Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNSD, MNDC, FF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for the return of the security deposit under the Act and a cross application by the landlord for a monetary order for money owed or compensation for damage or loss under the Act for $9,500.00.

Both the landlord and tenant were present and gave testimony in turn. The landlord called a witness.

Issues to be Decided for the Tenant's Application

The tenant was seeking to receive a monetary order for the return of the security deposit retained by the landlord.

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

- Whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act. This determination depends upon the following:
    - Did the tenant pay a security deposit and pet damage deposit?
    - Did the tenant furnish a forwarding address in writing to the landlord?
    - Did the tenant provide written consent to the landlord permitting the landlord to retain the security deposit at the end of the tenancy?

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for rent owed and compensation for loss of rent, cleaning and repairs.

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

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act*. This determination depends upon answers to the following questions:
    - Has the landlord submitted proof that the rental amount being claimed is validly owed by the tenant to this landlord?
    - Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a that the costs were incurred due to the actions of the tenant that contravened the Act or agreement?
    - Has the landlord proven that the amount or value being claimed is justified?

The tenant has the burden of proof to establish that the deposit existed. The landlord has the burden of proof to show that compensation for damages and losses is justified.

Background and Evidence

The tenancy began on October 1, 2008 with rent set at $1,900.00 per month plus utilities. A security deposit of $950.00 was paid. A tenancy agreement was submitted into evidence. The landlord testified that under the tenancy agreement the renters were to function as caretakers of the house on behalf of the landlord who was away. The landlord said that the tenancy was only expected to be for a 6-month period. However, the tenancy lasted much longer. The landlord testified that the tenancy agreement also included a requirement that the tenant was to be responsible for taking care of the exterior grounds of the home as well. In regards to the payment of utilities, the landlord testified that there was a mutually-agreed-upon arrangement by which most utilities would be left in the landlord's name and the tenants would pay the landlord's accounts when the invoices from the service-providers were delivered by mail.

The landlord stated that although no move-in or move-out condition inspection reports were completed, the home was newly purchased and was in pristine condition when the tenancy began and the move-out condition was documented in the photographs submitted into evidence by the landlord and the witness also supported the landlord's testimony. Also in evidence was written testimony. The landlord testified that the tenancy ended on June 24, 2010 pursuant to a Two-Month Notice to End Tenancy for Landlord Use that was undisputed by the tenant and at that time the tenant had provided a written forwarding address. The landlord acknowledged that the tenant's security deposit was not refunded.

The landlord testified that the tenant had left significant damage to the home and the landlord was seeking a total of $9,500.00 in compensation.

The landlord gave testimony regarding structural damage caused by the tenants totaling $6,979.50. This included an estimated $3,000.00 to repair damage from water ingress behind tiles caused by failed silicone seals and grout in the tub area that landlord felt had occurred due to the tenant's failure to report the deficiency to the landlord. In addition the landlord claimed there was an estimated $700.00 to replace a counter in the master bathroom marred by a faded area, estimated $1,000.00 or more to address a mark on the hardwood floor, estimated $1.000.00 to replace several stained cedar planks on the deck ruined by spills from the barbeque, estimated $400.00 for a new double stainless steel sink that was scratched through usage by the tenant, and estimated replacement cost of a glass-top range that was marked up through improper cleaning and careless use or abuse by the tenant. Although the landlord did not provide invoices or written estimates, she referred to photographs showing areas of the home allegedly damaged by the tenant.

The landlord was also claiming $2,495.50 which consisted of: $248 charged by a tradesperson to remove loose silicone and grout in the window and tub walls; $127.00 invoice for water consumption used during the tenancy; $815.25 charged in April to repair lawn-damage through lack of regular watering; $533.25 to replace a damaged irrigation box; $504.00 charged to mow, trim, weed and mulch the lawns in May 2010; $126.00 charged to mow and trim lawn the garden; a $27.00 bill for unpaid local government utility charges; $15.00 for the tenant's portion of an invoice from the Regional District; and the $100.00 cost of the application. The landlord submitted into evidence copies of invoices for the above expenditures.

The landlord's position was that the damages being claimed were supported by the evidence and the landlord was requesting a monetary order for the $9,500.00 and to retain the security deposit in partial satisfaction of the claim

The tenant disputed all of the claims except the $127.00 invoice for water usage. The tenant testified that the tenants had never agreed to function in the capacity as "caretakers" and pointed out that there was no term in the tenancy agreement signed by the parties placing such a responsibility on the tenant. The tenant stated that the agreement did not delegate responsibility for exterior grounds-keeping onto the tenant and aside from rudimentary tasks such as cutting the grass, the tenant never contemplated being responsible for total grounds-keeping and gardening. In fact, according to the tenant, communications from the landlord confirmed that professional landscaping services were retained by the landlord to handle setting up and maintaining the automatic sprinkler and irrigation systems, in which the tenant had no part. The

tenant conceded that the payment of utilities was part of the agreement and the method identified by the landlord was accepted by the tenant. However, the tenant stated that they knew nothing about the claimed unpaid local government utility charges of $27.00 and the $15.00 invoice from the Regional District.

The tenant disputed that the home was in pristine condition when the tenancy began and pointed out that no move-in condition inspection was done as required by the Act and the tenant was not given an opportunity to participate in a move-out condition inspection either.

In regards to the $3,000.00 for repairing water damage behind tiles, the tenant stated that they did not notice the failed silicone seal and would definitely have reported this to the landlord had they realized that this problem existed. The tenant disputed the claim of $700.00 to replace the counter and suggested that the damage was normal wear and tear and could have been caused by the sun. The tenant also stated that even if damaged, replacement of the entire counter would not be warranted. In regards to the estimated $1,000.00 cost to restore the damaged hardwood, the tenant testified that the mark in question was there when they moved in and was covered by an area carpet for the duration of the tenancy. The tenant stated that spills from a barbeque onto the deck would be considered as normal wear and tear and stated that the planks could also be cleaned up rather than replaced. The tenant also questioned the estimated cost of $1,000.00 for approximately 8 boards. The tenant testified that there was no need to replace the kitchen sink costing $400.00 and this also would apply to the $1,000.00 claim for the glass-top range as well, which, according to the tenant, was cleaned with the appropriate cleaner and was never abused. The tenant stated that the unit was maintained and they had hired a professional cleaner who kept things clean. The tenant pointed out that the above expenditures being claimed by the landlord had not yet been incurred and were based only on estimates unsupported by independent evidence.

The tenant did not agree to compensate the landlord for the $248 to replace loose silicone and grout as this was not caused by the tenant. In regards to the $815.25 to repair serious lawn-damage from not being watered, the tenant stated that the home featured automatic irrigation and the tenant did not tamper with the system at all since this was attended to by professional grounds-keepers hired by the landlord. The tenant referred to written communications from the landlord advising the tenants that these services had been arranged by the landlord. As far as the tenant was concerned, the same held true for the other lawn-care and landscaping charges. In regards to the malfunctioning irrigation box, the tenant stated that they had no involvement in this matter and were not even aware of how it was supposed to work.

The tenant disagreed with all of the claims except the $127.00 outstanding charge for the water that they stated had never been previously received. The tenant was claiming the return of their remaining security deposit wrongfully withheld by the landlord more than 15 days after providing a written forwarding address.

Analysis: Security Deposit

In regards to the return of the security deposit and pet damage deposit, I find that section 38 of the Act is clear on this issue. 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 the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount. I find that the tenant did not give the landlord written permission to keep the deposit. 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.

I find that the tenant’s security deposit was $950.00 and that the landlord failed to follow the Act in retaining the funds being held in trust for the tenant. I find that the tenant is therefore entitled to compensation of double the deposit, amounting to $1,900.00.

Analysis – Landlord’s Monetary Claim

In regards to an Applicant’s right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant fails to comply with the Act, the regulations or tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under the circumstances.

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

In this instance, the burden of proof is on the claimant, that being the landlord, to 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 respondent. .

I find that the tenant's role in causing damages could have best been established with a comparison of the unit 's condition before the tenancy began with the condition of the unit after the tenancy ended. In other words, through evidence using move-in and move-out condition inspection reports containing both party's signatures.

Section 23(3) of the Act covering move-in inspections and section 35 of the Act for the move-out inspections state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and the landlord and tenant must each sign the condition inspection report, after which the landlord must give the tenant a copy of that report in accordance with the regulations. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

In this instance, I find that the landlord admitted that neither a move-in condition inspection report nor move-out condition inspection report was completed and . I find the failure to comply with sections 23 and 35 of the Act has hindered the landlord's ability to establish what damages were caused by the tenant and did not pre-exist.

In regards to the landlord's claim for repairs and restoration of the rental unit, I find that, the landlord had not yet incurred the claimed expenditures of $3,000.00 for repairing water damage behind tiles, $700.00 to replace the counter, $1,000.00 to restore the damaged hardwood, $1,000.00 for refurbishing the deck, $400.00 to replace the kitchen sink at $400.00 nor $1,000.00 for the glass-top range. I find that these verbal estimated claims were disputed by the tenant based on various grounds that included challenging the cause, the need to replace or repair, the amount of the estimated cost and as well

as an allegation that some of the damage pre-existed the tenancy. I find that the estimates for the above were not supported by any independent documentary evidence to meet the standard of proof required.

In regards to the tile/wall damage caused by water infusion, I accept the tenant's testimony that they did not realize that this was occurring and therefore could not be expected to report it to the landlord. I also find that the landlord did not practice due diligence by failing to exercise the right to periodically inspect the premises for condition issues under section 29 of the Act as part of the landlord's maintenance responsibility under section 32 of the Act.

Given the above, I find that the landlord has failed to sufficiently meet the burden of proof and the portion of the application relating to the above must be dismissed.

I find that the $248 spent by the landlord to replace silicone and grout would have been incurred regardless of any other factor because there was no indication that the sealant needed to be replaced due to being compromised or damaged by the tenant.

In regards to the expenditures to restore the exterior grounds and repair damage allegedly caused by neglect of maintenance and lack of water, I find that these expenditures were genuinely incurred by the landlord. However, I find that there was no term in the written tenancy agreement that required the tenant to specifically attend to grounds keeping. In such cases, in the absence of a term in the agreement detailing the actual tasks to be assumed by the tenant, the expectation under the Act would be that the tenant should perform basic upkeep such as mowing the lawn. I find that in this instance, the landlord had employed professionals to care for and maintain the premises and had even advised the tenant that this was being done. I find that this clearly implied that the tenant was not expected to take care of the lawns or gardens. I also find it was not established that the malfunction of the irrigation system had any connection to the tenant and any damage that stemmed from this event would not be a liability of the tenant.

This tenancy has ended and I acknowledge that the landlord may well have incurred a financial impact from the failure of this relationship. However, none of the monetary claims of the landlord, except for the $127.00 utility cost, successfully passed all elements in the test for damages and loss.

Conclusion

Based on the testimony and evidence I find that the landlord is entitled to compensation of $127.00 for utility charges attributable to the tenant.

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to the return of double the tenant's security deposit in the amount of $1,950.00, and the $50.00 paid by the tenant for this application. This award is reduced by $127.00 leaving $1,823.00 owed to the tenant. I hereby grant a monetary order in favour of the tenant for $1,823.00. This order must be served on the Respondent and may be filed in the Supreme Court, (Small Claims), and enforced as an order of that Court.

The remainder of the landlord's application is hereby dismissed without leave to reapply.

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: November 2010.

Dispute Resolution Officer