Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, FFL

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 deposit, pursuant to section 38; and
- authorization to recover the filing fee for her application, pursuant to section 72.

The landlord, the landlord's agent, and the two tenants, female tenant ("tenant") and "male tenant," 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 lasted approximately 52 minutes.

The landlord confirmed that her agent had permission to speak on her behalf at this hearing. The tenant confirmed that she had permission to represent the male tenant at this hearing (collectively "tenants"). The male tenant did not testify at his hearing.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing package and the landlord's agent confirmed receipt of the tenants' evidence. In accordance with sections 88, 89 and 90 of the *Act*, I find that the tenants were duly served with the landlord's application and the landlord was duly served with the tenants' evidence.

At the outset of the hearing, I explained the hearing and settlement process to both parties. Both parties confirmed that they were ready to proceed with the hearing.

Issues to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit and for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to retain the tenants' security deposit?

Is the landlord entitled to recover the filing fee for her application?

Background and Evidence

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

Both parties agreed to the following facts. This tenancy began on April 1, 2009. Monthly rent in the amount of $1,496.59 was payable on the first day of each month. A security deposit of $700.00 was paid by the tenants and the landlord continues to retain this deposit in full. A written tenancy agreement was signed by both parties. No move-in condition inspection report was completed for this tenancy, but a move-out condition inspection report was completed with the landlord only, not the tenants present. The landlord did not provide the tenants with two opportunities to complete a move-out condition inspection and did not use the Residential Tenancy Branch ("RTB") approved form for a "Notice of Final Opportunity to Schedule a Condition Inspection." The landlord did not have written permission to retain any amount from the tenants' security deposit. The landlord's application to retain the tenants' security deposit was filed on October 6, 2020.

The tenant claimed that she provided a written forwarding address by way of a letter that was sent by registered mail to the landlords on September 21, 2020. The tenant provided a Canada Post tracking number verbally during the hearing for the mailing. The landlord's agent claimed that no forwarding address was received from the tenant, but mail was returned by Canada Post to the landlord with the tenants' new address contained on it.

As per her application, the landlord seeks a monetary order of $5,279.92 plus the $100.00 filing fee. The tenants dispute the landlord's entire monetary claim.

The landlord's agent testified regarding the following facts. The landlord obtained an order of possession enforceable in September 2020 against the tenants, at a previous RTB hearing in August 2020. The landlord sold the rental unit to new owners, who took possession on October 7, 2020. On September 30, 2020, the landlord went to the rental unit, the tenants refused to leave, and a video recording was submitted. The landlord obtained a writ of possession from the Supreme Court and hired bailiffs to remove the tenants' possessions on October 2, 2020, when the bailiffs were available. The tenants were not present when the bailiff arrived, but the landlord did not want to remove the tenants' possessions from the rental unit. The tenants caused extensive damage to the rental unit when the landlord inspected it on October 2, 2020. The landlord inspected the rental unit on three occasions on July 7, July 22, and September 9, where the RCMP was present, and all the damage being claimed by the landlord was present, except for the lawn damage. The tenants cut the wires to the new appliance, demolished the deck, removed exterior shed walls, punched holes in the walls, ripped out the thermostat, removed the furnace ducts, and left spoiled food and garbage all over the property. The landlord and her son took photographs of all damages on October 2, 2020. The landlord disputes the tenants' claims made in her evidence.

The tenant testified regarding the following facts. The tenants did not receive the landlord's bailiff invoice and photographs of the deck. The tenants submitted a video of what happened on September 30, 2020, when the landlord came to the rental unit. On September 30, 2020, the tenant informed the landlord that she was delayed in moving out because her items were in storage. The landlord told the tenant that the storage was unavailable since September 2018, so the tenant could not access it. On September 30, 2020, the tenant told the landlord that her movers would be coming on October 1, 2020 to remove her items, and the tenants left at 9:00 a.m. on October 1, 2020. The only items left behind at the rental unit by the tenants were items in storage, to which the tenant was refused access by the landlord. The bailiff did not remove the tenant from the rental unit and the tenants provided a copy of their own moving expenses which is above the average cost. The landlord did not complete move-in or move-out reports, so she cannot claim for any damages. There were already damages done to the deck and storage at the rental unit, due to lack of renovations, repair and maintenance by the landlord. The landlord's real estate agent came to the rental unit with cameras and recorded everything around the house. The landlord's photographs do not show any holes in the walls or damages, as claimed in the landlord's monetary order worksheet. The tenant does not know what the issue with the refrigerator was because the landlord left it in the carport for three to four months, as per the tenant's photograph. The landlord needed to take the fence out and did so using commercial garbage trucks. The tenants want their security deposit back from the landlord.

Analysis

Burden of Proof

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

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.

The following Residential Tenancy Branch ("RTB") *Rules of Procedure* are applicable and state the following, in part:

> *7.4 Evidence must be presented*
> *Evidence must be presented by the party who submitted it, or by the party's agent…*
> …
> *7.17 Presentation of evidence*
> *Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence…*
>
> *7.18 Order of presentation*
> *The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof…*

Findings

On a balance of probabilities and for the reasons stated below, I make the following findings based on the testimony and evidence of both parties.

At the outset of the hearing, I notified the landlord's agent about the above four-part test and asked him to indicate what was being claimed and the amounts for each claim. However, he failed to go through any specific claims or the amounts for each claim, as noted on the landlord's monetary order worksheet.

At the outset of the hearing, I informed the landlord's agent that the landlord-applicant had the burden of proof, on a balance of probabilities, to present the landlord's claim. I find that the landlord and her agent did not properly present their evidence, as required by Rule 7.4 of the RTB *Rules of Procedure*, despite having the opportunity to do so during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules of Procedure.*

I asked the landlord's agent several questions regarding the landlord's application, in order for me to make a decision. This hearing lasted 52 minutes so the landlord and her agent had ample opportunity to present their application and respond to the tenant's testimony. However, the landlord's agent failed to go through the landlord's numerous documents that were submitted for this hearing, including invoices, receipts, and other documents. Even the tenant questioned the landlord's agent regarding the landlord's documents, particularly the bailiff invoice, but the landlord still failed to properly explain these amounts or documents.

I dismiss the landlord's application of $5,279.92 without leave to reapply.

During the hearing, the landlord's agent stated that the landlord was not pursuing her application for lawn expenses of $360.00 x 2, totalling $720.00, and a thermostat for $200.00. He maintained that the landlord did not incur these costs, since the rental unit was sold to new owners. These claims are dismissed without leave to reapply.

I dismiss the landlord's claims for cleaning of $447.50 and $600.00, a new refrigerator of $740.86, and a picket fence repair of $226.75, without leave to reapply. The landlord did not even indicate these amounts during the hearing. The landlord did not go through any invoices or receipts during the hearing. The landlord did not complete move-in or move-out condition inspection reports with the tenants to show the condition of the rental unit when the tenants moved in or out, in order to prove the above damages. The landlord did not indicate whether costs were paid and if so, how and when they were paid.

The landlord's cleaning invoice indicates a balance due of $447.50, not a receipt of a payment made. On the invoice, no dates were provided as to when the work was done and by how many people. Only "Monday" and "Tuesday" were indicated for when the

work was done. The date of the invoice is October 7, 2020, when the landlord said the new owners took possession of the rental unit.

The landlord did not provide an invoice or receipt for the $600.00 for cleaning. The landlord stated in the monetary order worksheet that “two owners” cleaned for 4 days at 5 hours each per day, at a rate of $15.00 per hour, for 40 total hours.

The landlord’s document for the new refrigerator of $740.86 is a partial email from an apparent online store purchase of $699.99, where the landlord photocopied a handwritten small yellow note indicating $740.86. There is no purchase invoice or receipt, indicating if any amount was paid, and if so, when and how it was paid. The landlord attached a bill of lading, with no cost, for a previous refrigerator purchase on June 13, 2019, more than 1.5 years prior to this hearing date.

The landlord’s invoice for the picket fence repair of $226.75 is from April 30, 2016, almost five years prior to this hearing date. The invoice is in the name of the tenant where it states, “invoice to” and “ship to.” The landlord claimed that the tenant tore down the picket fence, so this was the cost. But the landlord did not provide a new invoice for the cost of any new picket fence that was actually paid, if any, and how and when it was paid.

I dismiss the landlord’s claims for bailiff costs of $2,224.81 and the Supreme Court filing fee for a writ of possession of $120.00, without leave to reapply. The landlord did not even indicate these amounts during the hearing. The landlord did not go through any invoices or receipts during the hearing. The landlord did not indicate whether costs were paid and if so, how and when they were paid.

The landlord’s bailiff invoice, dated November 21, 2020, indicates that the landlord paid deposits on October 1 and 2, 2020 to the company. However, no work or charges were recorded on the invoice until November 18, 2020 and November 21, 2020, well after the new owners took possession of the rental unit on October 7, 2020. Yet, the landlord’s agent claimed during the hearing that the bailiff arrived on October 2, 2020, to remove the tenants’ possessions but the invoice does not reflect that information.

I find that the landlord did not require a writ of possession or a bailiff to remove the tenants from the rental unit. The landlord’s agent agreed during the hearing that the tenants had vacated the rental unit by the time the bailiff was “available” on October 2, 2020 and that the bailiff was only used to remove the tenants’ possessions because the landlord did not want to remove them. The tenant claimed that she did not have access

to her items from the landlord's storage when she left. I find that the landlord had possession of the rental unit when the tenant vacated on October 1, 2020, since the tenant informed the landlord on September 30, 2020, that she would vacate with her movers' assistance on October 1, 2020.

Part 5 of the *Regulation* provides a procedure for a landlord dealing with items left behind by tenants at a rental unit, which does not require a bailiff to remove these possessions. The landlord is entitled to consider the tenants' personal property abandoned as per section 24 of the *Regulation* and must deal with it in accordance with section 25 of the *Regulation*.

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

Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenants' security deposit or file for dispute resolution for authorization to retain the deposit, 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 deposit. However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the deposit 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 a balance of probabilities and the evidence of both parties. The tenancy ended on September 30, 2020. I find that the tenants provided their written forwarding address to the landlord on September 21, 2020, by way of a letter sent by registered mail. The tenant provided a Canada Post tracking number to confirm this mailing. The landlord did not have written permission to retain any amount from the tenants' security deposit. The landlord applied to retain the deposit on October 6, 2020, which is within 15 days of the later date of September 30, 2020.

I find that the tenants are not entitled to double the value of their security deposit. The landlord's right to claim against the deposit for damages was extinguished for failure to complete a move-in condition inspection report, as per section 24 of the *Act*. However, the landlord also made other claims related to cleaning and bailiff fees, which are not damages.

The landlord continues to hold the tenants' security deposit of $700.00. Over the period of this tenancy, no interest is payable on the deposit. In accordance with section 38 of the *Act* and Residential Tenancy Policy Guideline 17, I order the landlord to return the security deposit of $700.00 to the tenants within 15 days of receiving this decision. I issue a monetary order to the tenants for $700.00.

Although the tenants did not apply for the return of their security deposit, I am required to deal with its return on the landlord's application to retain the deposit, as per Residential Tenancy Policy Guideline 17.

Conclusion

The landlord's entire application is dismissed without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of $700.00 against the landlord. The landlord must be served with this Order as soon as possible. Should the landlord 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.

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: January 26, 2021

Residential Tenancy Branch