



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, FFL; MNDCT, MNSD, FFT

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("Act") for:

- a monetary order for damage to the rental unit and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenants' security and pet damage deposits ("deposits"), pursuant to section 38; and
- authorization to recover the filing fee for her application, pursuant to section 72.

This hearing also dealt with the tenants' cross-application pursuant to the *Act* for:

- a monetary order for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of double the amount of the tenants' deposits, pursuant to section 38; and
- authorization to recover the filing fee for their application, pursuant to section 72.

The "first hearing" on May 8, 2018 lasted approximately 88 minutes and the "second hearing" on November 1, 2018 lasted approximately 85 minutes. The landlord and her lawyer spoke for most of the hearing time during both hearings, as compared to the tenant and his lawyer.

"Tenant SD" did not attend both hearings. The tenants' lawyer attended the first hearing only. Tenant LE ("tenant"), the landlord, and the landlord's lawyer attended both hearings. The tenants' lawyer represented both tenants at the first hearing. The tenant represented tenant SD at both hearings. The landlord's lawyer represented the landlord at both hearings. At both hearings, both parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Preliminary Issue - Adjournment of First Hearing and Service of Documents

The first hearing on May 8, 2018 was adjourned for a continuation because it did not conclude after 88 minutes of testimony. By way of my interim decision, dated May 8, 2018, I adjourned both parties' applications to the second hearing date of November 1, 2018. At the first hearing, I notified both parties that they were not permitted to serve any further evidence after the first hearing and before the second hearing because the purpose of adjourning the first hearing was only to continue the hearing, not to adduce additional evidence.

At the first hearing, both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that both parties were duly served with the other party's application.

Issues to be Decided

Is either party entitled to a monetary order for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to a monetary order for damage to the rental unit?

Is the landlord entitled to retain the tenants' deposits?

Are the tenants entitled to the return of double the value of their deposits?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties at the both hearings, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on August 1, 2017 and was for a fixed term ending on July 31, 2018. The tenants vacated on September 30, 2017. A security deposit of \$1,350.00 and a pet damage deposit of \$1,350.00 were paid by the tenants and the landlord continues to retain both deposits. Move-in and move-out condition inspection reports were completed for this tenancy. A forwarding address was provided by the tenants to the landlord by way of text message on October 2, 2017. The landlord did not have any written permission to keep any part of the

tenants' deposits. The landlord filed her application to keep both deposits on April 5, 2018. A written tenancy agreement was signed by both parties.

Both parties agreed that they attended a "previous hearing" on November 27, 2017, after which a decision of the same date ("previous decision") was issued by a different Arbitrator. The file number for the previous hearing appears on the front page of this decision. Both parties agreed that the tenants filed the application that was the subject of the previous hearing to cancel a 1 Month Notice to End Tenancy for Cause ("1 Month Notice"), as well as other relief.

The landlord seeks a monetary order of \$23,727.70 plus the \$100.00 application filing fee. The tenants seek a monetary order of \$11,832.19 plus the \$100.00 application filing fee. Both parties provided voluminous evidence packages, including but not limited to affidavits, photographs, text messages, emails, letters, and reports.

The landlord seeks \$18,900.00 for a loss of rent from October 2017 to April 2018, because the tenants vacated prior to the end of the fixed term tenancy and she was unable to re-rent the unit until May 1, 2018. She claimed that she posted advertisements for re-rental from December 2017 to April 2018 and provided copies of same. She claimed that it was difficult to find tenants during the winter months. She stated that she received legal advice to wait for the previous hearing to take place on November 27, 2017 in order to find out whether she could re-rent the unit since the tenants applied to cancel a 1 Month Notice and did not cancel the previous hearing.

The landlord claimed that the tenants tied their dogs to the trees at the rental property, causing extensive damage to the trees, which have to be repaired and replaced. The landlord seeks \$73.50 for an estimate for yard care, \$35.00 to repair a fence, and \$138.00 to clean the house after the tenants moved out. She said that she paid the above amounts but did not submit receipts for same. The landlord further seeks \$1,411.20 for trees and yard care, \$500.00 to \$700.00 plus taxes to remove damaged trees, and \$2,500.00 plus taxes to replace the trees but claimed that she has not yet paid these amounts and was waiting for this hearing.

The tenants seek \$100.00 for the previous hearing application filing fee and \$100.00 for their current application filing fee. The tenants seek \$280.00 and \$1,500.00 for lawyer fees and \$324.19 for process service fees, related to their application at this hearing.

The tenants also seek \$2,700.00 for one month's rent for a loss of quiet enjoyment and unlawful access by the landlord to their property. They further seek \$1,428.00 in

moving expenses for having to vacate due to the landlord's harassment. The tenant testified that several incidents occurred at the rental property where the landlord was hostile, made unannounced visits without notice herself and with her tree experts, and caused post-traumatic stress disorder for tenant SD and her son. The tenant claimed that the occupants living downstairs would swear, play loudly, lock the gates and were harassing towards the tenants.

Analysis

Landlord's Application

Rental Loss

I find that the landlord and tenants entered into a fixed term tenancy for the period from August 1, 2017 to July 31, 2018.

Subsection 45(2) of the Act sets out how tenants may end a fixed term tenancy:

A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

The above provision states that the tenants cannot give notice to end the tenancy before the end of the fixed term. If they do, they may have to pay for rental losses to the landlord. In this case, the tenants ended the tenancy on September 30, 2017, prior to the end of the fixed term on July 31, 2018. I find that the tenants breached the fixed term tenancy agreement. As such, the landlord is entitled to compensation for losses she incurred as a result of the tenants' failure to comply with the terms of their tenancy agreement and the Act.

Section 7(1) of the Act establishes that tenants who do not comply with the Act, Regulation or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the Act places a

responsibility on a landlord claiming compensation for loss resulting from tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

I award the landlord \$2,700.00 in rental loss for October 2017. The tenants failed to give proper notice to the landlord that they were leaving the rental unit on September 30, 2017. I find that one month is a reasonable period of time for the landlord to find a tenant and re-rent the unit.

I dismiss the remainder of the landlord's application for a loss of rent of \$16,200.00 from November 2017 to April 2018. I find that the landlord failed to mitigate her losses in her efforts to re-rent the unit to prospective tenants. I find that the landlord delayed looking for tenants until the previous hearing occurred on November 27, 2017, after which a decision was issued on the same date to both parties. She said that she received legal advice not to do anything with the unit until the hearing. However, she agreed that she conducted a move-out condition inspection and report with the tenants on September 30, 2017 and received the keys back on that date. Even though the hearing was still scheduled, the tenants did not indicate to the landlord or in their application that they intended to return to the unit or apply for an order of possession to return. The landlord was well aware that the unit was vacant and should have attempted to re-rent it as soon as she had notice that the tenants were leaving and certainly when they returned the keys and the tenancy ended on September 30, 2017.

The previous hearing decision is clear that no determination on the merits of the 1 Month Notice was being made by the Arbitrator, despite him disposing of the matter which he was required to do at the hearing. I do not accept the landlord's evidence that it was too difficult to rent the unit in the winter months or that it takes seven months to find a tenant to rent the unit.

Other Losses

Section 67 of the *Act* requires a party making a claim for damage or loss to prove the claim, on a balance of probabilities. In this case, to prove a loss, the landlord must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

On a balance of probabilities and for the reasons stated below, I dismiss the remainder of the landlord's application without leave to reapply.

I dismiss the landlord's claim of \$138.00 for cleaning the rental unit, \$35.00 to repair the fence, and \$73.50 for yard care. The landlord failed to provide receipts to show that she paid these amounts as she claimed. The landlord had ample time to provide these receipts. I find that she failed part 3 of the above test.

I award the landlord \$500.00 to replace one tree and \$200.00 to replace the other trees because these amounts were agreed to by the tenant during the hearing.

I dismiss the remaining claims for \$500.00 to \$700.00 plus taxes to remove damaged trees, \$2,500.00 plus taxes to replace the trees, as well as \$1,411.20 for trees and yard care. The landlord said that she did not have this work done, she did not pay for the work and I find that she failed to demonstrate losses in this regard.

As the landlord was mainly unsuccessful in her application, I find that she is not entitled to recover the \$100.00 filing fee from the tenants.

Tenants' Application

As notified to both parties during the hearing, the tenants are not entitled to recover the \$100.00 filing fee for a previous hearing that occurred in November 2017. That application has already been dealt with and cannot be reinstated at these current hearings.

I dismiss the tenants' claims for \$280.00 and \$1,500.00 in lawyer fees and \$324.19 in document service fees for their application, without leave to reapply. The only hearing-related fees recoverable under section 72 of the *Act* are for filing fees.

On a balance of probabilities and for the reasons stated below, I dismiss the tenants' claim for \$2,700.00 for one month's rent compensation for a loss of quiet enjoyment and unlawful access by the landlord to the rental unit, without leave to reapply. I find that the landlord provided notice and did not make unannounced visits to the rental property. I find that the landlord used the shared, common driveway to access the property and I find that the tree experts were there to resolve the tree issues experienced by both parties. I find that the tenants failed to provide medical documentary evidence to show

any post-traumatic stress disorder or other medical conditions, as they alleged, due to the landlord and the downstairs occupants' alleged harassment. The tenants did not produce any police reports or police witnesses indicating that they were harassed by anyone.

On a balance of probabilities and for the reasons stated below, I dismiss the tenants' claim for \$1,428.00 in moving expenses, without leave to reapply. I find that the tenants voluntarily moved from the rental unit rather than waiting for the previous hearing to take place and for the Arbitrator to decide whether they had to move out. The tenant claimed that he did not know that he was entitled to stay in the rental unit until the hearing; but ignorance of the law is no excuse. As noted above, I find that the tenants were not harassed into moving out so I find that they did so voluntarily.

Deposits

Section 38 of the *Act* requires the landlord to either return the tenants' deposits or file for dispute resolution for authorization to retain the deposits, within 15 days after the later of the end of a tenancy and the tenants' provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the deposits. However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the deposits to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

I make the following findings based on the undisputed testimony of both parties. The tenancy ended on September 30, 2017. The tenants did not give the landlord written permission to retain any amount from their deposits. The landlord did not return the deposits to the tenants. The landlord filed her application to keep the deposits on April 5, 2018, well past the 15 day deadline. Although the landlord claimed that she sent evidence regarding the deposits as part of the tenants' previous application and previous hearing, she did not file a claim to keep the deposits.

However, the tenants provided a written forwarding address by way of text message to the landlord on October 2, 2017. Text message is not permitted by section 88 of the *Act* and therefore, I find that the doubling provision has not yet been triggered. In accordance with section 38(6)(b) of the *Act* and Residential Tenancy Policy Guideline 17, I find that the tenants are not entitled to receive double the value of their deposits of

\$2,700.00. I find that they are only entitled to the regular return of their deposits of \$2,700.00 minus the monetary award provided to the landlord.

As the tenants were only partially successful in their application, I find that they are not entitled to recover the \$100.00 filing fee paid for their current application.

I order the landlord to retain the tenants' entire security and pet damage deposits totaling \$2,700.00 for the loss of rent claim. I issue a monetary order for the balance of the landlord's claim in the amount of \$700.00 for the trees claim.

Conclusion

I order the landlord to retain the tenants' entire security and pet damage deposits totaling \$2,700.00.

I issue a monetary order in the landlord's favour in the amount of \$700.00 against the tenant(s). The tenant(s) must be served with this Order as soon as possible. Should the tenant(s) fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The remainder of both parties' applications are 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: November 08, 2018

Residential Tenancy Branch