Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for damage to the unit, site or property, for unpaid rent or utilities, to keep all or part of the security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenants for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. What are the terms of this tenancy?
2. How did this tenancy end?
3. Have the Tenants breached the *Residential Tenancy Ac (Act)?*
4. If so, has the Landlord met the burden of proof to establish he suffered a loss as a result of that breach?
5. Has the Landlord extinguished his right to claim against the security deposit for damage to the unit, site or property?

Background and Evidence

The parties agreed they entered into a fixed term tenancy agreement that began on March 1, 2010, and was set to end on February 28, 2011 at which time the Tenants were required to vacate the rental unit. The Tenants were allowed to occupy the unit early, on approximately February 18, 2010. Rent was payable on the first of each month in the amount of $1,650.00 and on February 18, 2010 the Tenants paid $825.00 as the security deposit. The parties attended a walk through inspection March 1, 2010,

and both parties signed the condition inspection report form. The Tenants provided the Landlord with their forwarding address on November 2, 2011.

The Landlord advised the Tenants did not vacate the property at the end of the fixed term lease and they verbally agreed that they would continue the tenancy on a verbal month to month tenancy with the same terms as the original agreement. He stated that both parties attended the move out inspection on November 2, 2011, however the Tenants refused to sign the condition inspection form so no form was completed.

The Tenants argued that they made no verbal agreement about terms of their tenancy other than it would continue on a month to month basis and rent would continue to be $1,650.00 per month. They advised that although they attended the unit on November 2, 2011 to complete the inspection there was no walk through inspection conducted. They said that when they attended the unit it was obvious to them that the Landlord had already made up his mind he was not going to return their deposit so they recorded the conversation and provided a copy and a transcript in their evidence package. All of the business that day was conducted at the counter in the kitchen and no walk through was conducted as the Landlord had contractors working in the house at that time.

The Landlord began to present the details of his claim and advised that he is withdrawing his request for the lease break fee of $500.00 as this was claimed in error. The remainder of his claim is as follows:

a) **$1,650.00 for loss of November 2011 rent**, not unpaid rent as claimed, because of late notice and he pointed to his evidence which displays his office date stamp of October 3, 2011, on the Tenants' notice to end tenancy. He argued they advertised the unit as soon as possible and on November 14, 2011 they entered into a new agreement effective December 1, 2011.
b) **$168.00 for required cleaning** as supported by his photographs provided in evidence The receipt is dated November 14, 2011 however he is not certain which date the work was actually completed.
c) **$250.00 for yard cleanup** as supported by the landscaping invoice totalling $1,593.20. He proportioned this claim to what would have been the Tenants' responsibility, as per the terms of their tenancy agreement, for basic upkeep, mowing the lawns, raking leaves, and maintaining flowerbeds.
d) $200.00 for hauling debris that was left on the inside and outside of the unit. The invoice was not dated however he believes the work would have been completed shortly after November 3 to 4th, 2011.
e) $50.00 filing fee.

The Tenants are not in agreement with any of the items being claimed by the Landlord and argued it was obvious the Landlord had no intention of returning their deposit from the beginning because he has continued to change his story about what he is claiming.

The Tenants noted that as per their evidence of the recording of the move out meeting, the Landlord at that time was arguing that he was going to keep their deposit because the Tenants had painted the interior of the house with colors that were not neutral. When the Tenants argued this issue they pointed out how the Landlord actually paid for the paint as he refused to maintain the house properly so they had agreed to provide the labour to have it painted if he paid for the paint; they noted that there was never any discussion about what colors had to be used.

The Tenants then pointed out that in the Landlord's initial evidence package he indicates the Tenants vacated the rental unit without notice to support his claim for rent for November 2011 and also the lease break fee. However, they note that after they served their responding evidence the Landlord submits additional evidence which all of a sudden includes a copy of their written notice to end their tenancy and two invoices for items being claimed in the original claim. They believe this supports that the Landlord had no intention of returning their deposit from the beginning and that he is simply creating or manufacturing things to support his claim.

The Tenants advised the tenancy ended at the end of October 2011 however they had moved all of their possessions out by October 21, 2011. They said they provided the Landlord verbal notice about a week prior to the end of September 2011, and then on Friday September 30, 2011 they delivered their written notice to end their tenancy to the Landlord's office just prior to noon. They know for certain that their notice to end their tenancy was delivered on that date because the male Tenant has a meeting every Friday in town at noon and he recalls delivering it just prior to attending his meeting.

The Tenants acknowledged that for the last part of their tenancy they were not able to keep up the yard work in the back yard because of several large trees which had fallen down. They argued the back yard was too dangerous to work in with these large trees and branches fallen so they admit to not mowing it and they also admit to not informing the Landlord that the trees had fallen. They advised that given their previous experiences with requesting work to be done from this Landlord they simply did not bother to inform him about the trees because they knew he would not do anything about it and they knew they were moving out soon.

The Tenants also admitted to forgetting to clean the fridge. Each of them stated they thought the other had cleaned the inside of the fridge which caused it to be missed

during the cleaning. They advised they were aware of some maple syrup that had spilled in the fridge which would have taken some time to clean.

The Tenants refute the rest of the Landlord's claim. Specifically, as follows:

a) **$1,650.00 for loss of November 2011 rent**, they provided proper written notice to end this tenancy and the Landlord began showing this unit as early as the first week of October 2011.
b) **$168.00 for required cleaning** they cleaned everything, except the fridge which they missed. The Landlord had allowed contractors in the unit to replace or work on the windows, prior to the inspection, and the black material shown in his photos is the result of the contractors doing their work, walking inside the unit with their muddy boots which happened after the Tenants had cleaned and vacated the property.
c) **$250.00 for yard cleanup** the Tenants advised they continued to maintain the front yard and they stopped looking after the back yard after 3 large trees fell. They admitted to not informing the Landlord about the fallen trees because they were planning to move out. They argued that they did not have specific terms for their verbal tenancy agreement other than paying rent on the first of each month in the amount of $1,650.00.
d) **$200.00 for hauling debris** the Tenants noted that the move in inspection report proves there was debris and junk left at the property by previous tenants, including a large metal wheelchair lift. They paid to have their debris hauled away as supported by the invoice provided in their evidence. The debris hauled by the Landlord was not theirs and could have even been material left behind by the contractors.

In closing the Tenants stated the Landlord did not have a camera with him at the time they attended the move out meeting so they questioned when some of these photos were taken. They note that in one of the photos their fire pit is displayed and they have this fire pit at their new rental unit.

The Landlord stated that he believed the photos were taken November 2, 2011 and pointed out that the Tenants admitted that they did not inform him that trees had fallen. He argued that they do take care of their tenant's maintenance requests and that they do follow up on issues when they are reported to them. He did not amend his claim or package of evidence he simply provided additional evidence.

Analysis

I have carefully considered the aforementioned and the documentary evidence which included, among other things, a copy of the original fixed term tenancy agreement, invoices for work performed at the rental unit, copies of the Tenants' notice to end tenancy, an audio recording and transcript of the move out meeting, the Tenants' written statement and other written correspondence between the parties.

Section 44 (1) (b) of the Act stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. Accordingly, in this case the written tenancy agreement ended as of February 28, 2011.

The evidence supports the Tenants did not vacate this property at the end of the fixed term rather they remained and entered into a verbal month to month tenancy. The Landlord argued the verbal tenancy continued under the same terms; to which the Tenants denied.

I note that the Act speaks to terms of a tenancy continuing for fixed term tenancy agreements that do not require the tenants to vacate as follows: Section 44 (3) of the Act states that if, on the date specified as the end of a fixed term tenancy agreement that **does not require the tenant to vacate** the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms. [my emphasis added] However, this is not the case for fixed term tenancies which require the tenants to vacate and as noted above for those cases the Act specifies the tenancy ends.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails. In this case, the Landlord has the burden to prove specified terms of a tenancy agreement if it involves maintenance to the yard. Accordingly, the only evidence before me was verbal testimony and I find the disputed verbal testimony insufficient to meet the Landlord's burden of proof.

Based on the aforementioned, I find the parties entered into a verbal month to month tenancy agreement that began March 1, 2011. The standard terms of this agreement were that rent was payable on the first of each month in the amount of $1,650.00 and

the Landlord continued to hold the February 18, 2010, security deposit of $825.00 in trust.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

In determining this claim I favor the evidence of the Tenants, who stated they delivered their notice to end tenancy to the Landlord's office on Friday September 30, 2011, as supported by their evidence, over the evidence of the Landlord who stated their copy of the notice is date stamped received October 3, 2011. I favored the evidence of the Tenants over the Landlord, in part, because the Tenants' evidence was forthright and credible. The Tenants readily acknowledged that they missed cleaning the fridge and they did not inform the Landlord that the trees had fallen in the back yard. In my view the Tenants' willingness to admit fault when they could easily have stated they did have all items cleaned and did report the trees to the Landlord lends credibility to all of their evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Landlord's explanation of not receiving the Tenants' notice until October 3, 2011, because it was not date stamped by his office until October 3, 2011, to be improbable considering that the Landlord provided testimony that debris was hauled away from the rental property between November 3rd and 4th, 2011, and yet he provided an invoice for this work in his evidence which was date stamped received November 1, 2012, prior to the work being done. I find the Landlord's explanation that the notice simply could not have been received earlier, because it was not date stamped to be improbable. There is no evidence to deny that the notice was dropped off at the Landlord's office on Friday, September 30, 2011 or to deny that his staff were too busy with other month end functions, such as collecting rent, and left general correspondence to date stamp on the following Monday. Rather, I find, on a balance of probabilities that the Tenants did submit their written notice to end their tenancy on September 30, 2011, and that the Tenants' explanation that the Landlord changed his reasons for his claim after receiving the Tenants' evidence, then submitted different supporting documentation to support his altered claim, to be plausible given the circumstances presented to me during the hearing.

For all the aforementioned reasons, I find as follows:

The Landlord has withdrawn his claim for lease break fee. There is no evidence of a claim for unpaid rent or utilities; therefore I dismiss the Landlord's request for compensation for unpaid rent or utilities.

Section 45(1) of the Act provides that a tenant may end a tenancy by providing one month written notice on a date that is prior to the day in the month that rent is due. In this case, I have found above that rent was due on the first of each month and that the Tenants provided their notice to end their tenancy on September 30, 2011. Accordingly, I find the Tenants ended this tenancy in accordance with the Act, and therefore I dismiss the Landlords' claim for $1,650.00 for loss of November 2011 rent.

The evidence supports the Tenants had cleaned and vacated the property by October 21, 2011, and that prior to and during the move out inspection meeting that was held on November 2, 2011, the Landlord allowed contractors to enter the unit and conduct renovations. The Landlord relied on an invoice dated November 14, 2011, which simply states cleaning for six hours for an amount of $150.00 plus HST. Therefore, in the absence of a detailed cleaning receipt to prove what was actually cleaned, or the actual date the work was performed, I accept the Tenants' argument that this cleaning was required due to a mess created by the contractors and not a mess left behind by them. Accordingly, I dismiss the Landlord's claim of $168.00 for cleaning.

As noted above this was a verbal tenancy agreement that did not specify terms relating to yard maintenance. Therefore I find there to be insufficient evidence to support the Tenants did anything in breach of the Act, regulation, or tenancy agreement, which caused the Landlord to suffer a loss. Accordingly I dismiss the Landlord's claim of $250.00 for yard cleanup.

The move in condition inspection report clearly notes debris at the rental unit from the onset of the tenancy. I accept the Tenants evidence that they paid to have their debris removed. The Landlord relies on an invoice that is not properly dated, is date stamped by his office as being received November 1, 2011, for work that was allegedly performed November 3 or 4th, 2011, with no indication of when the work was performed or how many hours were spent conducting the alleged work. Therefore, I find there is insufficient evidence to prove the Tenants were in breach of the Act, regulation, or tenancy agreement. Accordingly I dismiss the Landlord's claim for $200.00 for hauling debris.

Section 35(3) of the Act provides that a landlord must complete a condition inspection report at the end of a tenancy in accordance with the regulation. Both the regulation and section 35 of the Act speaks to completion of the condition inspection in the absence of a tenant and/or if a tenant refuses to sign.

Section 36(2) of the Act stipulates the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is **extinguished** if the landlord (a) does not comply with section 35 (2) *[2 opportunities for inspection]*, (b) having complied with section 35 (2), does not participate on either occasion, 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. [My emphasis added] Accordingly, the Landlord was barred from making application to retain the security deposit. Therefore, I hereby order the Landlord to return the Tenants' security deposit of **$825.00** plus interest of $0.00, forthwith.

The Landlord has not been successful with his application and therefore must bear the burden of the cost to file this application.

Conclusion

The Tenants' decision will be accompanied by a Monetary Order in the amount of **$825.00.** This Order is legally binding and must be served upon the Landlord.

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: February 20, 2012.

Residential Tenancy Branch