Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPR, MNDCL-S, MNRL-S, OPN, FFL, MNDL-S**

Introduction

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $1,549.70 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant has already vacated the rental unit, so the orders of possession initially sought by the landlord are no longer required.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

This hearing was reconvened from a previous hearing on January 10, 2020. In an interim decision of that same date, I ordered that the landlord serve the tenant with an amendment to the application and supporting documents by January 17, 2020. I also permitted the tenant to serve the landlord with documentary evidence which was responsible to the landlord's claim.

At this hearing, the parties testified that each had served the other with the required documents. As such, I deem that each has been served in accordance with the Act,

Issues to be Decided

Is the landlord entitled to:

1) a monetary order of $1,549.70;
2) retain the security deposit in partial satisfaction of this order; and
3) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into an oral tenancy agreement starting June 1, 2019. Monthly rent was $825 and is payable on the first of each month. No security deposit was paid at the start of the tenancy. The landlord testified that, on November 4, 2019, the tenant paid her $400 without telling her what this amount represented. The landlord testified that she assumed it was the belated security deposit that she requested from the tenant in September 2019. The tenant testified that this $400 transfer represented a partial payment of rent for the month of November 2019. The tenant testified that she did not provide the landlord with a security deposit.

The tenant vacated the rental unit on November 20, 2019.

The parties did not conduct a move-in condition inspection report at the start of the tenancy nor a move-out condition inspection report at the end of the tenancy.

The landlord testified that the tenant sent her a text message on October 3, 2019 stating that she would vacate the rental unit at the end of the month (that is, October 31, 2019). The landlord testified that the reason for the tenant giving this notice was that the tenant was unable to provide the security deposit which the landlord demanded of her in September 2019.

The landlord testified that she relied on the tenant's notice to end tenancy and arranged for the rental unit to be re-rented for November 1, 2019, for $1,050 per month. The landlord provided a copy of a letter from the new renter corroborating her testimony.

The landlord testified that the tenant did not vacate the rental unit on October 31, 2019. She testified that the tenant did not vacate the rental unit November 20, 2019, following the landlord serving her with a 10 day notice to end tenancy for non-payment of rent.

The landlord testified that the tenant did not pay any rent for the month of November 2019.

The landlord testified that the rental unit required cleaning and repairs after the tenant left. She testified that the she had to have the carpets cleaned, as they were stained. She also testified that she had to repair several small holes in the walls and repaint parts of the walls once repaired. She also testified that when the tenant left, she took two beach towels and a bird feeder which belonged to the landlord.

The landlord also claims compensation for her photocopying costs from a prior application brought by the tenant against her that was dismissed with leave to reapply.

In total, the landlord claims $1,649.70, representing the following:

Carpet Cleaning	$283.50
Paint and Repair	$27.95
Painting and cleaning (labour)	$75.00
Photocopying	$58.25
November Rent	$825.00
Loss of income for November	$225.00
Feeder and towel	$55.00
Filing Fee	$100.00
Total	**$1,649.70**

The landlord stated that the $400 received from the tenant in November should be credited against this amount.

The tenant argued that she should not be responsible for paying any amount to the landlord.

The tenant testified that when she vacated the rental unit, it was in better condition than when she received it. She denied damaging the rental unit. She argued that the landlord had provided no evidence as to its condition at the start of the tenancy, so it is impossible to say whether any damage to the rental unit predated the tenancy.

The tenant argued that she did not end the tenancy on October 31, 2019. She conceded that she texted the landlord on October 3, 2019 and wrote:

> Hi there - so unfortunately I'm not going to make your deadline tomorrow morning.

Therefore I guess I will prepare to leave your property at the end of the month

She testified she wrote this on the understanding (based on what the landlord told her) that the landlord was permitted to terminate the tenancy if the tenant did not provide her a security deposit. She testified that shortly after sending this text message she learned that the landlord could not demand a security deposit after 30 days from the start of the tenancy. She argued that this negated her notice to end the tenancy.

The tenant also argued that since her notice to end tenancy was sent by text message, it was invalid, as such notices must be sent in writing.

The tenant also argued that that contrary to the October 3, 2019 text message, the landlord, on October 10, 2019, asserted that the tenancy ended on October 26, 2019 at noon, and not on October 31, 2019. The landlord admitted to doing this and testified that she was “mistaken” to have done this. She did not provide an explanation as to why she took this position.

Additionally, the tenant testified that she filed an application for dispute resolution to dispute a one-month notice to end tenancy, which was to come to a hearing on November 25, 2019. As such, she understood that she was not required to leave until the hearing took place.

The tenant testified that she vacated the rental unit on November 20, 2019 because she received a 10 day notice to end tenancy for non-payment of rent. She testified that she paid $400 for “half a month’s rent” on November 4, 2019. She testified that this should be enough to satisfy her obligations towards the landlord. She testified that the landlord cut off her cable and wi-fi in September 2019, and that these were included in her monthly rent.

Analysis

In the hearing, I advised the tenant that I only have the ability to address the issues raised in the landlord’s application. As such, I told her, I cannot account for any denial of services or facilities by the landlord when calculating whether rent is owed.

Section 26 of the Act states:

Rules about payment and non-payment of rent

> 26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

As such, a tenant cannot make deductions from the monthly rent, or withhold any portion of the monthly rent for any alleged breach of the Act by the landlord. Accordingly, if the tenant believes she is entitled to compensation for the landlord cutting of her cable or wi-fi, she must make a separate application claiming for a monetary order to compensate her for the landlord's alleged breach.

In this case, the tenant has not brought her own application for compensation for the landlord's alleged breaches of the Act. As such, I will not consider any alleged termination of services by the landlord when determining what amount the tenant owes the landlord.

Landlord's Claim for Cleaning/Repair Costs

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
>
> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Section 37 of the Act states:

> **Leaving the rental unit at the end of a tenancy**
>
> 37(2) When a tenant vacates a rental unit, the tenant must
>
> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

As such, the landlord bears the onus to prove that the tenant breached section 32 of the Act by failing to leave the rental unit reasonably clean and undamaged.

The landlord did not prepare a move-in condition inspection report. I cannot, therefore, determine what the condition of the rental unit was at the start of the tenancy. I do not know if the stains on the carpet or the damage to the walls pre-dated the tenancy. Accordingly, I cannot say that, on a balance of probabilities, the tenant damaged the rental unit or failed to leave it reasonably clean.

For similar reasons, I find that the landlord has failed to prove that the tenant improperly removed the towels and bird feeder from the rental unit. I have no proof that the landlord owned these items. The tenant testified that these items belong to her and submitted photos of these items which she says pre-date the tenancy and show that they belong to her.

As such, I dismiss these portions of the landlord's claim.

Photocopying costs

The Act does not provide for the recovery of disbursements (such as mailing costs, photocopying costs, or travel costs) incurred in the course of a dispute resolution. The Act only permits the recovery of the filing fee. As such, I decline to award the landlord any amount for the photocopying costs incurred.

November Rental Arrears

I find that, on October 3, 2019, the tenant agreed to vacate the tenancy as of October 31, 2019. I find that the landlord accepted that the tenancy would end on this date. I find that the tenant later attempted to revoke this agreement when she came to understand

that the landlord could not demand a security deposit after 30 days from the start of the tenancy (I make no determination as to the truth of this possession).

I am not persuaded by the tenant's argument that the October 3, 2019 text message should be of no force or effect because it is not a notice to end tenancy "in writing". I find that a text message is "written" and that both parties understood what was meant by the text message at the time it was sent: the tenant would vacate the rental unit on October 31, 2019. The effect of the October 3, 2019 text message cannot be avoided by virtue of its contents not being in the form of a written letter.

The tenant's October 3, 2019 text message was either an acceptance of the landlord's offer to mutually agree to end the tenancy, or the tenant's notice to end the tenancy. Under either of these scenarios, the tenant is not permitted to revoke the tenancy ending on October 31, 2019.

If the October 3, 2019 text message constituted a mutual agreement to end tenancy, the tenant cannot unilaterally withdraw from it. To withdraw from an agreement requires the consent of the opposing party. In this case, the landlord did not give her consent.

If the October 3, 2019 text message constituted a notice to end the tenancy from the tenant, the tenant would still not be permitted to withdraw that notice. Policy Guideline 11 addresses withdrawing a notice to end a tenancy. It states:

> A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

As the landlord did not consent to the tenant staying in the rental unit past October 31, 2019, I find that the October 3, 2019 text message sent by the tenant causes the tenancy to end on October 31, 2019. As such, the tenant breached the Act by failing to vacate the rental unit on October 31, 2019.

Section 57 of the Act addresses landlord compensation in situations such as this. It states:

> **What happens if a tenant does not leave when tenancy ended**

57(1) In this section:

[…]

"**overholding tenant**" means a tenant who continues to occupy a rental unit after the tenant's tenancy is ended.

[…]

(3) A landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

Policy Guideline 3 states that a "tenant will be liable to pay occupation rent on a *per diem* basis until the landlord recovers possession of the [rental unit]." As such, the tenant must pay the landlord $550, represent payment for 20 days of occupation of the rental unit ($825 ÷ 30 days = $27.50/day, $27.50 x 20 days = $550). As the tenant has already paid the landlord $400 towards November "rent", I find this amount should be credited against the overholding fee.

I order that the tenant pay the landlord $150.

Loss of Rent

I find that by telling the tenant that the tenancy was to end on October 26, 2019 (as opposed to October 31, 2019) the landlord caused significant confusion as to when the tenancy was to end, or if it was to end at all (that is, did that assertion somehow negate the tenant's text message of October 3, 2019). By taking this position, the landlord may have contributed to the tenant refusing to leave the rental unit on October 31, 2019. I find that by sowing confusion as to the terms on which the tenancy was to end, the landlord failed to minimize her damage suffered as a result of the tenant not vacating the rental unit on October 31, 2019 (that is, the loss of the ability to rent the rental unit to another tenant, at a higher rate, for the month of November 2019).

Accordingly, I decline to award the landlord any amount for this portion of her claim.

Filing Fee

As the tenant has been substantially successful in this application, I decline to order that she reimburse the landlord for the filing fee.

Conclusion

Pursuant to section 67 of the Act, I order the tenant to pay the landlord $150.

I also note that the lack of proper documentation throughout the tenancy on the part of both the landlord and the tenant caused significant confusion among them. I encourage the parties to use the forms available on the Residential Tenancy Branch web site (Tenancy Agreement, Condition Inspection Reports, Notices to End Tenancy, and Mutual Agreements to End Tenancy) in any of their future tenancies.

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: March 18, 2020

Residential Tenancy Branch