Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes:

MND MNSD FF

Introduction

This Dispute Resolution hearing was to deal with an Application by the landlord for a monetary order for compensation for damage or loss under the Residential Tenancy Act, (the Act) and an order to retain the security deposit in satisfaction of the claim.

Both parties attended the hearing and each gave testimony in turn.

Issue(s) to be Decided for the Landlord's Application

The landlord was seeking to retain the security deposit and receive a monetary order in compensation for money owed or compensation for damage and loss under the Act including cleaning costs, carpet cleaning, purchase of paint and supplies, patching and painting and repairs to the linoleum for a total claim of $673.88.

The issues to be determined based on the testimony and the evidence is whether the landlord is entitled to monetary compensation under section 67 of the *Act* for damages or loss and to retain the security deposit. This determination depends upon answers to the following questions:

- 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 balance of probabilities:
    - that the damage or loss was caused by the actions of the tenant and in violation of the Act
    - verification of the actual costs to repair the damage
    - that the landlord took reasonable steps to mitigate the costs

The burden of proof regarding the above is on the landlord/claimant.

Background and Evidence

The landlord testified that tenancy began as a fixed term on March 1, 2010 and a security deposit in the amount of $675.00 was paid. The landlord testified that the rental unit was totally refurbished at a cost of $10,000.00 just prior to the commencement of the tenancy.

The landlord submitted into evidence, a move-in condition inspection report completed and signed by both parties and a move-out inspection report completed in the tenant's absence. The landlord testified that the tenant had given notice to vacate effective for the end of August, but suddenly vacated several days prior to the date without first leaving a forwarding address or making arrangements for the required move-out inspection. The landlord acknowledged that the tenant was not subsequently contacted by the landlord to insist that the tenant participate in the move-out inspection because he had moved quite far away and it was clear that the tenant was willing to cooperate.

The landlord testified that the unit was left in a damaged and unclean condition. The landlord submitted photographic evidence showing damaged paint surface, holes in the walls, stains on some shelving, a marred stove-top and a close-up picture of a gauge in the linoleum. The landlord was claiming $150.00 to shampoo the carpet, which had a large soap stain in the middle of it, $100.00 for general cleaning, $122.54 for paint, $26.34 for assorted supplies, $100.00 labour for the sanding, filling and repainting and $150.00 to repair damaged linoleum. The landlord submitted receipts for the paint, supplies and the flooring repair. The landlord testified that at the end of August, had the tenant told the landlord the precise date they intended to move out, the tenant would have been offered the opportunity to inspect, clean and repair the damage to the unit

The tenant testified that they did not refuse to cooperate with any proposed move-out inspection and in fact were never contacted by the landlord to schedule an inspection at all. The tenant testified that until the landlord refused to return the deposit and made this application, they believed that all was well and there were no concerns about the condition of the unit. As far as the tenant was concerned, the rental unit was left in a reasonably clean condition as required by the Act. With respect to the carpet-cleaning charge, the tenant disputed that this was a valid claim and pointed out that no evidence was submitted in support of the need to re-shampoo the carpet. In regard to the holes in the wall, the tenant stated that this was necessary to fasten a large piece of artwork with the landlord's permission and they were specifically told by the landlord not to worry because the wall would merely be patched. The tenant stated that, had they

realized that it would become an issue of concern, the tenant could have, and certainly would have, patched the walls. The tenant stated that they were never afforded the chance to do so. The tenant also did not agree with the cost claimed for supplies and stated that the items in question would be considered as part of a landlord's normal property management inventory . In regard to the linoleum damage, the tenant acknowledged that this occurred when a framed picture fell and the corner of the piece had pierced the floor. The tenant felt that this was an unforeseeable accident and should be considered as wear and tear. In addition, the tenant testified that the floor damage could have been repaired at little or no cost and objected to the professional repair fee of $150.00 that was paid for the work.

The tenant pointed out that, by not offering the tenant 2 opportunities to participate in the move-out inspection as required under the Act and Regulations, the landlord had legally extinguished its right to claim against the tenant's security deposit under the Act and the claim should be denied on that basis..

Analysis

In regard to an applicant's right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their 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 the authority to determine the amount and order payment in such circumstances.

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

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 tenant. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to mitigate the damage or losses that were incurred.

Section 37 of the Act states that, when a tenant vacates a rental unit, the tenant must leave it reasonably clean and undamaged except for reasonable wear and tear.

In regards to the obligations of the landlord in scheduling the move-out inspection, section 16 (1) of the Regulation states that the landlord and tenant must attempt in good faith to mutually agree on a date and time for a condition inspection between 8 a.m. and 9 p.m., unless the parties agree on a different time. And section 17 of the Regulation states that a landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times. I accept the landlord's testimony that the landlord did attempt to follow this process.

However, the Regulation also provides that, if the tenant is not available at a time first offered then a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

I find as a fact that the tenant did not approach the landlord to arrange a move-out inspection. However, section 35 of the Act requires that the landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit, (a) on or after the day the tenant ceases to occupy the rental unit, or, (b) on another mutually agreed day and it goes on to say that "*the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection*." (my emphasis)

I find that the landlord was not privy to the tenant's forwarding address until later, but the landlord did not initially send an email or make a phone call to contact the tenant for the purpose of arranging the move-out inspection. I find that, even after the landlord did succeed in obtaining the tenant's forwarding address, the landlord still neglected to send a formal notification that the tenant was required to participate in the move-out inspection.

Notwithstanding the fact that the landlord's claim against the tenant's security deposit may have been extinguished under section 36(2) of the Act, I find that pursuant to section 7 and 67 of the Act, either party can still make a claim for any damages caused by the other's noncompliance with the Act. In this instance, I find that the landlord's application had presented a claim for damages and the right to pursue this matter for a determination exists independent of the status of the tenant's security deposit.

However, I find that the landlord's failure to comply with the Act in neglecting an attempt to arrange a participatory move-out inspection did function to unfairly prejudice the tenant by depriving the tenant an opportunity to be made aware of the deficiencies and a reasonable chance to rectify them.

Given the above, I find that the landlord's claims for $100.00 for cleaning and $150.00 for carpet cleaning costs must be dismissed. I also find that the landlord is not entitled to be reimbursed for the cost of general supplies and equipment.

I find that the landlord's cost for repairing the walls was significantly greater as a result of the fact that that none of the original paint had been reserved on hand, therefore eliminating the possibility that paint touch-ups could be done. Unfortunately, the landlord was forced to purchase a supply of new paint and re-coat larger areas that would otherwise have been necessary. In this regard, I find that the landlord's claim for the newly-purchased paint and the labour for painting does not satisfy element 4 of the test for damages. I also find that, had events transpired in compliance with the Act as they should have, the tenant could likely have managed to patch and sand the damaged in the walls at minimal cost for the materials and some touch-up paint. Given the above, I find that the landlord's entitlement to compensation for the wall damage must be limited to $50.00.

In regard to damage to the linoleum, I do not accept the tenant's categorization of the tear as reasonable wear and tear and I find that the surface was compromised by the damage and would require professional attention to avoid having to replace the entire surface. I find that this would have been an expectation regardless of whether or not

the tenant was given an opportunity to address the damage and I find it reasonable that the landlord consulted with the original installers to have the work done properly. Accordingly, I find that the landlord is entitled to be compensated in the amount of $150.00 for this repair.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord entitled monetary compensation in the amount of $200.00 comprised of $50.00 estimated cost of patching the walls and the $150.00 for the cost of repairing the floor damage.

I order that the landlord retain this amount from the security deposit of $675.00 leaving a security deposit refund balance of $475.00 owed to the tenant and I hereby issue a monetary order in favour of the tenant in this amount. 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 dismissed without leave.

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 2011.

Residential Tenancy Branch