Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **TT: MNDCT, MNSD, FFT**
LL: MNDL-S, FFL

Introduction

This hearing dealt with applications from both the landlord and tenants pursuant to the *Residential Tenancy Act* (the "*Act*").

The landlord applied for:

- a monetary order for damages and loss pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenants applied for:

- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. Both parties were represented by counsel.

In accordance with the *Act*, Residential Tenancy Rule of Procedure 6.1 and 7.17 and the principles of fairness and the Branch's objective of fair, efficient and consistent dispute resolution process parties were given a full opportunity to make submissions and present evidence related to the claim. The parties were directed to make succinct submissions, and pursuant to my authority under Rule 7.17 were directed against making unnecessary submissions or remarks not related to the matter at hand. Despite this the hearing ran considerably over the scheduled time in order to allow all parties a full opportunity to be heard.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is either party entitled to a monetary award and to the deposits for this tenancy as claimed?
Is either party entitled to recover the filing fee from the other?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. Both parties gave lengthy submissions over the course of the hearing and provided substantive documentary materials. The principal aspects of the claims and my findings around each are set out below.

The parties agree on the following facts. This fixed-term tenancy began on November 28, 2019 and was scheduled to end on November 30, 2021. The monthly rent was $8,500.00 payable on the first of each month. A security deposit of $4,250.00 was collected at the start of the tenancy. The tenancy ended in accordance with a Mutual Agreement between the parties on August 31, 2021. The parties participated in a move-in and move-out inspection and a condition inspection report was prepared and signed by the parties on August 27, 2021.

In their written submissions and accompanying affidavit the landlord and their agents dispute that they were provided a forwarding address by the tenants. A copy of the inspection report was submitted into evidence. The tenants provided a forwarding address on the inspection report. The landlord provided no explanation as to why they claim they were not provided a forwarding address when there appears to be a forwarding address clearly provided on the condition inspection report signed by both parties.

The landlord filed their application for dispute resolution on October 1, 2021. The landlord returned $2,250.00 of the security deposit to the tenants on October 12, 2021 and still retains the balance of $2,000.00.

The condition inspection report submitted into evidence notes “oil stain(?) on wood counter”. The landlord submits that this damage was significant and required a cost of $2,000.00 to restore to a pre-tenancy condition. The landlord submitted some photographs of the issue and estimates from a third-party company as evidence. The landlord submits that they ultimately chose the most economic pricing quoted of $2,000.00 for the repair work.

The tenants submit that they noted the stain on the countertop but did not agree to a monetary amount for the repair costs. The tenants submit that the amount quoted is excessive and out of proportion with the damage.

The tenants submit that there were multiple issues with this tenancy throughout its term which the landlord failed to rectify in a timely manner. Among the issues cited by the tenants are air quality issues, odour emanating from the bathroom, non-functioning heating systems, presence of rodents in the suite, failure to clean areas adjoining the suite, and lack of regular retrieval of garbage from its collection point. The tenants provided written submissions and evidence including correspondence between the parties, photographs and videos of the suite and various invoices and receipts for out-of-pocket expenses.

The tenants submit that they incurred significant out-of-pocket expenses for purchase of items, supplies and devices to deal with the issues found in the rental unit. The tenants submitted receipts and invoices for these expenditures.

The tenants gave evidence that the issues were present from the start of the tenancy, but they endured them in silence until informing the landlord of their various grievances in an email dated May 17, 2021. The parties agree that the landlord took some action after the correspondence. The tenants submit that the landlord’s response was inadequate, not in a timely fashion and ultimately failed to resolve the multiple issues identified.

The tenants submit that as a result of the ongoing issues they were unable to enjoy the rental unit and suffered a significant loss of their right to quiet enjoyment. The tenants specifically say that there was a noxious odour emanating from the bathroom of the

rental suite which was so pervasive that they could not use the bathroom or the adjoining bedroom. The tenants called a witness YW, a personal friend who testified that they attended at the rental unit and observed the smell in the rental unit. The tenants say that the landlord's agents attended at the rental unit on multiple occasions but were unable to rectify the issue and ultimately took no further steps.

The tenants say that as a result of the ongoing deficiencies they were forced to vacate the rental property and find new accommodations. The tenants signed a Mutual Agreement to End Tenancy and vacated the rental unit, incurring great expenses for relocating and had to pay a higher monthly rent at their new residence.

The landlord disputes the tenants' claim in its entirety and submits that they acted in a timely manner to address the issues cited, took reasonable steps to capture and eliminate the rodent found in the property, investigated claims of odour and air quality issues and made arrangements for necessary repairs as advised by their agents and third-party contractors. The landlord submits that much of the complaints of the tenants were not verified by their agents and contractors but they took reasonable steps to address issues where it was reasonable.

Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit as per section 38(4)(a).

I find that the tenants provided a forwarding address to the landlord in writing on the condition inspection report dated August 27, 2021. I see no cogent reason why the landlord would not have been served with this forwarding address clearly indicated on the inspection report prepared and signed by the parties. I accept the evidence of the parties that the landlord returned the amount of $2,250.00 to the tenants on October 12, 2021 after filing an application for dispute resolution on October 1, 2021.

Based on the undisputed evidence before me, I find that the landlord has not filed an application to retain the security deposit within the 15-day time limit and has failed to

return the tenant's security deposit in full. I accept the tenants' evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenants are entitled to a monetary award of $6,250.00, double the security deposit of $4,250.00 less the amount of $2,250.00 already returned. ([$4,250.00 x 2 = $8,500.00] - $2,250 = $6,250.00)

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Residential Tenancy Rule of Procedure 6.6 sets out that the onus of proving their claim is on the applicant on a balance of probabilities.

I accept the undisputed evidence of the parties, noted on the condition inspection report that there was some damage to the wooden countertop of the rental unit. Based on the photographic evidence submitted I find the damage to be minor discoloration that is faintly perceptible. I find the submission of the landlord that the damage required refinishing the countertop at a cost of $2,000.00 to be unreasonable. I find the cost and the scope of the work cited by the landlord and their third-party contractors to be out of proportion with the damage shown and more in the nature of replacing the fixture rather than simply repairing the damage. I do not find the explanation that the whole countertop must be repaired in order to have consistent colour to be reasonable given the evidence. I am not satisfied that the $2,000.00 claimed by the landlord is the reasonable cost for damage attributable to the tenants. Consequently, I dismiss the landlord's claim.

Based on the totality of the evidence I am not satisfied that the tenants have established their full claim on a balance of probabilities. The tenants cite various issues with the rental unit including a persistent odour found in the rental unit's bathroom, HVAC and air conditioning issues, pest infestation and garbage cleanup. The tenants submit that as a cumulative result of the issues with the tenancy and the landlord's failure to attend and

address each of the items in a timely manner they were forced to vacate the rental unit and incurred additional costs for relocating.

Section 28 of the *Residential Tenancy Act*, as cited by counsel, speaks to a tenant's right to quiet enjoyment, and provides as follows:

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;

(b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6 further discusses quiet enjoyment and provides that:

> A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means a substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
>
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

Taken in its entirety, I find the tenants' submissions and calculation of losses to be so hyperbolic as to lose credibility and their expectations of the landlord and timeline for response to complaints to be unreasonable.

I find that much of the issues cited by the tenants to be accurately described as minor inconveniences or small discomforts. Based on the evidence, including the

photographs of the tenants, I find that complaints that the vestibule was not cleaned to the tenants' satisfaction or garbage was not picked up on a daily basis from the collection point to be minor aspects of a tenancy and the effect on the tenants to be negligible. If these issues were so significant as to have a measurable impact on the value of the tenancy, it would be reasonable to expect the tenants would have made some mention of these issues earlier in the tenancy when they were detected. The evidence of the tenants is that the vestibule issue was raised in June, 2021, over 18 months after the start of the tenancy. Similarly, based on the evidence, daily garbage collection was not cited to be an issue until June, 2021.

I accept the evidence of the tenants that they first reported the presence of a rodent in the rental property on October 5, 2020 and the issue was dealt with on October 11, 2020. I find this to be a reasonable timeframe, especially given that the evidence is that there was single animal rather than an infestation. I find the tenants' characterization of the timeframe as a "significant amount of time" to be unreasonable and hyperbolic. The evidence is that the tenants first reported the issue on October 5, 2020 and the following day, without waiting a reasonable time for the landlord to take action, began purchasing traps and items to deal with the issue themselves.

Similarly, the tenants state in their written submission that they first informed the landlord of the odour air quality and heating issue by correspondence on May 17, 2021. The documentary evidence shows that they purchased materials prior to informing the landlord of any issues with the tenancy. The evidence shows that items were purchased in April and early May, 2021 prior to the date they submit they informed the landlord of any issue. The purchase of a heater was on March 13, 2020, over a year prior to informing the landlord there was any issue. Based on the evidence I find that these expenditures are not attributable to any breach on the part of the landlord due to the tenants' active choice to make purchases without informing the landlord of any perceived issues.

I find that the purchases made by the tenants are items they chose to buy rather than necessary expenditures resulting from the landlord's breach. Many of the items were purchased by the tenants without giving notice to the landlord of any perceived deficiency and other items were purchased without providing reasonable time for the landlord to investigate and take action. I find these are not losses due to the landlord and therefore dismiss this portion of the tenants' application.

The parties disagree on whether there were issues with the odour in the rental unit. Both parties provided sworn testimony and witnesses attesting to their observations. Viewed within the context of the tenants' other complaints and claims I find the tenants' testimonial evidence to be of limited probative value. The tenants characterize the odour emanating from the bathroom as so pervasive and intrusive that they were unable to use the adjoining bedroom or parts of the rental unit. If such a powerful odour existed it would be reasonable to expect that it would be easily detected by anyone who entered that area of the rental unit. The tenants' own witness notes, in their correspondence dated July 12, 2021, that they perceived a smell in the master bathroom and write "Outside is pleasant but not inside the bathroom". The cleaning service hired by the tenants provided a written note dated August 27, 2021 stating "had a bad smell before we come in this bathroom".

Given the conflicting evidence I am unable to find that the tenants have met their evidentiary burden to establish that there was odour in the rental unit. I find that, even if there was odour in the rental unit as the tenants claim, their own evidence shows that it was limited to the bathroom and not so powerful that it required areas of the rental unit to be vacated. Based on the totality of the evidence I am not satisfied, on a balance of probabilities that there was odour in the rental unit bathroom that was so ongoing and unreasonable as to constitute a breach of the tenants' right to quiet enjoyment.

I find the tenants' complaints about the heating and air system in the rental unit, was similarly first reported to the landlord in May of 2021, 18 months after the start of the tenancy. I find little evidence to support the tenants' claim that the system was defective from the outset of the tenancy. I further find little evidence that any issues that the system may have had, resulted in an ongoing disturbance that resulted in a loss of quiet enjoyment.

Based on the correspondence between the parties and their testimonies I find the landlord took reasonable steps to investigate and address the issues raised by the tenants in a timely manner. While the tenants may have felt frustration at the response time of the landlord, I find the evidence supports that their actions were reasonable, professional and within appropriate timeframes.

I find insufficient evidence to support the tenants' claim that there was ongoing deficiencies that were so unreasonable as to result in a loss of quiet enjoyment. Consequently, I dismiss this portion of the tenant's application.

I accept the evidence of the parties that this tenancy ended by way of a Mutual Agreement to End Tenancy. While the tenants characterize this as a result of the numerous deficiencies in the rental unit and the landlord's breach in failing to address these issues, I find little evidence that the agreement was not entered freely by the parties. I find that any costs associated with moving, or a new tenancy are not attributable to any breach on the part of the landlord but the result of the tenants choosing to end the tenancy and find new accommodations. For these reasons, I dismiss this portion of the tenant's application.

As the tenants were partially successful in their application, I find it appropriate to order the partial recovery of their filing fee from the landlord in the amount of $50.00.

Conclusion

The landlord's application is dismissed in its entirety without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of $6,300.00. 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: May 3, 2022

Residential Tenancy Branch