Decision

Dispute Codes:

MNDC, MNSD, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for monetary compensation for damage to the unit and a request to retain the security deposit in partial satisfaction of the claim.

Both parties appeared and gave testimony during the conference call.

Issue(s) to be Decided

The issue to be determined, based on the testimony and evidence, is whether or not the landlord is entitled to monetary compensation for damages.

Preliminary Matter: Service of Applicant's Evidence

The landlord had submitted documentary evidence on file to support the landlord's claims. This included a copy of a move-in condition inspection report signed by both parties, a copy of a move-out condition inspection report signed only by the landlord, copies of communications between the parties, copies of past purchase orders for appliances and carpeting in 2009 and photos showing the condition of the rental unit.

The tenant confirmed that the above evidence was received by the tenant prior to the hearing.

The landlord stated that they had also submitted copies of invoices for the purchase of replacement carpeting sent by fax to the Residential Tenancy Branch. This evidence was not found in the file and the landlord was not able to provide the date the documents were sent. The tenant testified that evidence containing copies of the carpet or cleaning invoices were never sent to the tenant.

The Residential Tenancy Rules of Procedure, Rule 3.1, requires that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

The other party must be given an opportunity to review all of the evidence before the application can be heard. In this instance, I find that the landlord was not able to confirm that copies of the invoices were ever properly served on the tenant. However, verbal testimony from the landlord was considered.

Background and Evidence

The tenancy began in August 2009 and the current rent was $862.91. A security deposit of $385.00, pet damage deposit of $385.00 and remote key deposit of $130.00 had been paid by the tenant. The tenancy ended on February 29, 2012.

The landlord testified that the carpet in the unit was in good condition when the tenant moved in, with only minor cigarette burns in the living room. The landlord testified that when the tenancy ended, the tenant left extensive damage to the carpet including a large burn mark on the bedroom flooring that forced the landlord to replace it at a cost of $2,287.80. The landlord also stated that the rental unit was not left in a reasonably clean condition as required by the Act. In support of these claims, the landlord submitted into evidence photographs showing the carpets and other areas of the unit.

The tenant disputed the landlord's claims. The tenant pointed out that the carpet was not in a new condition when she moved in, as confirmed by the move-in condition inspection report showing that the carpet already had burn marks on it. With respect to the cleaning, the tenant testified that she had left the unit reasonably clean, with the exception that the carpets were not shampooed. The tenant acknowledged that she agreed to pay for carpet-cleaning, not replacement of the carpets.

The tenant stated that she was not offered a sufficient opportunity to participate in the move-out inspection. According to the tenant the landlord gave her a particular time that the inspection would take place on February 29, 2012 and when she indicated that she could not attend at that time due to her work schedule, the landlord merely proceeded to carry out the inspection in her absence. The tenant testified that the same day, the landlord emailed her a copy of the report and she wrote back to the landlord disputing their assessment of damages and costs. A copy of the tenant's March 3, 2012 letter was in evidence.

The tenant's position was that the security deposit, pet damage deposit and remote key deposits totaling $900.00 should be refunded without further delay.

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 the Act, the regulations or the 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 to order payment under these 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 reasonable steps to mitigate or minimize the loss or damage

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

Section 37(2) of the Act states that, when a tenant vacates a rental unit, it must be left reasonably clean and undamaged except for reasonable wear and tear.

In this instance, the landlord has alleged that the tenant left the unit damaged to the extent that the unit required cleaning and re-carpeting, while the tenant's position was that the unit was left in the condition it was in when the tenancy began.

I find that the tenant's role in causing damages can normally be established by comparing the condition before the tenancy began with the condition of the unit after the tenancy ended. In other words, through the submission of completed copies of the move-in and move-out condition inspection reports featuring both party's signatures. I find that conflicting verbal testimony on the subject will not suffice to support a claim for damages.

Sections 23(3) and 35 of the Act for the move-in and move-out inspections state that the landlord must complete a condition inspection report in accordance with the regulations and both the landlord and tenant must sign the report, after which the landlord must give the tenant a copy in accordance with the regulations. Part 3 of the Regulation goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspection Reports must be conducted.

In this instance I find that the landlord's form used for the move-in and move-out condition inspection reports did not comply with section 20(1)(of the Residential Tenancy Regulation which states that a condition inspection report completed under section 23 or 35 of the Act must contain the following information:

> (a) the correct legal names of the landlord, the tenant and, if applicable, the tenant's agent; (*my emphasis*)
>
> (b) the address of the rental unit being inspected;

(c) the date on which the tenant is entitled to possession of the rental unit;

(d) the address for service of the landlord;

(e) the date of the condition inspection;

(f) a statement of the state of repair and general condition of each room

(g) a statement of the state of repair and general condition of any floor or window coverings, appliances, furniture, fixtures, electrical outlets and electronic connections provided for the exclusive use of the tenant as part of the tenancy agreement;

(h) any other items which the landlord and tenant agree should be included;

(i) a statement identifying any damage or items in need of maintenance or repair;

(j) appropriate space for the tenant to indicate agreement or disagreement with the landlord's assessment of any item of the condition of the rental unit and contents, and any additional comments;

(k) the following statement, to be completed by the tenant:

I, ...
(Tenant's name)

[ ] agree that this report fairly represents the condition of the rental unit.

[ ] do not agree that this report fairly represents the condition of the rental unit, for the following reasons:
.....

(my emphasis)

I find that the document put forth into evidence as the Move Out Condition Inspection Report, did not contain the above clause required under section 20(1)(i) and 20(1)(k) and also was not signed by the tenant, only the landlord.

With respect to the landlord's testimony that the tenant refused to cooperate with the scheduled move-out condition inspection, I find that section 35 of the Act states that, in arranging the move-out inspection, the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. Part 3 of the Regulation 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 and section 17 of the Regulation states that:

(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(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.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

The Act states that the landlord must make the inspection and complete and sign the report without the tenant if:

(a) the landlord has complied with subsection (3), and

(b) the tenant does not participate on either occasion.

Section 36 (2) of the Act states that the right of the landlord to claim against a security deposit, for damage to residential property is extinguished if the landlord does not comply with section 35 (2) *[2 opportunities for inspection]*,

I find that insufficient evidence was presented by the landlord to prove the landlord had ever offered the tenant two separate opportunities to schedule the inspection. In fact, the landlord acknowledged that they had never issued written notification *on the approved form* granting the tenant a final opportunity to participate in the move out condition inspection. I accept the tenant's testimony that the landlord merely went ahead with the inspection regardless of the fact that the tenant was not able to attend.

Given the above, I find that the flaws in the inspection process adversely affected the evidentiary weight of the data contained in the move-out condition inspection report dated February 29, 2012 and prevented the landlord's monetary claim from satisfying element 2 of the test for damages.

In addition, I find that the landlord was not able to satisfy element 3 of the test for damages, because of the lack of evidence, such as receipts or invoices proving the monetary loss.

Given that the landlord has not succeeded in meeting all four elements of the test for damages, I find that the landlord's claim for damages cannot succeed.

That being said, I accept that the tenant was willing to pay for carpet cleaning in the amount of $250.00 and although the carpet was replaced instead, I find that the landlord should be entitled to this amount.

I find that the remaining $650.00 left on deposit must be refunded to the tenant in accordance with section 38 of the Act.

Conclusion

I hereby grant a monetary order to the tenant pursuant to section 38 in the amount of $650.00. This order must be served on the applicant landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

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: May 15, 2012.

Residential Tenancy Branch