



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MND, MNSD, MNDCT, FF

Introduction

The proceeding dealt with monetary cross applications. The landlord applied for monetary compensation for unpaid rent, damage to the rental unit, and, authorization to retain the tenant's security deposit. The tenant applied for monetary compensation payable to tenants in receipt of a *2 Month Notice to End Tenancy for Landlord's Use of Property* and return of double the security deposit. The hearing was held over three dates. An Interim Decision was issued and sent to both parties, along with Notices of Hearing, following the first two hearing dates.

The landlord appeared for every scheduled hearing. As seen in the first Interim Decision, I did not hear any submissions from the landlord on April 25, 2018 except for service of hearing packages and the landlord's request to join the parties' two Applications for Dispute Resolution, which I granted. As seen in the second Interim Decision, both parties appeared on June 27, 2018. On June 27, 2018 the landlord presented her claims against the tenant and the tenant provided responses to the landlord's claim for unpaid rent. The hearing time expired before the tenant could present his position with respect to the landlord's damage claim or present his claims against the landlord. The hearing was adjourned and it was expected that at the reconvened hearing of August 23, 2018 the tenant would continue to respond to the landlord's claims against him and present his claims against the landlord. Since the tenant did not appear for the reconvened hearing set for August 23, 2018 I dismissed the tenant's Application against the landlord without leave to reapply. Also, in making my decision pertaining to the landlord's claims, I have considered the tenant's submissions concerning unpaid rent.

Issue(s) to be Decided

1. Is the landlord entitled to recover unpaid rent from the tenant in the amount claimed?
2. Has the landlord established an entitlement to compensation claimed for damage to the rental unit?
3. Is the landlord authorized to retain any or all of the tenant's security deposit?

Background and Evidence

The tenancy started on June 1, 2011 and continued on a month to month basis after the one year fixed term expired. The tenant paid a security deposit of \$800.00 and was required to pay rent of \$1,600.00 on the first day of every month.

In mid-April 2016 there was sewer back-up in the rental unit that affected most rooms in the rental unit and rendered the unit largely uninhabitable until July 2016. The tenant stayed at a hotel while the remediation took place and did not pay rent for May 2016 or June 2016. The tenant moved back into the rental unit for July 2016 and the landlord collected rent for July 2016.

On January 12, 2017 the landlord issued a *2 Month Notice to End Tenancy for Landlord's Use of Property* (2 Month Notice) to the tenant with a stated effective date of April 1, 2017. The tenant did not pay rent for February 2017 and on February 4, 2017 the landlord issued a *10 Day Notice to End Tenancy for Unpaid Rent* ("10 Day Notice") with an effective date of February 15, 2017. The tenant vacated the rental unit on or about February 15, 2017.

Both parties participated in the move-in and move-out inspection together. The landlord had prepared a move-in inspection report at the start of the tenancy. The landlord prepared a move-out inspection report at the end of the tenancy. The tenant did not authorize the landlord to make any deductions from the security deposit. The landlord made a previous Application for Dispute Resolution against the tenant on February 24, 2017 (file number referenced on the cover page of this decision). The hearing was set for hearing in July 2017. At that hearing the landlord appeared but the tenant did not. The tenant explained that he was aware of the hearing but that he was unable to attend. At the hearing in July 2017 the landlord was unable to satisfy the Arbitrator that she had served the tenant with her Application for Dispute Resolution and the Arbitrator dismissed the landlord's application with leave to reapply. The landlord then applied for review consideration of that decision and provided the registered mail receipt as proof of

service but the late found evidence was not a basis to grant a review hearing. The landlord then re-filed her claims against the tenant on September 28, 2017.

Unpaid rent -- \$4,800.00

The landlord seeks to recover unpaid rent for the months of May 2016, June 2016 and February 2017 from the tenant because he did not pay rent for these months and the tenancy agreement was still in effect for these months.

The tenant submitted that he did not pay rent for May 2016 and June 2016 because the rental unit was uninhabitable and his insurance policy was already paying for his stay in the hotel. The tenant pointed out that he told the landlord he would not be paying for May 2016 and June 2016 and the landlord demand the payment or seek to end the tenancy for unpaid rent in May 2016 or June 2016. The tenant stated that had the landlord demanded rent for those months or tried to end the tenancy for unpaid rent, he would have ended the tenancy. The tenant was of the belief he was being helpful by keeping the tenancy going despite the circumstances.

As for rent for February 2017 the tenant submitted that the tenancy ended February 15, 2017 and he was entitled to not only withhold rent for February 1 -15, 2017 but also receive a refund for the equivalent of one-half of a month's rent because he received a 2 Month Notice. The tenant submitted that he sent the landlord a 10 Day Notice to end the tenancy via email on January 31, 2017 and hand delivered another copy to the landlord on February 5, 2017.

The landlord acknowledged that she did not insist on the tenant paying rent for May 2016 and June 2016 because she felt bad about the circumstances. The landlord acknowledged that she had a post-dated cheque for the month of May 2016 in her possession but that the tenant told her to hold it and cash it for July 2016 when he regained use of the rental unit, which the landlord did. The landlord did point out; however, that the tenant also asked her to provide a letter confirming he had paid rent for May 2016 and June 2016 so that he could submit them to his insurance company. The landlord refused to provide such a false letter but the landlord was uncertain as to whether the tenant ever received compensation from his insurance company for those months on top of having his hotel stay paid for.

Damage to master bedroom carpet -- \$616.00

The master bedroom carpeting was not damaged by the sewer backup. At the end of the tenancy there was a red stain on the carpeting. The landlord tried removing the stain by using a professional cleaner but the stain remained, although a bit lighter. The landlord replaced the carpeting with new carpeting that was similar to that in the second bedroom at a cost of \$616.00 which she seeks to recover from the tenant. The carpeting was approximately eight years old.

Damage to living room laminate flooring – \$897.25

The floor in the living room was replaced when the sewer back up was remediated in June or July 2016 so the laminate flooring was nearly new at the end of the tenancy. At the end of the tenancy there was a significant chip or dent in the floor. The landlord determined that the damaged board may be replaced but that several other boards will have to be removed and reinstalled to do so which is why it will cost nearly \$900.00 to rectify this damage. The landlord pointed out that this damage exceeds reasonable wear and tear and that there were several other areas noted as having wear and tear on the move-out inspection report that she did not claim.

Filing fee for landlord's previous Application for Dispute Resolution -- \$100.00

The landlord requested recovery of the filing fee she paid for her previous application that was dismissed in July 2017. I declined to hear this claim as the award of a filing fee is before the Arbitrator hearing that Application and the Act provides that a decision of an Arbitrator is final and binding subject only to applicable review provisions. The landlord sought a review of the previous decision and it was also dismissed. As such, I cannot change the previous decisions and to do so would violate the Act.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

Unpaid rent

Pursuant to section 26 of the Act, a tenancy agreement obligates a tenant to pay rent when due to the landlord even if the landlord has violated the Act, regulations or

tenancy agreement, unless a tenant has a legal right to withhold rent. Section 32 of the Act obligates a landlord to provide a rental unit to the tenant that is suitable for occupation. Where a tenant has paid rent but is deprived of use and enjoyment of the unit, even if the loss is no fault of the landlord, a tenant may be entitled to compensation from the landlord for the time the unit was not inhabitable; however, a tenant may not unilaterally decide to withhold rent. Rather, a tenant's right to withhold comes from limited and specific provisions in the Act or where the landlord has agreed or waived entitlement to rent from the tenant.

It is undisputed that in mid-April 2016 the unit became uninhabitable due to a sewer back-up that was no fault of the tenant or the landlord. It is also undisputed that the tenant did not pay rent for May 2016 and June 2016 and the landlord did not pursue the tenant for payment of rent at that time, or at any other time during the tenancy. Rather, the landlord waited to pursue the tenant for unpaid rent until after the tenancy ended.

Depending on the severity of circumstances, where a rental unit becomes uninhabitable unexpectedly, such as in the case of a fire, flood or earthquake, the tenancy may be found to be frustrated and the tenancy comes to an end when the frustrating event occurs. I find it am unsatisfied the tenancy became frustrated in the circumstances before me. I make this finding considering the following factors:

- The tenant left some of his possessions in the rental unit while it was being remediated and with the intention of returning to live in the rental unit.
- The landlord was in possession of a rent cheque dated May 1, 2016 but did not cash it until the tenant regained possession of the rental unit in July 2016 and she accepted that monies as rent for July 2016.
- The tenant moved back into the rental unit when the remediation was complete.
- The parties also appeared to remain in communication with each other during the period of remediation yet the landlord did not communicate to the tenant that she considered the tenancy to be frustrated or at an end due to unpaid rent.

In the above circumstances, I am of the view that the parties did not consider the tenancy to be frustrated. Rather, it appears to me that the parties were willing and agreeable to continuing the tenancy even though the unit was temporarily uninhabitable. I also of the view that given the uninhabitable status of the rental unit for May 2016 and June 2016; the landlord's agreement to not cash the May 2016 post-dated rent cheque until July 2016 when she accepted it for rent for July 2016; and, the landlord's lack of action to pursue the tenant for unpaid rent or end the tenancy; I find the landlord waived

entitlement to rent for May 2016 and June 2016. Therefore, I make no award to the landlord for rent for the months of May 2016 and June 2016.

As for rent for February 2017, I find the tenant does not owe the landlord rent for this month. Where a tenant receives a 2 Month Notice, the tenant may end the tenancy early by giving the landlord 10 days' of notice, in writing. A tenant in receipt of a 2 Month Notice is also entitled to receive compensation from the landlord in an amount equivalent to one month's rent which may be received by the tenant withholding rent for the last month pursuant to section 51(1) of the Act. If rent has already been paid, the landlord must issue a refund to the tenant.

In this case, the tenant should have paid rent on February 1, 2017 since he had not given a 10 day notice to the landlord using an acceptable manner of service (email is not recognized as a method of service under section 88 of the Act). It appears that a 10 Day Notice was given by the landlord and the tenant shortly afterward, on February 4, 2017 and February 5, 2017 to end the tenancy effective February 15, 2018. Even if the tenant had paid rent for February 2017 the landlord would have had to refund it to the tenant pursuant to section 51(1). As such, I make no award to the landlord for unpaid rent for February 2017.

Damage to carpet and laminate

Section 37 of the Act provides that a tenant must leave a rental unit undamaged at the end of the tenancy; however, reasonable wear and tear does not constitute damage. Accordingly, a landlord may pursue the tenant for compensation for damage, but not wear and tear or pre-existing damage.

Awards for damages are also intended to be restorative. Where a fixture, appliance or other building element is so damaged it requires replacement, it is often appropriate to reduce the replacement cost by the depreciation of the original item. In order to estimate depreciation of the replaced item, where necessary, I have referred to normal useful life of the item as provided in Residential Tenancy Policy Guideline 40: *Useful Life of Building Elements*.

Section 21 of the Residential Tenancy 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."

The parties signed the move-out inspection report; however, the areas of concern identified by the landlord (stained carpet and laminate floor damage) were areas where the tenant disputed the damage existed. The tenant indicated that no carpet stain existed at the end of the tenancy and there was no damage to the flooring. The landlord did provide photographs of the carpet stain before and after cleaning; and, of the dent in the laminate flooring. The landlord appeared before me on all hearing dates and was submit to my examination. The tenant; however, did not present his case as to the landlord's claim for carpet replacement or floor damage and was not subject to further examination. Accordingly, I find the landlord has satisfied me that the red stain in the carpeting was still visible after carpet cleaning, albeit much lighter, and there was a dent in the laminate flooring, although the size of the dent and it' location is undeterminable from the photographs provided to me by the landlord.

Although I accept the landlord's version of events that the tenant left the carpet and laminate floor damaged, I find the landlord's claim for compensation to be unreasonable. The landlord did not take into account the several years of wear and tear for the eight year old carpeting or that carpeting has an average life of 10 years; and, I find that to award the landlord the full replacement cost would be unreasonable. Also, the laminate floor dent has not been repaired and I am uncertain of its size or location, causing me to question whether it is so significant that it will be replaced. Accordingly, I find it appropriate to award the landlord compensation for the diminished value. All things considered, I find the amount of the security deposit to be a reasonable award for the landlord's losses associated to damage to the rental unit.

In keeping with the above, I authorize the landlord to retain the tenant's security deposit in full satisfaction of the landlord's losses.

Conclusion

The landlord is authorized to retain the tenant's security deposit in satisfaction of the landlord's losses.

The tenant's application is dismissed without leave to reapply.

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 17, 2018

Residential Tenancy Branch