Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, FF, O

Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for damage to the rental unit pursuant to section 67;
- 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;
- authorization to recover their filing fee for this application from the tenant pursuant to section 72 and
- other remedies, which they described in their application for dispute resolution as the loss of income they incurred as a result of the tenant's failure to provide adequate notice to end her tenancy.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that she received a copy of the landlords' dispute resolution hearing package sent by the landlords by registered mail on August 16, 2013, and copies of the landlords' written evidence package. I am satisfied that the landlords served the tenant with copies of the above documents in accordance with the *Act*.

During the hearing, the tenant clarified the spelling of her last name which is as it appears above rather than the spelling identified on the landlords' application for dispute resolution. I amended this spelling accordingly.

Issues(s) to be Decided

Are the landlords entitled to a monetary award for losses and damages arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Are the landlords entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This tenancy commenced on April 1, 2013, when the tenant entered into a three-month fixed term tenancy that was to have expired on June 30, 2013. Monthly rent was set at $550.00, payable in advance on the first of each month. The landlords entered into written evidence a copy of the signed Residential Tenancy Agreement (the Agreement) for this tenancy, which included a copy of an Addendum. Both parties initialled a portion of the Agreement in which both parties confirmed that this tenancy was to end on June 30, 2013, by which time the tenant committed to vacate the rental unit. The signed Addendum noted that the parties to the Agreement and the former tenant, a friend of the tenant's who attended this hearing as her witness, agreed to allow the tenant to pay the former tenant her $400.00 security deposit. This security deposit was in lieu of having the landlords return the former tenant's security deposit to him and then receive a new $400.00 security deposit from the tenant.

Since the tenant took over the rental premises immediately following the tenancy of her witness, no joint move-in condition inspection was conducted for this tenancy. The female landlord (the landlord) testified that the tenant approached her before the end of June 2013, to request an extension of her tenancy agreement. Although the landlords agreed to the proposed extension and prepared and sent a new Agreement to the tenant, she did not sign it and return it to the landlords. The landlord gave undisputed testimony and written evidence that the tenant initially failed to pay rent for July 2013, requesting a notice to end tenancy from the landlords to assist her in obtaining funding from the Ministry of Social Development (the Ministry). The landlords entered into written evidence a copy of a $375.00 cheque issued by the Ministry to the landlords to be applied to the tenant's July 2013 rent. The landlord testified that the tenant did pay the remainder of her rent for July 2013.

The landlord gave undisputed sworn testimony and written evidence that the tenant contacted the landlords on July 19, 2013, to advise that she was planning to end her tenancy and vacate the rental unit immediately. The tenant testified that she was allergic to bees and the landlord had failed to deal with an infestation of ants and bees she had reported to the landlords some time before. Although the tenant vacated the rental unit and returned her keys to another tenant who acted as the landlords' agent, the agent and a real estate agent did not conduct a move-out condition inspection until July 25. The landlord testified that the landlords did not actually take possession of the rental unit until August 2, 2013, as the landlords live outside the province.

The landlords' applied for a monetary award of $400.00, which would enable them to retain the tenant's security deposit. The landlord testified that smoking damage occurred during this tenancy which resulted in the landlords having to spend 5 days

cleaning the rental unit and repainting it to enable new tenants to take occupancy of the rental unit. The landlord requested a monetary award of $92.00 for the pro-rated amount of lost rent that the landlords incurred when they were unable to receive rent from the new tenant they had secured until August 6, 2013. The landlord also submitted receipts and invoices for paint ($40.95) and painting work ($480.00) that the landlord said were necessary due to the extensive damage caused by smoking in this rental unit during this tenancy. She said that the rental unit was repainted in July or August of 2012, shortly before the tenant's witness commenced his tenancy. The landlord noted that Section 3 of the Agreement stated that this was a No Smoking rental unit. The landlord testified that the tenant had been observed smoking in the rental unit on at least two occasions and was warned to stop such activity. The landlords also submitted statements from individuals who were familiar with the condition of the rental unit but anonymized the names of these individuals in the copies sent to the tenant.

The tenant testified that she is a non-smoker and did not smoke in the rental unit during her tenancy. She said that for some of her tenancy her son and daughter who are smokers visited her. However, she maintained that they did not smoke in the rental unit, although they may have brought an ashtray into the rental unit, which may have been observed by a real estate agent showing this rental property to prospective purchasers. She denied that there was smoke damage to the rental unit. She testified that the former tenant, her witness, was a smoker, but smoked outside the rental unit during his tenancy. She said that she did not believe that the walls of the rental unit were recently painted when she began her tenancy.

The former tenant testified that he is a smoker but did not smoke in the rental unit during his tenancy. He testified that he only stayed in the rental unit 4 or 5 times, the reason for him giving up the rental unit. He testified that he had to redo the caulking in the bathroom at the beginning of his tenancy because the bathroom was mouldy. He said that the rental unit had not recently been painted as the landlord had maintained. He also testified that he was aware that the landlords did little to address the tenant's reported problems with bees at this rental property.

Analysis – Landlord's Application to Recover Loss of Rent

In the absence of a new signed Agreement between the parties and the landlords' acceptance of rent cheques for this tenancy for July 2013, I find that this tenancy converted to a periodic tenancy as of July 1, 2013. Section 45(1) of the *Act* requires a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for August 2013, the tenant would have needed to provide her notice to end this tenancy before July 1, 2013. Section 52 of the *Act* requires that a

tenant provide this notice in writing. Based on the evidence before me, I find that the tenant did not comply with the provisions of section 45(1) of the *Act* and the requirement under section 52 of the *Act* that a notice to end tenancy must be in writing.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. There is undisputed evidence that the tenant did not pay any rent for August 2013. As such, the landlords are entitled to compensation for losses they incurred as a result of the tenant's failure to comply with the terms of the *Act*. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to re-rent the premises for August 2013. In fact, the landlords did re-rent the premises to new tenants for most of August 2013. However, the landlord testified that the rental unit was not available for occupancy by August 1, 2013, because the tenant had caused smoke damage that required repainting, which could not allow the rental unit to be occupied until August 6, 2013.

I find that there is undisputed evidence that the tenant surrendered vacant occupancy of the rental unit on July 19, 2013. The delays that followed for the remainder of July 2013, appear to have been in the nature of the complications that arise from the landlords living out of the province. Rather than hiring someone to attend to the damage that required repair and mitigating the tenant's losses immediately, the landlords delayed conducting a move-out condition inspection by their agent until July 25, 2013. They further delayed attending to the necessary repairs until they were planning to travel to the rental unit on August 2, 2013, when the landlords entered the rental unit for the first time themselves. While I realize that the landlords may not have been in a position to attend to this matter themselves until August 2, 2013, I find that the tenant should not be held responsible for the delays caused by the landlords' decision to manage this rental property from afar and without an on-site manager empowered to take mitigative action to reduce the tenant's losses. For these reasons, I find that the landlords had time between July 19, 2013 when the tenant surrendered her keys to the rental unit until July 31, 2013, to undertake any repairs that may have been necessary in order to enable a new tenant to take possession of the rental unit on August 1, 2013. Under these circumstances, I find that the landlords have not discharged to the extent necessary their duty under section 7(2) of the *Act* to minimize their loss of income for August 2013. For these reasons, I dismiss the landlords' application to recover five days of loss of income for August 2013, without leave to reapply.

Analysis – Landlords' Application for Damage Arising out of this Tenancy

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator 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 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.

In this case, the landlord, and the tenant (supported by the tenant's witness) provided conflicting evidence with respect to the condition of the rental unit at the beginning and end of this tenancy. While the landlord maintained that the rental unit was in good condition at the start of this tenancy and was freshly painted as recently as August 2012, the tenant and her witness (the former tenant) said that this was not so. The landlord said that there was extensive smoke damage that required repainting and the tenant and her witness said that there was not.

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. In this case, the landlord confirmed that no joint move-in condition inspection was conducted at the beginning of this tenancy and no move-out condition inspection report was created at the end of this tenancy. The landlord also did not provide a copy of any joint move-out condition inspection report regarding any inspection that may have occurred at the end of the tenancy of the witness.

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 24(2) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***24*** *(2) The right of a 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 23 (3) [2 opportunities for inspection],*
>
> *(b) having complied with section 23 (3), does not participate on either occasion, or*
>
> *(c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.*

The landlord admitted that no joint move-in condition inspection was conducted and that she did not complete a move-in condition report. Responsibility for completing the inspection and preparation of a report rests with the landlord. Instead of following the requirements of the *Act* with respect to joint move-in and move-out condition inspections and reports, the landlord relied on the Addendum she developed with the agreement of the tenant and former tenant. In implementing that Addendum, the landlord avoided the process of assessing the condition of the rental unit at the end of the tenancy of the former tenant and obtaining agreement from the tenant as to the condition of the rental unit at the commencement of her tenancy. As I noted at the hearing, section 5 of the *Act* states that "landlords and tenants may not avoid or contract out of this *Act*" and "any attempt to avoid or contract of this *Act*... is of no effect." While I accept that none of the parties involved in preparing or signing the Addendum purposefully sought to contract out of the *Act*, the effect of their doing so left the landlords in a position whereby they had no way of independently or effectively verifying whether the smoke damage they claimed for occurred during this tenancy, the tenancy of the former tenant or an even earlier tenancy.

While I have given the landlords' written and sworn testimony careful consideration, I find on a balance of probabilities that they have not demonstrated to the extent necessary that any damage caused by smoking that was evident by the end of this tenancy arose during this tenancy. The tenant gave sworn testimony that she is not a smoker and the former tenant testified that he was. This evidence alone calls into question whether whatever smoking damage was present occurred during this tenancy or the former one. I find that the landlord's failure to conduct joint move-in and joint move-out condition inspections and create move-out condition inspection reports in accordance with the above-noted sections of the *Act* extinguishes the landlords' entitlement to claim against the tenant's security deposit.

I have also considered whether the landlord has demonstrated entitlement to a monetary award for the tenant's contravention of the provision in section 37(2)(a) of the

Act to leave the rental unit "reasonably clean and undamaged." However, I find that the landlords failed to provide:

- a copy of a move-out condition inspection report at the end of this tenancy;
- any photographic evidence; or
- witnesses at this hearing, other than the landlord, who could give first person testimony as to the condition of the rental unit.

Even if I were to accept that the rental unit was not clean and undamaged by July 19, 2013, the landlords have not presented any evidence to show that this lack of cleaning or damage occurred during this tenancy and not the previous one. The landlords' failure to conduct a joint move-out condition inspection at the end of the previous tenancy or a joint move-in condition inspection at the beginning of this tenancy renders it difficult, if not impossible, to determine if the tenant is responsible for failing to leave the rental unit reasonably clean and undamaged.

Under these circumstances and as the party initiating the claim bears the burden of proof, I dismiss the landlords' application for damage, without leave to reapply.

As the landlords have been unsuccessful in their application, they bear the cost of their filing fee. For the reasons outlined above and as I have dismissed the landlords' claim for a monetary award, I also dismiss the landlords' application to retain any portion of the tenant's security deposit and order the landlords to return that deposit to the tenant.

Conclusion

I dismiss the landlords' application for dispute resolution without leave to reapply.

I issue a monetary Order in the tenant's favour in the amount of $400.00, to obtain a return of her security deposit from the landlords plus applicable interest. No interest is payable over this period. The tenant is provided with these Orders in the above terms and the landlord must be served with this Order 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. 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: November 04, 2013

Residential Tenancy Branch