



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDMNSD FF
 MNDC MNSD FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlord and the Tenants.

The Landlord filed to obtain a Monetary Order for damage to the unit, site or property, to keep all or part of the pet and or security deposit, and to recover the cost of the filing fee from the Tenants for this application.

The Tenants filed to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, for the return of all or part of the pet and or security deposit, and to recover the cost of the filing fee from the Landlord for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

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. Should the Landlord be awarded a Monetary Order?
2. Should the Tenants be awarded a Monetary Order?

Background and Evidence

The following facts were not in dispute:

- The Agent worked directly with the Tenants from the outset. He showed the Tenants the rental unit and he signed the tenancy agreement and move in condition inspection report form on as agent for the original landlord; and

- The Agent collected the first set of post dated cheques for rent payments and delivered them to the original landlord's father; and
- The original landlord passed away in 2011 and his father became the Landlord;
- The Agent continued to conduct property management business as agent for the new Landlord; and
- This tenancy began on April 15, 2009 for a fixed term and switched to a month to month tenancy after April 30, 2012; and
- Rent was payable on the first of each month in the amount of \$1,236.00 and on April 13, 2009 the Tenants paid \$600.00 as the security deposit and \$200.00 as the pet deposit; and
- The Tenants continued to provide the Landlord with post dated cheques to be held in trust by the Landlord for future rent payments and six cheques were provided for the period of January 2012 to June 2012; and
- The Tenants provided verbal notice to end their tenancy to the Agent via telephone on April 30, 2012 and delivered written notice to the Landlord's office on May 1, 2012 to end their tenancy effective May 31, 2012; and
- The Tenants vacated the rental unit by May 31, 2012; and
- The Agent conducted a walk through inspection with the Tenants on May 31, 2012 and provided them with a signed written receipt indicating the keys were returned, the suite was cleaned, and there was no damage above normal wear and tear; and
- The Tenants provided the Agent with their forwarding address, in writing, on June 1, 2012; and
- The Landlord cashed the Tenants' June 1, 2012 post dated cheque, that he held in trust, without the Tenants' written consent and without an Order issued by the Residential Tenancy Branch authorizing him to do so; and
- The Landlord issued the Tenants cheque # 1585 dated August 30, 2012 in the amount of \$79.59, as partial return of their security and pet deposits; and
- The rental unit was not advertised for re-rent until May 31, 2012 when the Agent posted the advertisement on the internet.

In support of their June 28, 2012 claim for \$2,836.00 the Tenants submitted documentary evidence which included, among other things, copies of: their written statement; letters and e-mails issued from the Landlord between May 28, 2012 and June 19, 2012; the May 31, 2012 receipt issued and signed by the Agent indicating the suite was clean and undamaged; a police file number, a copy of the forwarding address provided to the Agent, and a copy of the internet advertisement to re-rent the unit.

The Tenants affirmed they were seeking to be reimbursed for the June 1, 2012 post dated cheque of \$1,236.00 that the Landlord cashed after their tenancy had ended. They argued that they had attempted to deliver their written notice the Landlord's office on April 30, 2012 and that no one was working in his office that day. They stated they knew they had to provide their notice on April 30, 2012 so they called the Agent to advise him they were moving. They were able to deliver the written notice the next day to the Landlord's office. The Tenants noted the Landlord delayed in attempting to get new tenants because they did not advertise the unit until May 31, 2012.

The Tenants stated they are also seeking the return of double their security and pet deposits because the Landlord did not return their deposits within the required time frames. They confirmed that they did not cash the \$79.59 cheque they had received in early September 2012 because it was received after this arbitration process had started.

The Landlord argued that there were people working in his office on April 30, 2012 and that there was no attempt made by the Tenants to deliver their written notice. He confirmed he was in the hospital at that time; however his staff or co-workers would have been at the office. The Landlord acknowledged cashing the June 1, 2012 cheque and argued that he was entitled to do so because rent was payable on June 1, 2012.

The Agent affirmed that the female Tenant called him on April 30, 2012 and that she told him that she had attempted to drop off her notice at the Landlord's office but no one was there so she was providing him with the notice. He said he did not tell her that everything would be okay; rather he told her she would need to drop off the notice in writing to the Landlord's office.

The Landlord submitted evidence in support of his August 28, 2012 claim for \$720.41 of damages which included, among other things, copies of: his written statement; letters to the Tenants, e-mails between the Landlord and his Agent, a June 24, 2012 e-mail from the Agent listing items that should be charged to the Tenants for damages; and an invoice from the Agent dated August 16, 2012 for \$720.41 for clean up and repairs to the rental unit.

The Agent submitted that when he began to show prospective tenants the unit he noticed that there was a foul smell in the unit which he later determined to be cat spray and urine. He said he also began to notice how the unit was not cleaned as well as it should have been so he informed the Landlord that the unit required work. He stated that the unit was freshly painted and the carpets were new at the start of this tenancy. He confirmed that he provided the Landlord with a list of work performed and an invoice dated August 16, 2012 which included the cost he had to pay the carpet cleaning company to deodorize and clean the carpets.

The Tenants confirmed that the carpets in the living room and one bedroom were new however the remaining carpets in the other rooms were old green shag from the 1970's. They stated that their cat is female so she does not spray and she did not urinate on the carpets. The Tenants questioned why these alleged issues were not brought forward earlier and why the Agent would sign a document stating the unit was okay as of May 31, 2012.

In closing the Landlord stated that his Agent did not schedule a move out inspection for May 31, 2012; rather he was at the unit to pick up the keys so he could let the bank appraisers into the unit. He stated he was of the opinion that he was entitled to the June 1, 2012 rent because the Tenants did not provide proper notice to end their tenancy as it was not received at his office until May 1, 2012.

The Agent clarified and confirmed that access to the unit for the appraisal was on May 14, 2012, and that he did conduct a walk through with the Tenants on May 31, 2012. He stated he did not notice the issues with the unit until he began to show it to prospective tenants, sometime in June 2012.

Analysis

I have carefully considered the aforementioned, and all of the documentary evidence.

When a party makes a claim for damage or loss the burden of proof lies with the applicant to establish their claim. To prove a loss the applicant must satisfy the following four elements:

1. Proof that the damage or loss exists,
2. Proof that the damage or loss occurred due to the actions or neglect of the other party in violation of the Act, Regulation or tenancy agreement,
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage, and
4. Proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Landlord's Claim

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

In this case the evidence supports the Agent conducted a walk through inspection of the rental unit on May 31, 2012, in the presence of the Tenants and provided the Tenants a signed written receipt # 043706 that states:

- *RECEIVED TWO SETS KEYS*
- *SUITE CLEANED*
- *NO DAMAGE*
- *WEAR & TEAR DAMAGE ONLY*

Based on the aforementioned I find the evidence supports that the Tenants left the rental unit in a condition that complies with section 37(2) of the Act and therefore there is insufficient evidence to prove there was damage to the unit.

Notwithstanding the Landlord's evidence which included an invoice issued from his Agent and dated August 16, 2012 (2 ½ months after the tenancy ended); I find there to be insufficient evidence to prove that the Landlord actually suffered a loss of \$720.41. I make this finding in part because the Landlord's claim was not supported by company invoices or proof of payment to the companies who allegedly performed the work at the

rental unit. Also, the alleged loss occurred 1 ½ months after the Tenants filed their monetary claim and 2 ½ months after the Landlord and his Agent regained possession of the rental unit. Therefore, the alleged damages could have been caused by other occupants. Accordingly, I find the Landlord has not met the burden to satisfy the test to prove his claim, as listed above, and the claim is dismissed.

The Landlord has not been successful with his claim; therefore I find the Landlord must bear the burden of the cost to file his claim.

Tenants' Claim

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit.

Section 45(1) of the *Act* stipulates that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is the day before the day in the month, that rent is payable under the tenancy agreement.

Upon review of the evidence before me I find there to be insufficient evidence to prove the Tenants attempted to deliver written notice to end their tenancy to the Landlord's office on April 30, 2012, within regular business hours. Accordingly, I accept the undisputed fact that the written notice to end the tenancy effective May 31, 2012, was delivered and received by the Landlord's office on May 1, 2012, which is a breach of section 45(1) of the *Act*.

Despite the notice to end tenancy being in breach of section 45 of the *Act*, the tenancy did end on **May 31, 2012**, pursuant to section 44(1)(d) of the *Act*, as the Tenants vacated the property and possession of the unit was returned to the Agent.

Based on the foregoing, I find the Landlord was not entitled to cash the June 1, 2012 post dated cheque he held in trust, as rent was not payable because the tenancy had ended May 31, 2012. I further find that the Landlord was unfairly enriched by taking it upon himself to cash a cheque he held in trust after the tenancy agreement had ended. He did so without the Tenants' written permission and without making a claim to obtain an Order, upon proving he was entitled to the money. Accordingly I grant the Tenants a monetary award of **\$1,236.00** for the return of the June 1, 2012 post dated cheque that was cashed by the Landlord.

The evidence supports that the Tenants provided the Landlord's Agent with their forwarding address, in writing, on June 1, 2012, and as per the foregoing this tenancy ended May 31, 2012.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in

writing, the landlord must repay the security and pet deposits, to the tenant with interest or make application for dispute resolution claiming against the security deposit.

In this case the Landlord was required to return the Tenants' security and pet deposits in full or file for dispute resolution no later than June 16, 2012. The Landlord did not file his claim until August 28, 2012 and then he issued a cheque on August 30, 2012 for a partial refund of \$79.59.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposits and the landlord must pay the tenant double the security deposit.

Based on the foregoing I find that the Tenants have succeeded in proving their claim and I award them the return of double their security and pet deposits plus interest in the amount of **\$1,600.00** (2 x \$600.00 + 2 x \$200.00 + \$0.00 interest).

The Tenants have succeeded with their application; therefore I award recovery of their **\$50.00** filing fee.

Conclusion

I HEREBY DISMISS the Landlord's claim, without leave to reapply.

The Tenant's have been awarded a Monetary Order in the amount of **\$2,886.00** (\$1,236.00 + \$1,600.00 + \$50.00). This Order is legally binding and must be served upon the Landlord. Information on how to enforce this Order through Provincial Court can be obtained from the *Residential Tenancy Branch*.

The Tenants are currently holding the Landlord's cheque # 1585 for \$79.59. I HEREBY Order the Tenants to write void across the front of this cheque and return it to the Landlord when they serve him with their Monetary Order.

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: October 16, 2012.

Residential Tenancy Branch