Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL -S, MNDL, MNRL, FFL, MNSD, FFT

Introduction

This proceeding dealt with monetary cross applications filed by both parties, as amended. The landlords seek compensation for unpaid utilities, unpaid and/or loss of rent, damage and furniture disposal; and, authorization to retain the tenant's security deposit. The tenants seek return of double the security deposit. The hearing was held over two dates and an Interim Decision were issued on February 1, 2019. The Interim Decision should be read in conjunction with this decision.

Both parties appeared or were represented at both hearing dates and over the course of two hearing dates both parties had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

Issue(s) to be Decided

1. Have the landlords established an entitlement to compensation from the tenants, as amended?
2. Are the tenants entitled to return of double the security deposit?

Background and Evidence

The parties executed a written tenancy agreement for a tenancy that commenced on May 1, 2018. The tenancy was a fixed term for six months and then continued on a month to month basis from November 1, 2018 onwards. The rent was set at $1,690.00 payable one the first day of every month. The tenants paid a security deposit of $845.00. The tenants vacated the rental unit at the end of December 2018.

The rental unit was described as being a lower suite in a house. The upper suite was vacant during the tenancy; however, the landlord was in the upper suite frequently on weeknights and weekends while he was renovating it.

A move-in and a move-out inspection report were prepared with both parties present.

The tenants provided their forwarding address to the landlord via email on December 31, 2018. The tenants did not authorize the landlord to make any deductions from their deposit.

The landlords filed an Application for dispute Resolution to make a claim against the security deposit on January 9, 2019 and amended the claim on January 23, 2019.

Landlords' Application

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

Unpaid hydro -- $113.47 + $95.19 + 151.05 + 293.56

The landlord submitted that there was a separate hydro meter for each suite in the house and that the tenants were supposed to put the hydro for the lower suite in their name but they did not. Accordingly, the hydro account remained in the landlord's name. The landlord testified that he discovered the tenants had not been paying for their own hydro on approximately December 10, 2018 and he spoke with the tenants about it and they said they did not know they had to pay for hydro. The landlord gave the tenants copies of the hydro bills on December 19, 2018, via email, for the months of May 2018 through November 2018. The hydro bill for December 2018 was attached to the evidence package served to the tenants.

The tenants submitted that they assumed the hydro was on one meter and that it would be pro-rated like the gas bill is. The tenancy agreement provides that the tenants were responsible for only 35% of the gas bill; however, they used very little gas because the boiler was not working and they used electric space heaters. The tenants testified that the landlord only raised the issue of unpaid hydro after they gave their notice to end tenancy on December 18, 2018. In light of these circumstances, the tenants were agreeable to paying say 50% of the hydro bill but not all of it.

The landlord confirmed that he did not seek any gas payments from the tenants and did not charge them any gas because the boiler was not working properly.

Unpaid and/or loss of rent -- $845.00

The landlord submitted that he received notification from the tenants that they intended to end their tenancy at the end of December 2018 via an email dated December 18, 2018. The landlord testified that he posted advertisements for the lower suite right away but did not secure new tenants until January 17, 2019 for a new tenancy set to commence on February 1, 2019.

I noted that the landlord had only claimed loss of rent equivalent to one-half of the monthly rent. The landlord explained that when he filed the Application he did not know how long the unit would be vacant. I pointed out that when he filed his Amendment on January 23, 2019 that would have been after he secured replacement tenants but that he did not increase the claim to reflect a loss of rent for the entire month of January 2019. The landlord appeared confused as to why he did not amend the amount of the claim for loss of rent in those circumstances.

The tenants were of the position they left the rental unit under duress. The tenants explained this was due to the boiler not working, leaking windows, the lack of insulation, mould, and other issues that were bothersome but the tenants had been willing to overlook. In addition, the tenants suffered from frequent sounds of construction upstairs since the landlord was renovating in the evenings and weekends, which is the same time they were home. The tenants felt fed up with the environment and sought something more desirable. When a more suitable unit came available they took it.

The tenants pointed me to emails they had sent to the landlord on November 6, 2018 and November 30, 2018 to complain about the issues they were experiencing and notifying the landlord they would move out if the situation did not improve in support of them ending the tenancy early. The landlord acknowledged that he received emails from the tenants but considered them to be complaints and did not realize they were going to end the tenancy.

The landlord maintained that the construction noise did not violate city noise by-laws except for one time. The landlord submitted that the tenants complained once and he stopped after they complained.

The tenants were of the position the landlord was trying to re-rent the unit for a lot more than they were paying, at the rate of $1820.00 per month versus $1,690.00 and the landlord had advertised the unit in a misleading way, such as indicating there was a pool and a family room when in fact the house had a pool table and an unfinished rec room. The landlord submitted that he re-rented the unit for $1,790.00 and there were no problems getting rent in that amount. The landlord acknowledged that there may have been some errors in the initial advertisements.

Removal of sofa -- $78.31

The landlord submitted that the tenants left a sofa behind in the rec room despite their assurance they would come back to get it. The landlord obtained a quote for its removal but the sofa remains at the property.

The tenants stated the sofa was in the rec room when they moved. The tenants pointed out that the rec room was not part of the rental unit although they had access to the area.

Painting -- $434.29

The landlord submitted that the new tenants want the rental unit re-painted because it smells like smoke. The landlord testified that he did not have it painted before the new tenants moved in. Rather, the landlord claims the new tenants accepted the unit as is but that they will paint it at a later date and the landlord has to supply the paint. The landlord reduced his claim for painting to the estimated cost of the paint, which he expects will cost approximately $125.00, although he has yet to purchase the paint as of the date of the reconvened hearing.

The tenants testified that they did not smoke in the unit but that they only smoked outside. The tenants acknowledge their clothing likely smelled of smoke. The tenants object to having to pay for repainting the unit. The tenants pointed out the move-out inspection report makes no mention of a smoke odour and the tenants were of the position the landlord's request to claim for repainting nearly a month after their tenancy ended to be dubious. The tenants pointed out that the unit is still not painted and has been re-rented.

Tenants' Application

Return of double security deposit

The tenants seek double the security deposit on the basis the lack of a refund caused them hardship.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons with respect to each Application.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided in section 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.

The burden of proof is based on the balance of probabilities. It is important to note that where one party provides facts or a version of events in one way, and the other party provides facts or version of events in a different but equally probable way, without further evidence the claim will fail for the party with the burden of proof.

Landlords' application

The landlord bears the burden to prove his claims against the tenants.

Unpaid hydro

The tenancy agreement provides that electricity was not included in the monthly rent payment. The property includes two suites. The tenants questioned whether there were two hydro meters on the property: one for each suite.

The landlord provided a print out of all of the hydro accounts in his name and I see that that there are two hydro accounts for the subject property: including one account that has a distinction that it is for unit “DS” which presumably stands for downstairs suite. The landlord seeks to recover the hydro bills he paid for account “DS” between May 5, 2018 and January 4, 2019 and I accept that the hydro account designated as being for DS represents hydro consumed in the rental unit.

The tenants argued that they should not be liable for all of the charges to the hydro account since the landlord did not present them with copies of the bills until many months later; however, I do not see how receiving the bills in a more timely manner would have reduced their overall liability to pay for hydro for their unit. As such, I find the delayed presentation of the bills does not negate the tenants’ liability.

The tenants submitted that they used electric space heaters frequently because of issues with the boiler. Upon review of the emails the tenants submitted into evidence I see several concerns about persistent banging noises coming from the boiler which caused the tenants to be disturbed and informing the landlord they were using space heaters. As such, I accept that the tenants resorted to using electric heaters much of time because of the banging and failing boiler system.

Due to the time that elapsed between the time the tenants started complaining about the boiler and having the boiler system replaced in mid-December 2018, I find the tenants may have been paying more for heat than they would have had the boiler been working property. For instance, the boiler ran on natural gas and the tenants were only responsible for 35% of the natural gas bill whereas using electric space heaters means the tenants were paying 100% of the electric heating cost. I notice that there is a significant spike in electricity consumption in November 2018 and December 2018. The bill for November 6, 2018 to January 4, 2019 was $293.46 whereas the bill for September 6, 2018 through to November 5, 2018 was only $151.05. I attribute a large portion of the increase to using the more expensive electric space heaters than the central heating system that ran on gas. Therefore, I limit the tenant’s liability for the last hydro bill as follows.

The increase in electrical consumption in the last billing cycle was $142.41 ($293.46 – $151.05) and I hold the tenants responsible for only 35% of the increase that I attribute to the heat, or $49.85. Therefore, I hold the tenants liable to pay the following amounts for hydro:

May 5 – July 5, 2018 hydro bill	$113.47
July 6 – September 5, 2018	95.19
September 6 – November 6, 2018	151.05
November 6 – January 4, 2019	151.05 + 49.85
Total award for hydro	$560.61

Unpaid and/or loss of rent

A tenancy comes to an end in one of the ways provided under section 44 of the Act.

Section 44(1)(d) provides that a tenancy ends when a tenant vacates or abandons a rental unit. The tenants returned vacant possession of the rental unit to the landlord at the end of December 2018. Accordingly, I find the tenancy came to an end on December 31, 2018 under section 44(1)(d). The issue in this case is whether the landlords are entitled to recover loss of rent for January 2019 considering the tenants gave the landlords notice to end tenancy on December 18, 2018. Although the notice to end tenancy was via email, I note that the parties frequently and ordinarily communicated by email and the landlords apparently accepted the tenant's notice given via email.

Where a tenant in a month to month tenancy, such as the tenants in this case after November 1, 2018, the tenant is required to give one full month of written notice to end the tenancy, pursuant to section 45(1) of the Act. It is undeniable that the tenants gave less than one full month of advance notice to end the tenancy; however, section 45(3) also provides for circumstances when a tenant may end a tenancy earlier. Section 45(3) provides:

> (3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice

Also, section 44(1)(f) provides that a tenancy is over when "the director orders that the tenancy is ended". As an Arbitrator, I am a delegate of the Director and I may order a tenancy to be over on a particular date.

The tenants wrote the landlord several emails concerning the boiler not working properly and making a lot of noise prior to a long email they wrote on November 6, 2018 concerning the boiler and the landlords' responses to their complaints. On November 6, 2018 the tenants wrote the landlord a long email to the landlord about the problems with the boiler and how the tenants found the entire situation to be unacceptable. Not only the lack of a properly working boiler, the tenants raised complaints concerning the delay in having the problem sufficiently addressed, and being told by the landlord that there were no plumbers available in the area when the tenant was able to find available plumbers. The tenants go on to state: "if this continues without proper resolution, we'll likely have to ask for our deposit back and move out, which would be unfortunate as we really like the place…"

On November 30, 2018 the tenants complain to the landlord about leaking windows and formation of mould.

On December 18, 2018 the tenants give their notice that they will be vacating before the end of December 31, 2018 and point to being "fed up with all the many issues we had to deal with here (they are too many to list at this point, however I have a detailed account of them all in the emails)."

In respose to the tenants' December 18, 2018 email the landlord thanks the tenants for their notice and states: "We respect your decision." Subsequent emails involve the landlord arranging to show the unit to prosepctive tenants. The landlord does not put the tenants on notice that they will hold the tenants responsible for loss of rent if the landlords do not secure replacement tenants for January 2019.

Residential Tenancy Policy Guideline 3: *Claims for Rent and Damages for loss of rent* provides informaiton and policy statements concerning claims for unpaid and/or loss of rent. The policy guideline provides, in part:

> Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:
>
> 1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
>
> 2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

> If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice.

All things considered, I find the landlords did breach a material and fundamental term of tenancy by failing to provide a working heating system and have it repaired or replaced in a timely manner and causing the tenants unreasonable disturbance which is a breach of quiet enjoyment they are entitled to receive from the landlord under section 28 of the Act. The tenants put the landlords on notice that the situation was unacceptable and that they would end the tenancy if it was not resolved. Several more weeks passed without a replacement boiler, the tenants continued to use electrical space heaters and in the meantime mould started forming around the windows. I find the living environment in the unit was untenable and I find the tenants in a position to end the tenancy early and without giving a full month of advance notice under section 45(3).

Also of consideration is that the landlords did not put the tenants on notice that they would pursue them for any loss of rent until after they returned possession of the unit to the landlords. In my view, the landlords should have put the tenants on notice of their intention to sue for loss of rent upon receiving the December 18, 2018 notice.

In light of all of the above, I make no award to the landlord for loss of rent for January 2019.

Removal of sofa

The parties were in dispute as to whether the sofa was brought to the property by the tenants or whether it was already there when the tenancy started. The move-in inspection report and the move-out inspection report are silent with respect to a sofa or removal of a sofa. I find the disputed oral testimony to be insufficient evidence to meet the landlords' burden to prove the tenants brought the sofa to the property as alleged. Therefore, I dismiss this portion of the landlords' claim.

Re-painting

The landlords seek the cost to purchase paint to repaint the unit on the basis the rental unit smelled of smoke due to the tenants smoking.

Section 21 of the Residential Tenancy Regulations provides that a condition inspection report prepared in accordance with the Residential Tenancy Regulations is the best evidence of the condition of a rental unit at the beginning and end of a tenancy in a dispute resolution proceeding unless there is a preponderance of evidence to the contrary.

The move-out inspection report makes no mention of smell or the need to paint the unit and I must consider whether the landlord has presented a preponderance of evidence to contradict his findings during the move-out inspection.

The landlord did not call the subsequent tenants to testify, the landlord did not provide a receipt for the purchase of paint, and I find the landlords' oral testimony is insufficient in itself to contradict the move-out inspection report he prepared with the tenants on December 31, 2018. Therefore, I make no award for re-painting and this portion of the landlord's claim is dismissed.

Tenant's application

The tenants seek doubling of the security deposit on the basis the lack of a refund of their deposit has caused them hardship. This is not a basis for doubling the deposit. Doubling of a security deposit is provided in section 38 of the Act.

Section 38(1) of the Act provides that the landlord has 15 days, from the date the tenancy ends or the tenant provides a forwarding address in writing, whichever date is later, to either refund the security deposit, get the tenant's written consent to retain it, or make an Application for Dispute Resolution to claim against it. Section 38(6) provides that if the landlord violates section 38(1) the landlord must pay the tenant double the security deposit.

The landlord made a claim against the tenants' security deposit within 15 days of the tenancy sending and receiving the tenant's forwarding address. The landlords' claims had some merit. Therefore, I find the landlords complied with section 38(1) and the tenants are not entitled to double the security deposit under section 38 and I dismiss their request.

The tenants remain entitled to a credit for the single amount of the security deposit, subject to any authorized deductions I may order.

Filing fees and disposition of security deposit

The landlords had limited success in their application and I award the landlords recovery of $25.00 of the filing fee they paid. I make no award for recovery of the filing fee to the tenants as their claim was dismissed.

The landlords are holding a security deposit of $845.00 and I authorize the landlords to deduct from the security deposit the amount I have awarded the landlords by way of this decision: $560.61 for unpaid hydro and $25.00 as a partial award for recovery of the filing fee. I order the landlords to return the balance of the security deposit to the tenants in the amount of $259.39 without delay. In keeping with Residential Tenancy Policy Guideline 17: *Security Deposits & Set-Off*, I provide the tenants with a Monetary Order for the amount of $259.39 to ensure payment is made.

Conclusion

The landlords were partially successful in their claims against the tenants. The tenants' application for return of double the security deposit was dismissed. As a result, the landlords are authorized to deduct $585.61 from the tenants' security deposit, in the single amount, and the landlords are ordered to return the balance of $259.39 to the tenants without further delay. The tenants are provided a Monetary Order in the amount of $259.39 to ensure payment is made.

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: April 04, 2019

Residential Tenancy Branch