



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ORCA REALTY INC. and TRILLION REALTY CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MND, MNR, MNSD, FF

Introduction

This hearing was originally scheduled for January 15, 2012 to deal with cross applications. The tenant had file an application to cancel a 10 Day Notice to End Tenancy for Unpaid Rent and the landlord had filed an application for a Monetary Order for unpaid rent and utilities; and, compensation for a re-renting fee, cleaning and damages. Both parties appeared at the originally scheduled hearing during which time I determined the tenant had not received the landlord's hearing documents. I was satisfied the landlord had made reasonable efforts to serve its hearing documents upon the tenant but through no fault of either party service was not effective. I confirmed the tenant's current mailing address and adjourned the hearing with instructions for the landlord to serve the tenant at his current address. The tenant was given liberty to submit evidence upon receipt of the landlord's Application for Dispute Resolution and evidence package.

The hearing was reconvened on February 27, 2013 and both parties confirmed service of hearing documents upon each other. I have accepted and considered the documents submitted to the Branch in reaching this decision.

The parties agreed that the tenant had vacated the rental unit since filing his Application for Dispute Resolution; thus, the tenant's request for cancellation of the Notice to End Tenancy was a moot issue.

In this decision, reference to landlord in its singular form includes any party that meets the definition of landlord under the Act, including the current or former: owner, property manager, or agent for the landlord, as applicable. It shall be up to those parties to apportion any liability or obligation to pay the tenant among themselves.

Issue(s) to be Decided

1. Did the tenant overpay rent and is the landlord entitled to unpaid rent and utilities for December 2012?
2. Did the tenant breach a fixed term tenancy and is the landlord entitled to recover costs to re-rent the rental unit?
3. Is the landlord entitled to compensation for cleaning?
4. Award of filing fees.
5. Disposition of the security deposit and pet deposit.

Background and Evidence

The tenant executed a written tenancy agreement in the presence of the landlord's agent on March 22, 2011 for a tenancy to commence May 1, 2011 and continue on a fixed term basis until April 30, 2012 at which time the tenant would have to vacate he rental unit. The tenancy agreement was then presented to the owner or agent for signature of the landlord. The tenancy agreement requires the tenant to pay rent of \$3,800.00 on the first day of every month.

In addition to rent the tenant paid the landlord \$250.00 per month for utilities with the understanding of both parties that those payments would be compared to the actual utility bills and any resulting overpayment or underpayment would be paid or refunded, as applicable.

During the hearing the parties were in agreement that the tenant had overpaid utilities during the tenancy. Accordingly, the landlord withdrew his request for the utility payment of \$250.00 for the month of December 2012. The remainder of the amounts claimed by the landlord were under dispute.

Below, I have summarized the parties' positions with respect to each of the issues under dispute.

Rent

The tenant notified the landlord in November 2012 that the tenant would be ending the tenancy effective December 30, 2012 although the tenant actually vacated the unit December 14, 2012. The landlord is seeking to recover unpaid rent of \$3,800.00 for the month of December 2012.

The tenant was of the position that the landlord is not entitled to unpaid rent for December 2012 since he had prepaid a month's rent when the tenancy formed and the

prepaid rent should be applied to rent owing for December 2012. The landlord was of the position the landlord was not in receipt of prepaid rent.

Section 3 of the tenancy agreement is entitled SECURITY DEPOSITS & PREPAID RENTS. It reflects that the tenant will pay a security deposit of \$1,900.00 and a pet damage deposit of \$1,900.00 prior to occupancy. Also contained in this section is the following clause:

- c. The tenant has prepaid the one month portion of rent in the amount of \$3,800.00. This amount, as directed by the tenant will only be applied to the April 2012 month of the tenancy. The tenant may not redirect this rent to apply to any other month other than what is specified above.

[Reproduced as written]

It is undisputed that the landlord collected \$3,800.00 in deposits by way of a cheque. The parties were in dispute as to whether the tenant prepaid rent of \$3,800.00 as indicated in clause c. above.

With respect to prepaid rent the landlord explained that in the past the landlord required tenants without a rental history to prepay last month's rent, albeit non-compliant with the Act. Although the tenancy agreement indicates the tenant prepaid last month's rent the tenant did not actually pay the amount when the tenancy formed. The landlord submitted that it was an oversight or error to not strike out Part 3. c. of the tenancy agreement. The landlord also testified that the pre-payment was expected before occupancy on May 1, 2011; however, the tenant did not come forward with the payment and it was not pursued further by the landlord.

The tenant submitted that he made the pre-payment in cash when he met with the landlord's agent (referred to by initials "CC" in this decision) on March 22, 2011 to review and sign the tenancy agreement.

The landlord's agent CC acknowledged that she reviewed every term of the tenancy agreement with the tenant on March 22, 2012; however, it was her testimony that she did not receive cash from the tenant that day. Rather, the only payment she collected that day was the cheque for the security and pet deposit in the total amount of \$3,800.00. CC submitted that she issues receipts for all cash payments she receives and that no receipt was issued to the tenant a cash payment on that date. Nor, was a cash payment or prepayment of \$3,800.00 reflected in the landlord's accounting records.

The tenant was of the position the tenancy agreement acts as a receipt as it acknowledges payment. The tenant provided a copy of a cheque he received from his employer the day before the cash payment was made to CC as evidence he had the cash available to him. The landlord was of the position the cancelled cheque does not prove cash was given to the landlord's agent and that it could have been used to fund the security deposit and pet deposit payment.

It was undisputed that the tenant paid rent and utilities for the month of April 2012 on March 27, 2012 and the pre-payment was not applied to the rent for April 2012.

Breach of fixed term

The landlord submitted the tenant breached a fixed term and, as such, is liable to pay \$2,240.00 to the landlord for the cost to find replacement tenants. The landlord confirmed that replacement tenants were secured for a tenancy that commenced January 1, 2013.

As evidence the tenant had breached a fixed term the landlord pointed to a document entitled "Extension of Current Lease" (the extension). The document indicates a new lease started May 1, 2012 and was to continue until April 30, 2013 for the monthly payment of \$3,950.00 and \$250.00 for pre-paid utilities. The landlord confirmed and as stated on the document, "...all other terms and agreements with respect to the original tenancy agreement will remain."

The tenant was of the position the extension is an invalid document as it was altered by the landlord after the tenant signed it and without his agreement. The tenant submitted that the landlord emailed the document to him and he signed it. The tenant provided a copy of the extension document sent to him for his signature as evidence. After he signed the extension he returned it to the landlord. The landlord then requested the tenant agree to an additional term. The tenant did not agree with the additional term and did not initial the change, yet, in the document submitted by the landlord as evidence the additional term was present and appears to be initialled by the landlord and the tenant. The tenant submitted that those are not his initials. The tenant also provided an example of his initials, as they appear on the original tenancy agreement.

The landlord was asked who signed the extension document on behalf of the landlord. The landlord stated that he did not know who signed it and that he did not recognize the signature. However, I note that the initials "PV" (the initials of the agent appearing at the hearing) appear as the landlord's initials next to the additional term and the signature for the landlord's signature appears very similar to the signature appearing on the landlord's Application for Dispute Resolution.

Cleaning charges

The landlord originally requested \$400.00 for cleaning and damage in filing the Application; however, the claim was reduced to \$200.00 to reflect the amount paid to a cleaner. The landlord submitted a copy of the cleaner's invoice indicating the cleaner spent 10 hours at the property. The landlord also provided photographs depicting a dirty dryer vent, cupboards in the laundry room, and stove top.

The landlord provided a copy of the condition inspection report. The move-out inspection was performed without the tenant present, which was an issue of contention.

The landlord submitted various emails showing attempts to schedule a move-out inspection with the tenant with the last date proposed by the landlord being December 27, 2012. The landlord confirmed that he did not give the tenant a Notice of Final Opportunity to Schedule a Condition Inspection. I noted that the landlord's last email, where he proposed December 27, 2012 to do the inspection did not indicate a time. The landlord explained that the tenant did not respond to the suggestion of December 27, 2012 so he did not propose a time to the tenant.

The tenant provided the same emails as the landlord along with others showing the tenant requested the landlord provide a time for the inspection so that he could have an agent attend on his behalf. The landlord did not respond to the tenant's request to set a time.

Aside for not being provided the opportunity to have an agent at the move-out inspection the tenant took issue with the landlord's assessment of the property. For example, the landlord indicated the carpets were dirty, whereas the tenant had them cleaned at the end of the tenancy, as evidence by a carpet cleaning receipt. When, in fact, the carpets were quite old.

The landlord acknowledged the carpets were old and that they were being replaced the same day the landlord attended the property to do the inspection. Initially, the landlord testified the carpets were in the process of being replaced when he arrived for the inspection but then changed his testimony to say they were replaced after the inspection was completed.

The tenant acknowledged additional cleaning was required in the laundry room which would take approximately 15 minutes. With respect to the stove top the tenant was of the position it looked much the same when the tenancy began. The tenant provided photographs of his own to demonstrate the condition he left the rental unit.

Tenant's Application

The tenant had originally filed to cancel a 10 Day Notice that was issued December 5, 2012 and recovery of the filing fee paid for the Application, among other issues pertaining to the lease extension; pre-paid rent; security deposit; prep-paid utilities; and, failure to schedule a move-out inspection.

Although it is no longer necessary for me to consider whether the 10 Day Notice should be cancelled I have considered: whether the landlord had a basis to issue the 10 Day Notice; and, the other issues raised in the tenant's Application for Dispute Resolution in deciding whether the tenant shall recover the filing fee paid for his Application.

In the tenant's evidence package, received after the landlord's Application for Dispute Resolution was served upon him, it would appear the tenant was requesting return of the security deposit and pet deposit, utility pre-payments that exceeded actual costs, and other costs related to the dispute resolution process.

The parties were informed that the tenant's request for return of the deposits was unnecessary as the deposits would be disposed of by way of the landlord's Application for Dispute Resolution since the landlord sought authorization to keep them. Residential Tenancy Policy Guideline 17 provides that a tenant shall be provided a Monetary Order where a landlord makes a claim against a security deposit and/or pet deposit and there remains a balance after the landlord's awards have been deducted.

The tenant submitted that in paying \$250.00 for utilities every month he overpaid utilities by \$511.44 when compared to actual utility bills. The landlord confirmed that the tenant's calculations had been reviewed by the landlord and the landlord was prepared to recognize the overpayment as calculated by the tenant.

As costs related to dispute resolution proceedings are not recoverable under the Act, except for the filing fee, I did not further consider recovery of the telephone or mailing costs as requested by the tenant.

Analysis

Upon consideration of everything presented to me I provide the following findings and reasons with respect to each of the Applications for Dispute Resolution.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of

probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Rent

The Act provides that a tenant may withhold rent in certain circumstances such as where rent or a security deposit has been overpaid. The issue to determine is whether the tenant had overpaid rent, or “pre-paid” the rent as the parties termed it, entitling the tenant to withhold the rent payment due for December 2012.

The tenant submitted that at the time of signing the tenancy agreement the landlord not only collected the security deposit and pet deposit from the tenant, but also collected an additional amount for last month’s rent which, at that time, was to be April 2012.

Whether this additional amount was paid by the tenant was the crux of the dispute between the parties with both parties providing disputed verbal testimony as to what transpired March 22, 2011. I found no basis to conclude the tenant or the landlord’s agent (CC) was more or less credible than the other. Therefore, I turn to the documentary evidence in determining whether there was a pre-payment of rent when the tenancy agreement was signed.

The tenant put forth a copy of a cheque from his employer that was cashed March 21, 2011 in support of his position that he pre-paid rent, in cash, on March 22, 2011. I find this evidence inconclusive as the cancelled cheque does not indicate either way whether the cheque was cashed or deposited into the tenant’s bank account and used to fund the security deposit and pet deposit payment.

The landlord put forth a copy of the ledger maintained by the landlord as evidence the payment of cash was not received. I find this evidence is not conclusive either. The absence of an entry in the ledger may be explained by several different scenarios, including an error or omission by the bookkeeper. Further, to make an entry for cash payment would depend upon whether the landlord’s agent brought the cash to the landlord’s office, deposited the cash in the landlord’s bank account, and notified the bookkeeper of the cash payment from the tenant.

Considering the inherent weaknesses in the above described evidence, I find the best evidence to be the tenancy agreement. I consider this to be the best evidence as to whether there was a pre-payment of rent upon considering the following:

- The tenancy agreement clearly indicates that rent had been pre-paid for April 2012;
- The landlord's agent reviewed every term with the tenant upon presenting the document for signature;
- The tenancy agreement was executed by the tenant and the landlord without alteration to clause 3. c.;
- In signing the tenancy agreement the parties acknowledge "Both parties agree to the above and agree that any terms or conditions can only be modified, changed, or increased in writing with both parties signature..." and,
- The landlord did not present any evidence that after the tenancy agreement was signed there was any attempt was made to communicate with the tenant that there was an error or omission in the tenancy agreement or seek the tenant's agreement to alter the tenancy agreement.

Further, the landlord testified that it was expected that the pre-paid rent would be paid by the start of the tenancy yet no action was taken by the landlord to collect this amount by the start of the tenancy.

In light of the above, I find the tenant pre-paid last month's rent when the tenancy formed, as evidenced by the tenancy agreement. Since the last month was to be April 2012 under the fixed term tenancy agreement yet the tenancy continued and the tenant paid April 2012 rent on March 27, 2012 I find the tenant overpaid rent for the month of April 2012 in the amount of \$3,800.00.

Upon review of the evidence presented to me, I also find the tenant overpaid rent for the months of May 2012 through November 2012 by way of a non-compliant rent increase of \$150.00 per month, for a total of \$1,050.00.

The amount of rent payable by a tenant is set by the tenancy agreement, or increased in accordance with the rent increase provisions of the Act. Unless a new tenancy agreement is entered into by the parties, a landlord must not increase the rent without serving the tenant with a Notice of Rent Increase, in the approved form, at least three months before the effective date of the increase. Where a landlord collects a rent increase that is non-compliant with the Act the tenant is entitled to recover that amount from the landlord, and such recovery may be made by withholding rent.

Despite the quantity of evidence I was provided, both in writing and orally, I was not provided any evidence that the landlord served the tenant with a Notice of Rent Increase and I find the parties did not enter into a tenancy agreement that replaced the original tenancy agreement. Although the parties executed a document entitled "Extension of Current Lease" I find this document is not a new tenancy agreement that replaced the original agreement, based upon the following considerations:

- The document clearly indicates, by virtue of its title and statement at the bottom of the document, that it is intended to extend the original tenancy agreement and that the other terms and agreements contained in the original tenancy agreement remain in effect;
- The definition of "extension", in this context is "an additional period of time" and serves to extend the date on which the tenancy ends; and;
- The "Extension of Current Lease" on its own does not meet the requirements of the Act for terms that must be contained in a tenancy agreement, whereas, the original tenancy agreement is largely compliant (the most notable exception being the pre-paid rent clause).

Based on the foregoing, I find the rent payable for December 2012 was limited to \$3,800.00 and the tenant was within his rights under the Act to withhold rent for the month of December 2012 as he had overpaid rent by more than that amount. As I have found the tenant had overpaid a total of \$4,850.00 [\$3,800.00 + \$1,050.00] after deducting rent payable for December 2012 I find the tenant is still owed \$1,050.00 by the landlord and the tenant is entitled to recover this amount under the Act. Therefore, I order the landlord to repay \$1,050.00 to the tenant and I dismiss the landlord's claim for unpaid rent against the tenant.

Breach of fixed term

At issue was whether the landlord had altered the document entitled "Extension of Current Lease" after it was signed by the tenant and whether such an alteration makes the document invalid.

The landlord presented a copy of the lease extension that was signed by both parties complete with what appears to be initials of the parties in the space next to an additional term.

The tenant put forth that he did not initial the additional term and did not return the document to the landlord as he had done when he signed the document via email

exchanges. The tenant presented copies of several email communications between the parties to demonstrate exchanges of the document before and after it was signed, along with the landlord's request for the tenant to initial an additional term but there is no evidence that an initialled document was returned to the landlord.

The landlord did not present evidence to indicate how the initial document was given to the landlord by the tenant. Nor did the landlord refute the tenant's contention that he did not initial the additional term. Further, I find the landlord's submission that he did not know who signed the lease extension document on behalf of the landlord to be unlikely when the signature of the landlord is very similar to the landlord's signature on the landlord's Application for Dispute Resolution. Therefore, I have significant reservations about the landlord's credibility in this matter and I accept the tenant's submission that he did not initial or otherwise agree to the additional term that appears on the lease extension submitted as evidence by the landlord.

A document that has been materially altered no longer reflects what the parties originally intended to serve as the basis for their legal obligation to each other. A material alteration usually relieves the non-consenting party of any obligation to perform according to the terms of the document. To be material, the change must affect an important part of the agreement and the rights of the parties.

Upon review of the additional term added by the landlord I note that the added term already exists in the tenancy agreement under part 4. s. Therefore, I find the insertion of the additional term does not materially alter the agreement between the parties.

Considering the above, I find the tenant agreed to enter in to another fixed term set to expire April 30, 2013. Since the tenant breached the fixed term by ending the tenancy in December 2012 I find the landlord entitled to recover losses associated with the breach.

I accept that the landlord diligently worked to find replacement tenants thus mitigating the loss of rent. I accept the evidence before me these efforts caused the landlord to incur a loss of \$2,240.00 and I find the landlord entitled to recover that amount from the tenant.

Cleaning charges

At the end of a tenancy a tenant is required to leave a rental unit reasonably clean. Where a condition inspection report is prepared in accordance with the requirements of the Act and Regulations, the inspection report serves as the best evidence as to the condition of the property, unless there is a preponderance of evidence to the contrary.

In support of the landlord's claim for cleaning costs I was presented an invoice showing a cleaner spent 10 hours at the property on January 1, 2013; however, the invoice is not detailed in that it does not describe the items cleaned during those 10 hours. Of further consideration is the cleaning invoice is dated January 1, 2013 which is after the landlord had the carpets replaced and, as a result, I have significant concerns that the cleaning charges include time spent cleaning due to renovations performed after the tenancy ended. Therefore, I find the cleaning invoice of little probative value.

In support of the landlord's position that the unit requiring additional cleaning the landlord referred to photographs he took on December 27, 2012 and a move-out inspection report he prepared on that date.

I find the move-out inspection report to be of little value as it was not completed with the tenant present and I find the landlord did not give the tenant at least two opportunities to participate in the move-out inspection, as required by the Act and Regulations. I accept that the landlord proposed December 27, 2012 to the tenant for a move-out inspection; however, the landlord did not specify a time he would be attending the unit. The Residential Tenancy Regulations require that a landlord propose a date and a time to a tenant for an inspection. I have rejected the landlord's position that he did not set a time because the tenant did not respond to the proposal as the tenant's evidence clearly shows the tenant requested that a time be set on multiple occasions. Nor, did the landlord issue a Notice of Final Opportunity to Schedule a Condition Inspection.

In addition, I note that the landlord made sweeping assessments on the inspection report that the majority of rooms were "dirty" yet he did not describe what parts of the room were dirty, as is required by the Residential Tenancy Regulations. I found the tenant's pictures of multiple areas of the house show a unit that appears clean and largely inconsistent with the landlord's assessment that nearly everything was "dirty". As pointed out by the tenant, the landlord assessed the carpets as being dirty yet the tenant had evidence he had them cleaned at the end of the tenancy. In turn, the landlord acknowledged that the carpets were old and in need of replacement. These discrepancies cause me significant concern as to whether the landlord's assessment accurately reflects the state of cleanliness as opposed to its age and condition.

In light of the above, I find the best evidence as to the condition of the rental unit left by the tenant are the photographs provided by both parties and the tenant's acknowledgement that the laundry room required cleaning and the stove top was as depicted in the landlord's photograph.

I find it reasonable and appropriate to estimate the time required to clean the items for which the tenant was responsible under the Act to be two hours. Therefore, I award the landlord \$40.00 for cleaning.

Tenant's Application

Having found previously that the tenant had the right to withhold rent for December 2012 and considering the evidence before me that the tenant raised the issue of pre-paid rent with the landlord in November 2012, I find the tenant had no choice but to file to dispute the 10 Day Notice to End Tenancy for Unpaid Rent served upon him in order to preserve the tenancy until he was set to vacate at the end of December 2012. I also find the tenant established merit in the other issues he raised on his Application for Dispute Resolution. Therefore, I order the landlord to compensate the tenant for the filing fee he paid for this Application for Dispute Resolution.

The parties were in agreement that the tenant had overpaid utilities by \$511.44 during the tenancy and this amount is awarded to the tenant.

The security deposit and pet deposit shall be returned to the tenant, less the amounts I have awarded to the landlord by way of this decision, as calculated below.

Monetary Order

As the landlord was partially successful in its application I award the landlord \$25.00 towards the filing fee it paid.

I have offset amounts awarded to the landlord against amount owed to the tenant, as provided under section 72 of the Act and I provide the tenant with a Monetary Order in the net amount calculated as follows:

Security deposit and pet deposit	\$ 3,800.00
Recovery of overpaid rent	1,050.00
Recovery of overpaid utilities	511.44
Filing fee for tenant's application	<u>50.00</u>
Total owed to tenant	\$ 5,411.44
Less: amounts awarded to landlord --	
Cost to re-rent (breach of fixed term)	(2,240.00)
Cleaning costs	(40.00)
Filing fee (partial award)	<u>(25.00)</u>
Monetary Order for tenant	\$ 3,106.44

The landlord is ordered to pay the tenant \$3,106.44 without further delay. The tenant is provided a Monetary Order for this amount to serve upon the landlord and enforce as necessary.

Conclusion

The landlord was partially successful and I have set-off the amounts awarded to the landlord against the amounts owed to the tenant. The tenant has been provided a Monetary Order for the net amount of \$3,106.44 to serve and enforce.

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: March 22, 2013

Residential Tenancy Branch

