss as a result of the violation;
- The value of the loss; and,
- That the party making the application did whatever was reasonable to minimize the damage or loss.

Based on everything before me, I provide the following findings and reasons with respect to each application before me.

Landlord's claims

1. Unpaid rent and retention of security deposit and pet damage deposit

Under section 26 of the Act, a tenant is required to pay rent when due under their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right under the Act to withhold rent. Section 21 prohibits a tenant from using the security deposit or pet damage deposit to pay rent unless the tenant has the landlord's written consent.

The parties had reached a mutual agreement to end the tenancy effective September 14, 2016. Accordingly, I find the tenants were obligated to pay the full amount of rent that was due on August 15, 2016 and the landlord is entitled to recover unpaid rent of $1,600.00 from the tenants.

Although the tenants did not have the landlord's written permission to use the deposits to pay rent, as required to do so under section 19 of the Act, the tenants made no request for return of the security deposit or pet damage deposit and stated that they considered the deposits to have been applied to rent for the last month of tenancy. As the landlord is entitled to recover unpaid rent from the tenants in the amount equivalent to the security deposit and pet damage deposit, I authorize the landlord to retain the deposits in satisfaction of unpaid rent.

2. Countertops

Under section 37 of the Act, a tenant must leave the rental unit undamaged at the end of the tenancy; however, reasonable wear and tear is not considered damage

The parties were in dispute as to whether the landlord had given the tenants permission to apply the epoxy. I find that dispute is not critical in making this decision since the landlord at no time authorized the tenants to damage the countertops. Accordingly, the issue is whether the tenants' application of epoxy to the kitchen counters amounted to damage. Upon review of the landlord's photographs, which are taken more close up than the tenants' photographs, and the statement form the countertop installer, I find the evidence satisfies me that the application of the epoxy left rough edges and had pooled in areas. I find it reasonable that this required rectification and could not be left as is.

Having found the tenants damaged the countertops, the issue is the value of the loss suffered by the landlord. Awards for damages are intended to be restorative. Where a damaged building element is replaced it is appropriate to reduce the replacement cost by the depreciation of the original item to reflect that most building elements have a limited useful life before they require replacement due to aging and wear and tear. In order to estimate depreciation of the replaced countertops, I have referred to normal useful life of the item as provided in Residential Tenancy Policy Guideline 40: *Useful life of building elements.* Policy guideline 40 provides that the average useful life of kitchen countertops is approximately 25 years.

The exact age of the countertops is unknown. From the photographs of the rental unit provided by both parties it is evident and undisputed that this is an older home and

based on the colour and style of the countertops I am of the view the countertops were likely older as well. The parties were in dispute as to the condition of the existing countertops supplied at the start of the tenancy. The move-in inspection report contains a single "checkmark" in every room which corresponds to a good condition. The building inspection report prepared for the landlord at or near the time of purchasing the property indicates the countertops are "solid and level with a reasonably installed and undamaged laminate cover". Most other areas of the rental unit are reflected as being generally older but of functional condition in the building inspector's report. There is a bolded note at the beginning of the building inspector's report where the inspector states that the inspection is "designed to focus mainly on structural and mechanical areas of the house" and "This report is designed to focus on aspects of safety regarding the building's construction rather than cosmetic details…" Consider all this evidence I am of the view the countertops were older and dated in appearance but in serviceable condition.

I find the landlord's request to recover 100% of the replacement cost of the countertops from the tenants to be unreasonable since the new countertops are undeniable more modern looking and will afford many more years of use for the benefit of the landlord. During the first hearing I pointed to policy guideline 40 and expected that at the reconvened hearing the landlord would have provided a reasonable allocation of the replacement cost of the countertops; however, she did not. Rather than dismiss the landlord's claim outright, in recognition of the devaluation of the countertops, I find it appropriate to estimate a reasonable award for the landlord. I find a reasonable award after taking into consideration the apparent age of the countertops but serviceable condition to be 20% of the replacement cost of the countertops, for an award of $266.52.

3. Painting and filling

As provided above, a tenant is required to leave the rental unit undamaged at the end of the tenancy and wear and tear is not considered damage.

The landlord submitted that she had to apply more paint to the kitchen to cover the grey and black paint the tenants had applied. The landlord provided photographs of the inside of a cupboard that appears to be dark and I accept that the tenants' attempt to cover up the dark colour was insufficient. The landlord also provided photographs of apparent attempts to cover up scuffs on the walls with white paint that was whiter than the existing paint on the walls. While it may be argued that the wall scuffs amount to wear and tear, applying the miss-matched paint made the touched-up areas more visible. Considering the landlord did not claim any compensation for labour I find the

landlord's request to recover the cost of paint reasonable and I award the landlord the amount requested of $77.10.

I make no award to the landlord for filler as I did not see evidence of unreasonably large or an excessive number of holes in the walls. Further, landlords are expected to anticipate some holes in walls from a tenant hanging artwork, as provided in Residential Tenancy Policy Guideline 1.

Tenants' claims

1. Loss of use and enjoyment

It was undisputed that the rental property had a sizable back yard; the tenants had two large dogs; and, the parties had discussed installation of removable fencing so that the tenants may keep their dogs outside. It was also undisputed that the backyard was congested with untamed brush; that there was discussion about the landlord's intentions to clear the area; and, that the backyard did not get cleared out by the land rod during the tenancy. The tenant's photographs depict a very unruly growth of vegetation and I accept that it would largely impede the tenants' use and enjoyment of the area.

The parties were in dispute as to whether the landlord was obligated to clear the backyard or merely "help" the tenants do so. I find the move-in inspection report clearly documents the landlord's obligation as follows: "Backyard to be cleared out" at the start of the tenancy. I note that the landlord did not include the word "help" or "assist" tenants do so. It is unreasonable to attempt to add words that were not there when the agreement was made. I further find the landlord's obligation, as recorded on the move-in inspection report, is consistent with a landlord's obligation to repair and maintain a property. As provided under Residential Tenancy Policy Guideline 1, a tenant occupying a single family residence is expected to mow the lawn and perform a reasonable amount of weeding in flower beds; however, a tenant is not expected to do larger landscaping tasks such as pruning or brush clearing. For all of these reasons, I find the landlord was obligated to clear out the backyard at the start of the tenancy.

The landlord argued that the parking area was cleared for the tenant's use. However, that is not what was agreed upon and I find the tenants had a reasonable expectation that the sizable backyard be cleared by the landlord so that they may use and enjoy it. I also find that the landlord's argument is inconsistent with her email of April 28, 2016 where she acknowledged that clearing of yard still needed to be done when she wrote: "We will get back to you regarding clearing up the yard."

The tenant submitted that oral discussions regarding the clearing of the backyard happened again in June 2016 when the landlord attended the property to deal with the dryer. I accept that as reasonably likely as the landlord did not rebut those submissions.

The landlord pointed to the tenant attempting to clean up the back yard as a basis for arguing the tenants were responsible for yard clearing and the landlord was only required to "help". However, I am of the view that the land clearing responsibility was that of the landlord for reasons provided above and that if the tenant was willing to do some work I find that was generous on part of the tenant.

In light of the above, I find I am satisfied that the landlord breached her duty to provide an adequately maintained backyard which is a violation of section 32 of the Act. However, I find the tenants' claim for compensation equivalent to $500.00 per month. The tenants clearly had some use of yard space and I find it unreasonable to compare their rent to apartments or suites with no yard space. I find a more reasonable approximation of the tenants' loss to be the difference in rent payable for a comparable house with a small yard and the rental unit. I was not provided such comparable information and I am left to approximate a reasonable award. I find it reasonable to award the tenants compensation of $100.00 per month for a total award of $600.00.

2. Early end of tenancy

The parties had an agreement requiring the tenants to pay rent on a monthly basis, not a daily or weekly basis. The parties documented their mutual agreement to end tenancy with an effective date of September 14, 2016. If tenant choses to move out earlier than the effective date the Act does not require the landlord to reimburse the tenant for the days the tenant does not occupy the rental unit. Nor, is there evidence that the landlord had agreed to compensate the tenants for leaving early. Therefore, I deny the tenants' claim to recover rent for the last week of the tenancy.

Filing fees

Both parties had some success in their respective claims against each other and I order that each party bear the cost of their respective application.

Monetary Order

As provided under section 72 of the Act, I order the awards to the parties to be offset and I provide a Monetary Order to the tenants for the net amount calculated as follows:

Landlord's awards:

Unpaid rent	$1,600.00
Less: security and pet damage deposits	(1,600.00)
Award for countertops	266.52
Award for painting	77.10
Owing to landlord	$ 343.62

Tenants' award:

Loss of use of backyard	$ 600.00

Monetary Order to tenants (net amount)	$ 256.38

Conclusion

Both parties were partially successful in their respective application against each other. The landlord is authorized to retain the tenant's security deposit and pet damage deposit in satisfaction of unpaid rent. The balance of the awards to each party have been partially offset and the tenants are provided a Monetary Order in the net amount of $256.38 to serve and enforce upon the landlord.

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: September 1, 2017

Residential Tenancy Branch