DECISION

Dispute Codes MND, MNSD, FF, O

Introduction

This hearing dealt with applications from the landlord and the tenant pursuant to the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for damage to the rental unit pursuant to section 67; and
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38.

The tenant applied for authorization to obtain a return of all or a portion of her security deposit pursuant to section 38. Both parties applied to recover their respective filing fees for their applications from the other party pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord confirmed that he received the tenant's written notice to end this tenancy on April 12, 2011. Although the tenant initially wished to end his tenancy earlier than he was allowed to under the *Act*, the parties confirmed that the tenant paid all of his May 2011 rent. The tenant confirmed that he received a copy of the landlord's dispute resolution hearing package sent by the landlord by courier on June 2, 2011. The landlord confirmed that he received a copy of the tenant's dispute resolution hearing package sent by the tenant by Canada Post's ExpressPost service on August 12, 2011. I am satisfied that both parties served and received these documents.

Near the end of the hearing, the landlord asked that the proceedings be adjourned to enable him to provide written evidence that he had not provided prior to this hearing. The landlord said that he had receipts and photographs that he had planned to provide at the hearing. He said that he believed that the hearing would be in person and not by telephone. The tenant opposed this request for an adjournment, noting that he provided his written evidence to the Residential Tenancy Branch and the landlord in advance of the hearing, and was interested in obtaining a decision regarding these applications.

The landlord had over three months notice of this hearing. The notice of hearing clearly stated that the hearing would be held by way of a telephone conference call. I refused to adjourn this matter as the landlord did not provide any compelling reason for doing so. To grant the adjournment would result in unfairness to the tenant who had submitted his written evidence on time and in accordance with the *Act,* and was interested in obtaining a return of his security deposit.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for damage arising out of this tenancy? Which of the parties are entitled to obtain or retain all or a portion of the tenant's security deposit? Are either of the parties entitled to recover their filing fees for this application from the other party?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, letters and receipts, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of these claims and my findings around each are set out below.

This tenancy commenced on April 1, 2002. Monthly rent was set at $655.00, payable in advance on the first of each month. The landlord continues to hold the tenant's $317.50 security deposit paid on April 1, 2002 plus interest.

The tenant said that he moved out of the rental unit on May 15, 2011, although he continued to pay rent for the month of May 2011. He said that he gave the keys to the rental unit to the building manager when he vacated the rental unit.

The landlord applied for a monetary award of $317.50. In the Details of the Dispute section of his application for dispute resolution, he provided the following description of his claim for damage and authorization to retain the tenant's security deposit:

> *Tenant refused keys return. Refused contact phone number. Refused to participate (left suite damaged) in final condition of inspection both opportunities.*

The landlord submitted no written evidence other than the above description of his claim. The landlord gave oral testimony at the hearing that the tenant told him that he had not cleaned the rental unit since early in his tenancy. The landlord said that there was "lots of damage" to the rental unit. He said that the tenant left the bathroom in poor condition as he had failed to clean the mould from the caulking. He said that the carpet was not cleaned properly, the windows were stained, and condensation had been allowed to build up in the rental unit because the tenant had failed to look after the rental unit properly. He said that he has many receipts to demonstrate that he incurred costs and said that he intends to submit them in support of another application for dispute resolution that he plans to submit for damage arising out of this tenancy.

The tenant applied for a monetary award of $327.50. The tenant provided a letter describing the circumstances that led to his application for dispute resolution and photographs of the rental unit. He provided oral and written evidence that the landlord

failed to adequately address the tenant's concerns about mould and water damage to the rental unit that had developed over this lengthy tenancy.

The landlord said that he conducted a joint move in condition inspection before the tenant occupied the rental unit. He provided undisputed oral testimony that he did not prepare a condition inspection report of that inspection to the tenant because the legislation at that time did not require one. He testified that the rental unit had been newly painted and carpeted shortly before the tenancy began and that the rental unit was in "mint shape" at that time. The landlord said that he thought that he put something in writing regarding the condition of the rental unit following the move-in inspection, but he did not have it available nor was he certain if it existed or if it was provided to the tenant.

The landlord testified that he could call the previous tenant who would attest to the condition of the rental unit when the previous tenant vacated. However, the landlord said that the previous tenant was not available during the hearing and the landlord had not made arrangements for that tenant to act as a witness at this hearing or to provide any written statement for consideration.

The parties disagreed regarding the circumstances surrounding the landlord's claim that the tenant refused to participate in a joint move-out condition inspection. The landlord said that he provided two requests for a joint move-out condition inspection that he posted on the tenant's rental unit. He said that on May 26, 2011 he posted a 24 hour notice requesting that the tenant participate in a joint move-out inspection on May 27, 2011 at 11:00 a.m. He said that he posted the second notice on the tenant's door on May 29, 2011 requesting a 4:00 p.m. inspection on May 30, 2011. The tenant said that the landlord knew that he had vacated the rental unit by then and that he, the tenant, did not receive either of these notices. The landlord also said that he provided the second of these notices to the tenant by mail to the mailing address of the Management Office of the rental complex that the tenant had identified as his mailing address at that time. The landlord testified that the tenant told him that he did not have to participate in the move out inspection because no joint move-in condition inspection was done and no report was issued by the tenant.

The landlord changed his testimony during the hearing regarding his provision of the move-out condition inspection report that he produced after he gained access to the rental unit and inspected the rental unit. At one point, he said that he produced this report on May 29, 2011. He later corrected this testimony to say that he inspected the rental unit on May 30, 2011. He testified that he sent a copy of the move-out condition inspection report to the tenant at the Management Office of the rental building, the

forwarding address left by the tenant. The tenant said that he never received a copy of the landlord's move-out condition inspection report. As noted above, the landlord provided nothing in writing to support his application for dispute resolution.

Analysis

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must pay the tenant double the amount of the deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the provision by the tenant of the forwarding address in writing or the end of the tenancy, whichever occurs later.

In this case, the evidence is that the only forwarding address that the tenant provided to the landlord prior to the tenant's application for dispute resolution was the Management Office of the building complex for the rental unit in question. Since the tenant had clearly vacated the rental unit by the end of May 2011, I do not find that the landlord was late in making his June 2, 2011 application for dispute resolution to seek permission to keep the tenant's security deposit. As such, section 38(6) of the *Act* does not apply and any entitlement the tenant has to the security deposit is limited to the original amount of that deposit plus applicable interest.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer 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. In this case, the onus is also on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

There is conflicting testimony from the parties regarding the condition of the rental unit at the end of this tenancy and who was responsible for any damage that may have arisen. Since this was a very long tenancy, there is considerable wear and tear that could be expected to have occurred over this nine-year tenancy. When disputes arise

as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. The landlord entered undisputed oral testimony that at the time this tenancy commenced, the legislation did not require him to provide a copy of the joint move-in condition inspection report to the tenant. Although he said that he may have produced a report at that time, he did not enter this into written evidence.

No joint move-out condition inspection was conducted, the tenant testified that he did not receive a copy of the landlord's move-out condition inspection report, and conflicting evidence was provided by the parties to explain why this did not occur. The landlord said that he posted two notices requesting that the tenant participate in a joint move-out condition inspection on the door of the rental unit and sent one to the tenant's mailing address. The tenant said that he did not receive these notices and that the landlord knew that the tenant had vacated the rental unit by the time of these notices. The landlord did not enter into written evidence a copy of these notices or a copy of the move-out condition inspection report he said he sent to the tenant.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy. Section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***36*** *(2) ...the right of the landlord to claim against a security deposit... for damage to residential property is extinguished if the landlord*
>
> > *(a) does not comply with section 35 (2) [2 opportunities for inspection],...or*
> >
> > *(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...*

Based on the evidence presented, I do not accept that the landlord's posting of two notices on the door of a rental unit that the tenant testified was vacated 11 days earlier constitutes proper compliance with the requirements of section 35(2) of the *Act*. In the absence of a copy of the move-out condition inspection report, I am also not satisfied that the landlord has complied with section 36(2)(c) of the *Act*.

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-out condition inspection and inspection report, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. However, had the landlord provided convincing documentation to demonstrate that the tenant caused damage that was beyond reasonable wear and tear that could be expected for a rental unit of this age and receipts to quantify that damage, I would have considered issuing a monetary award in the landlord's favour for damage. Although the landlord testified that he has written evidence and photographs to prove his claim for damage and entitlement to retain a portion of the tenant's security deposit, he did not enter this material into written evidence for this hearing. I am not satisfied that the landlord has supplied evidence to verify the actual amount of the damage he has encountered as a result of this tenancy. For these reasons, I dismiss the landlord's claim for damage arising out of this tenancy and for authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the damage caused by the tenant. I dismiss both of these applications from the landlord without leave to reapply.

I find that the tenant is entitled to a monetary Order for the return of all of his $317.50 security deposit plus applicable interest of $11.24. This results in a monetary Order of $328.74.

As the tenant has been successful in his application, I allow the tenant to recover his $50.00 filing fee for his application from the landlord. I dismiss the landlord's application to recover his filing fee for his application.

Conclusion

I issue a monetary Order in the tenant's favour in the amount of $378.74, which allows the tenant to recover all of his security deposit plus interest and his filing fee for this application.

The tenant is provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I dismiss all of the landlord's application for dispute resolution 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*.