Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNSD The Return of the Security Deposit

MND Compensation for Damage

MNDC Money Owed or Compensation for Damage or Loss

FF Recover the Filing Fee for this Application from the Respondent

Introduction

The hearing was convened to deal with an application by the tenant to obtain a monetary order for money owed or compensation for damage or loss under the Act, for the return of the tenant's security deposit and reimbursement for the cost of filing this application. The hearing was also convened to hear two cross- applications by the landlord for monetary orders for damages and loss against tenants as well as reimbursement for the cost of filing the application.

Issues to be Decided for the Tenant's Application

The tenant was seeking compensation for loss to the value of the tenancy and reimbursement for loss of enjoyment of the suite. The issues to be determined based on the testimony and the evidence are:

- Whether or not the tenant was entitled to an abatement in rent based on the landlord's restriction of, or failure to provide, services and facilities that were required by the Act and for intrusions on the tenant's right to quiet enjoyment that devalued the tenancy.

- Whether the tenant is entitled to monetary compensation under section 67 of the *Act* for loss of rent and damages by proving that the claim for damages or loss is supported and establishing:

        - Proof that the damages or losses were incurred due to the actions of the landlord in violation of the Act or Agreement
        - proof by the tenant that the actual amount or value being claimed is justified
        - proof that the tenant made reasonable effort to minimize the damages under section 7(2) of the Act
- Whether the tenant is entitled to the return of double the security deposit

<u>Issues to be Decided for the Landlord's Application</u>.

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord was entitled to retain the security deposit or any portion thereof. This relies on answers to the following questions:
    - When did the tenancy end and when did the tenant provide the forwarding address in writing?
    - Did the landlord make application for and obtain an order permitting the landlord to keep the deposit
- Whether the landlord is entitled to compensation under section 67 of the *Act* for loss of rent and damages. This determination is requires answers to the following questions:
        - Has the landlord proven that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing, on a balance of probabilities:
            - that the costs were incurred due to the actions of the tenant in violation of the Act.
            - verifiable proof that the landlord made reasonable effort to minimize the damages under section 7(2) of the Act

For the tenant's application, the tenant has the burden of proof.

For the landlord's application, the landlord has a burden of proof.

Preliminary Matter: Limitation Period

An issue arose in regards to whether or not the tenant's application was made beyond the statutory deadline under the Act. The parties testified that the tenancy started on May 1, 2006 and was ended by the landlord in May 2007. Evidence shows that the tenants vacated on May 22, 2007. The tenants filed their application on May 21, 2009 and the landlord filed cross applications on August 18, 2009.

Section 60 states that if this Act does not state a time by which an application for dispute resolution must be made, it must be made within 2 years of the date that the tenancy to which the matter relates ends or is assigned.

(2) Despite the *Limitation Act*, if an application for dispute resolution is not made within the 2 year period, a claim arising under this Act or the tenancy agreement in relation to the tenancy ceases to exist for all purposes except as provided in subsection (3).

(3) If an application for dispute resolution is made by a landlord or tenant within the applicable limitation period under this Act, the other party to the dispute may make an application for dispute resolution in respect of a different dispute between the same parties after the applicable limitation period of two years, but before the dispute resolution proceeding, dealing with the first application, is concluded.

Counsel for the landlord argued that, while the tenancy ended less than two-years prior to the tenant's application, the issues that form the subject of the dispute occurred more than two years ago and that therefore the two-year deadline under the *Limitations Act* should apply to bar the claim. The landlord also pointed out that, moreover, the tenant intentionally waited until the latest possible date to make application within the two-year period after the end of the tenancy.

I find that the limitation period established by section 60(1) of the Residential Tenancy Act that states, "*within 2 years of the date that the tenancy to which the matter relates*

ends or is assigned" must prevail in this situation and therefore the dispute resolution regarding the tenant's application is not barred from proceeding. I find that the tenant has succeeded in making the application within the statutory deadline specifically identified in the Act and I am also not prepared to make a negative inference based on the fact that the tenant's application was made extremely close to the expiry of the two-year deadline.

In regards to the landlord's application, I find pursuant to section 60(3) of the Act, that this is also not barred from proceeding.

Preliminary Matter: Parties to the Dispute

The tenant's application has included, as party to the proceedings, a former resident, M.K., who was a resident within the same building, but was not a co-tenant living in the same rental unit with the two applicant co-tenants, J.S. and C.L. of the subject address. The evidence and testimony has confirmed that M.K. moved into the lower self-contained unit at some point and did so under a separate tenancy arrangement with the landlord.

I note that only two individuals, J.S. and C.L. were identified on the tenancy agreement for the subject rental unit and only the signatures of these two individuals were shown on the tenancy agreement. The testimony was that the tenants, J.S. and C.L., rented the upper two floors in the building and that this dispute only relates to that particular tenancy and pertains only to the *Dispute Address* defined on the application. Therefore, I find that M.K., who resided in the lower unit, can not be party to the applicant tenant's application and can have no standing in the proceedings before me, other than that of witness. I amend the application to exclude M.K. as a party in the tenant's application.

Given the above, I find that the landlord's application for monetary compensation against M.K. cannot proceed and must be dismissed based on the fact that the M.K.'s tenancy ended more than two years prior to the landlord's application and section 60(3) is not applicable to extend the deadline for application in this instance. Accordingly, only

the landlord's cross application seeking monetary compensation against tenants J.S. and C.L. can proceed and be heard.

Background and Evidence – Tenant's Application

The tenant testified that, from the outset of the tenancy, the landlord was overly involved in the tenant's lives. According to the tenant, the landlord took the position that the tenants must be responsible for the upkeep of the garden and the grounds, despite no written provision stating this within the tenancy agreement signed by the parties. The tenants testified that, while they were willing to do basic yard chores such as watering and trimming the lawn, the landlord persistently attempted to impose a litany of specific tasks relating to managing the gardens and the grounds and continually tried to direct how and when these jobs were to be done. The tenant testified that the landlord would grill the tenants about the outdoor "duties" he had assigned to them, issuing instructions and deadlines. The tenant testified that, in instances where they did not do the work to the landlord's specification, the landlord would become agitated and verbally abusive towards the tenants by raising his voice and exhibiting threatening demeanor such as clenched fists. The tenant stated that the landlord's allegation saying that there existed a verbal tenancy agreement providing that, in exchange for a reduced rent from $1,800.00 to $1,600.00, the tenants had made a verbal commitment to accept responsibility for grounds-keeping and gardening, was simply not true. The tenant testified that there was no such term in the tenancy agreement, verbal or otherwise, and pointed out that the written agreement signed by the parties made no mention of a work-for-reduced-rent arrangement nor did it specify any grounds-keeping responsibilities.

The tenant testified that the landlord also frequently pestered the tenant about other issues and made arbitrary demands, for example forcing the tenant to use carpeting in a certain location in the unit. The tenant testified that the landlord also monitored the tenant's activities and those of their guests and related an example of an incident where the tenant had instructed her brother to wait for her return and the landlord, finding this individual sitting outside, had taken it upon himself to question the guest about why he

was on the premises. The tenant testified that the landlord even went so far as to caution the tenant about having people on site when the tenant was not present. The tenant testified that the landlord restricted access of the tenant's visitors by not permitting their bicycles to be parked anywhere on the property. The tenant testified that the landlord had no hesitation in engaging the tenant's guests, such as her young niece and mother, in conversation whenever he was within proximity.

The tenant testified that the landlord interfered with their quiet enjoyment by routinely coming on to the property presumably to do yard work, but also taking the opportunity to entertain his friends and leaving the clean up for the tenants to deal with. The tenant stated that the landlord would frequently leave his dogs unattended on the premises, and that their barking often disturbed the tenant. The tenant testified that, on occasion, the landlord would use the washing machine and dryer, for which the tenant paid hydro to operate, to do his laundry, occasionally leaving items in the machines for days. The tenant submitted that these ongoing intrusions served to devalue the tenancy. The tenant testified that the landlord evidently felt it appropriate to initiate discussions with the tenant at will about any issue that the landlord decided was important at the time. The tenant stated that, although the exchanges were sometimes reasonably cordial, the landlord's mood and associated behaviour was unpredictable and often took on an accusatory tone. The tenant stated that the landlord often subjected the tenant to emotionally charged outbursts. The tenant testified that these episodes alarmed and intimidated the tenant and also interfered with the tenant's right to quiet enjoyment. The tenant testified that, in addition to accosting the tenant in person, the landlord would sometimes telephone the tenant late at night or to the tenant's place of employment to harangue the tenant about concerns the landlord wanted to discuss.

The tenant testified that, because of the landlord's intrusive conduct and confrontational manner, the tenant found his frequent presence to be very stressful. The tenant testified that because it was uncomfortable not knowing whether the landlord was going to fly into a rage, the tenant tried to avoid the landlord and felt unable to use the yard at all while the landlord was on site. The tenant stated that, upon seeing the landlord's car parked outside, the tenant dreaded coming home. The tenant's position was that the

conduct of the landlord created a negative environment which limited the tenant's use and enjoyment of the common exterior areas and devalued the tenancy overall.

The tenant described one incident where an intoxicated passer-by had caused damage to the gate, which the tenant had promptly reported to the police and, upon learning of the damage, the landlord became belligerent, making outlandish accusations that the tenant was associating with unsavory characters.

The tenant also alleged that the landlord's dispute with, and harassment of, another resident living in the basement suite, created a tension-filled atmosphere, particularly in the latter half of the tenancy. The tenant testified that, even though the lower suite was occupied, the landlord still frequented the premises at will and acted in an increasingly intimidating manner until the tenancy ended.

The tenant testified that the landlord failed to respond in a timely fashion to maintenance or repair complaints and could not be contacted. The tenant testified that when the ivy was left untrimmed and grew over the tenant's window, the landlord ignored the problem despite repeated requests but then became furious when the tenant had the ivy professionally trimmed. Another example was when the landlord was unreachable for weeks when the tenants tried to report that a tree had apparently fallen onto the roof. The tenant testified that the tenant was not provided with any emergency contact information for the landlord, as required by the Act, and was only provided with a phone number where messages were often ignored.

Based on the above allegations, the tenant is claiming loss of quiet enjoyment and submitted that the tenancy was devalued in the amount of $7,500.00, which is being claimed in compensation.

The tenant testified that, when the tenancy ended, the landlord neglected to conduct a move-out inspection and, despite having a written forwarding address, the landlord did not return the security deposit within the required fifteen days. The tenant testified that, after a reminder letter sent from the tenant to the landlord in June 2007, the landlord

only returned a portion of the deposit, $682.43 and retained the remainder. The tenant is claiming the equivalent of double the security deposit held by the landlord.

The landlord disputed the testimony of the tenant and stated that the facts as represented by the tenant were not accurate. The landlord testified that at the start of the tenancy, the parties had verbally agreed that in exchange for a reduced rent, the tenant committed to do yard maintenance. The landlord felt that this was a valid term of the tenancy agreement. The landlord acknowledged being on the premises frequently, but denied interfering with the tenant's quiet enjoyment. The landlord also acknowledged having numerous discussions with the tenant about upkeep of the yard and other issues of concern, but stated that the conversations were polite and respectful. The landlord stated that he did not recall ever phoning the tenant late at night, nor at work. The landlord maintained that his actions in expressing concerns about people being on the premises drinking while the tenant was not home, were understandable and he felt that there was nothing wrong with talking to the tenant's guests in a friendly manner. The landlord denied ever using the laundry facilities at any time. The landlord admitted that his dogs were left on the premises while he was at work, but stated that he had specifically asked the tenant whether or not the dogs disturbed them and was assured that the dogs did not cause any problems. The landlord admitted to being upset at times but stated that he had never acted in a threatening manner. The landlord stated that he did become somewhat agitated over the gate being damaged by a person whom he believed the tenant had met at the local bar. The landlord pointed out that the tenant left on good terms at the end of the tenancy, even giving him a hug and a farewell gift. The landlord testified that he was shocked when suddenly served with the tenant's claim. The landlord's position is that his conduct did not reduce the value of the tenancy nor did he substantially interfere with the tenant's peaceful enjoyment of the suite.

In regards to the security deposit, the landlord acknowledged that the tenant had provided an address consisting of a commercial business card which the tenant had stated to be her forwarding address and acknowledged that this occurred around the time the tenant vacated. However, based on advice he received from Residential

Tenancy Branch, the landlord felt that this card would not constitute a valid written forwarding address under the Act. The landlord testified that he did eventually return most of the deposit to the address on the card in June 2007, sending $682.43. The landlord stated that he and was not aware of the law and the requirement to refund the deposit or make application for an order to keep it within 15 days.

Tenant's Application – Analysis

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

Section 28 of the Act protects a tenant's right to quiet enjoyment and states that 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.

Section 29(1) does provide that a landlord can access the rental property to inspect the premises with 24 hours written notice stating the date, time and purpose, which must be reasonable and subsection (2) provides that a landlord may inspect a rental unit monthly in accordance with this section.

Section 6 of the Act states that the rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement. The landlord's position was that the tenant was deficient in complying with verbal tenancy terms relating to grounds-keeping that were allegedly agreed upon by the parties in addition to the written agreement.

Although the landlord testified that his communications with the tenant in regards to the grounds-keeping were done merely to ensure that the tenants met their obligations under the agreement and confirm that they did the required tasks in a timely and correct way, I find that the tenancy agreement did not contain any clear terms describing what yard duties the tenant was agreeing to perform take note that the verbal terms being alleged by the landlord are under dispute by the tenant.

On the subject of whether or not a verbal tenancy agreement is valid under the Act, I find that the definition of tenancy agreement contained in the Act, does recognize verbal terms. That being said, section 6(3)(c) of the Act states that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it. In the case of verbal terms, I find that when disputed, it is virtually impossible for a third party to interpret disputed terms for the purpose of resolving a dispute that has arisen. Moreover, I find that in this instance, the parties had willingly signed a written agreement containing no addendum and there is no reason to believe that this document did not constitute the entire tenancy

agreement between these two parties. I find that the landlord's assertion that grounds-keeping obligations were a *verbal* addendum to the written terms was not supported by any evidence other than the landlord's unsubstantiated testimony. Therefore, I have determined the landlord has failed to prove that the agreement contained anything beyond a basic obligation to do rudimentary yard work such as mowing and watering.

In addition, I find that, if indeed the landlord did genuinely believe that the tenant was violating a valid and enforceable term of the agreement, it would be incumbent upon the landlord to make application pursuant to section 6(2) of the Act, which states:

" *A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58 (1)* [determining disputes]*.*"

I find that the landlord had the option of seeking dispute resolution under the legislation, but instead chose to subject the tenant to tirades, lectures and an overbearing presence, ostensibly in an effort to ensure that the tenants fulfilled, what the landlord had evidently decided, were contractual duties under the agreement.

In this regard I find that the landlord clearly crossed the line from misdirected diligence to outright annoyance. I find that there was no basis, either in the Act , nor the Agreement, to justify the landlord having any kind of ongoing squabbles with the tenant on the topic of grounds-keeping. In fact, I find that it would not be appropriate for the landlord to repeatedly discuss the tenant's deficiencies nor to persist in criticizing the tenant about yard work, even if there were precise terms within the agreement.,

In any case, I accept the tenant's testimony that the landlord's manner of dealing with the tenants was not always polite, nor respectful, as put forth by the landlord. I find that it is evident that the landlord did act in a confrontational and irrational manner on more than one occasion. I find that the frequency of the landlord's presence on site magnified the degree of interference and that the nature of the landlord's communications with the tenant, combined with his frequent presence on site, was sufficient to impede the tenant's quiet enjoyment in violation of section 28 of the Act .

I find on a balance of probabilities it is more likely than not that the landlord did use the laundry facilities on the premises and did leave his laundry in the machines. I also find on a balance of probabilities that barking from the landlord's dogs left unattended did bother the tenants.

Section 30 of the Act states that a landlord must not unreasonably restrict access to the property by the tenant of a rental unit or that of a person permitted on the residential property by that tenant. I find that by taking it upon himself to question the tenant's brother and then to impose his views on the tenant on the subject of restricting access of the tenant's guests, the landlord was in contravention of the Act.

I find that the tenant has succeeded in proving that all elements of the test for damages have been met. There was clearly a loss of value of the tenancy due to the actions of the respondent landlord which were in violation of the Act or agreement and I find that the tenant is entitled to a retro-active rental abatement of 30% for the duration of the tenancy. I find that his amounts to monetary compensation of $5,760.00.

In regards to the return of the security deposit and pet damage deposit, I find that section 38 of the Act is applicable. This section states that, within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or pet damage deposit to the tenant with interest or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing that the landlord can keep it to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the landlord makes an application and obtains an order that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposits.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not

make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that the tenant is entitled to double the security deposit of $800.00 plus interest of $11.13 totalling $1,611.13. The landlord has refunded $682.43 leaving $928.70 still outstanding in favour of the tenant.

I find that the tenant is entitled a total monetary claim of $6,648.70 comprised of $5,670.00 rental abatement in compensation for loss of quiet enjoyment, $928.70 remaining security deposit and the $50.00 fee paid by the tenant for this application.

Background and Evidence – Landlord's Application

As the landlord's application for monetary compensation against the tenant in the lower suite has been dismissed as being beyond the deadline to make a claim, only the application relating to the upper tenants will be determined. The landlord testified that he is claiming monetary compensation in relation to a number of breaches of the Act and agreement by these tenants. The landlord is claiming that the tenants failed to repair damage caused by the tenants and failed to leave the rental unit reasonably clean. The claims by the landlord included: $50.00 for cleaning the laundry room; $250.00 for damage to the front gate, $500.00 for damage to and loss of palm trees; $50.00 for damage to the walls; $140.00 for loss of carpets provided to the tenants; $100 for the loss of a bathroom cabinet provided for the tenant's use which the landlord stated was left to rust in the yard; $450.00 for the loss of a vintage desk provided for the tenant's use;. The landlord is claiming $2,600.00 compensation for the tenant's breach of an alleged term in the tenancy agreement that required the tenant to perform yard maintenance based on an alleged rent reduction of $200.00 per month for 13 months. The landlord is claiming from the security deposit $75.00 for failure to remove dog feces from the premises, $25.00 for failure to clean the oven and $50.00 for damage to the yard by the tenant's dog.

The landlord submitted a copy of the tenancy agreement, move-in inspection report, copies of cheques and rental receipts and copies of responses to advertisements for the rental suite. The landlord submitted copies of written testimony from several individuals who did not appear at the hearing, copies of communications and notices given to the tenants, a copy of a quote for replacement runner, and numerous photographs of the yard, plants, desk, a cat, laundry room and oven. Also submitted into evidence were copies of documents apparently prepared for court and records of a previous dispute resolution decision relating to a different tenancy.

The tenant disputed all of the monetary claims submitted by the landlord and testified that was no damage to the walls, palm trees, gate, yard or bathroom cabinet caused by the tenant nor their dog. The tenant testified that the landlord's carpet was left in the storage room, the cabinet was not left out in the yard and they have no knowledge about a missing desk. In regards to the cleaning claims, the tenant testified that the interior of the home and the yard were left in a reasonably clean condition as required under the Act. In regards to the claim relating to compensation of $200 per month for not maintaining the yard, the tenant testified that the tenancy agreement between the parties did not include a work-for-reduced-rent provision and that the tenant never agreed to take care of the garden and lawn maintenance.

Analysis – Landlord's Application

An Applicant's right to claim damages from the another party is dealt with in section 7 of the Act which states that if a landlord or tenant does not comply with the Act, regulations or tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. I find that in order to justify payment of damages under section 67, the Applicant is required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7 and I refer to the four-part test for damages discussed earlier in this decision.

In regards to the cleaning claims, including: $50.00 for the laundry room; $75.00 for clean-up of dog feces; and $25.00 to clean the oven, I find that no move out inspection

report was completed and the landlord has failed to establish proof that element 2 and element 3 of the test for damages has been met. In regards to the damage claims of $250.00 for the front gate; $500.00 for palm trees; $50.00 for damage to the walls; and $50.00 for yard damage by the tenant's dog, I find that the landlord has failed to submit adequate proof that the tenant was responsible and to verify the amount of the expenditures being claimed. Therefore I find that elements 2 and 3 of the test for damages have not been sufficiently satisfied to warrant compensation.

In regards to the loss of $140.00 for missing carpeting, $450.00 for the desk and $100.00 value for the rusted cabinet, I find that it is important to point out that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof. In other words, the claimant, in this case the landlord, has the onus of proving during these proceedings, that the compensation being claimed is justified under the Act. The tenants are disclaiming any responsibility for these items and are refuting the verbal testimony given by the landlord. When the evidence consists of conflicting and disputed verbal testimony, in the absence of clear, tangible evidence, then the party who bears the burden of proof is not likely to prevail.

The landlord's claim for $2,600.00 compensation for yard work left undone by the tenants which, according to the landlord was their responsibility to do, is solely reliant upon a purported verbal term that was allegedly agreed to by the parties. I have discussed this matter earlier in the decision and I have determined that these disputed verbal terms would not be enforceable under the Act or agreement.

Given the above, I find that the testimony and evidence submitted by the landlord fails to meet the burden of proof and is not sufficient to succeed in justifying the monetary compensation being claimed. Accordingly, I find that the landlord's application and all of the landlord's monetary claims must be dismissed.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to monetary compensation in the amount of $6,648.70 comprised of $5,670.00 rental abatement in compensation for loss of quiet enjoyment, $928.70 remaining security deposit and the $50.00 fee paid by the tenant for this application. I hereby issue a monetary order in favour of the tenant for $6,648.70. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Based on the testimony and evidence presented during these proceedings, I hereby dismiss both of the landlord's cross applications in their entirety without leave to reapply.

Date of Decision: September 2009

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Dispute Resolution Officer