Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding GRACEWAY PROPERTIES LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND MNR MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed on March 13, 2013, by the Landlord to obtain a Monetary Order for: damage to the unit, site or property; unpaid or utilities; and to recover the cost of the filing fee from the Tenant for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the Landlord 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

Is the Landlord entitled to a Monetary Order, pursuant to section 67 of the *Residential Tenancy Act*?

Background and Evidence

It was undisputed that the parties executed a written tenancy agreement for a fixed term tenancy that commenced on April 1, 2013 which was set to expire on March 31, 2014. The Tenants were required to pay rent of $1,900.00 on the first of each month and on March 1, 2013 the Tenants paid $950.00 as the security deposit and paid $950.00 as the pet deposit. The parties attended and signed the move in condition inspection report on March 6, 2013 and the move out condition inspection report on October 31, 2013. On September 30, 2013, the Tenants provided the Landlord with their forwarding address and their notice to end the tenancy effective October 31, 2013.

The Landlord testified that he is seeking monetary compensation of $2,611.50 which consists of the following:

> $1,940.00 in lost rent which is comprised of $1,520.00 for November 1 – 23, 2013; $20.00 for November 25 – 30, 2013; plus $400.00 for December 2014 through March 2014 (4 x $100.00); the Landlord submitted that he was not able to re-rent the unit until November 24, 2013. The new tenants pay $100.00 less per month than what these Tenants were paying. He pointed to the tenancy agreement addendum and said this claim was to cover the lost rent and "liquid damages".
>
> $577.50 for repairs of damages as per the quotation provided in the Landlord's evidence for $200.00 to re-paint the corridor, living room, two bedrooms, and the closet; $50.00 to repair baseboard; and $300.00 to repair and install laminate floor in the living room and bedroom. The Landlord testified that he met with the Tenants on October 21, 2013, and provided them with a list of items to clean and/or repair along with the paint brand name and color codes so they could touch up the walls. The Tenants did not use the proper paint and instead attempted to color match with a different brand which resulted in patches on the walls, as supported by his evidence. The Landlord has since painted the property but did not submit receipts. He noted that the laminate floor in the living room and dining room was not repaired; rather, it was removed and replaced with ceramic tiles so he was reducing the claim for flooring to $150.00 for a total amount of $427.50.
>
> $80.00 for plumbing charges to unclog the bathroom sink. The Landlord argued that the Tenants should be responsible for the bathroom plumbing costs because it was their hair that plugged the sink. He acknowledged that the receipt provided in his evidence was for the plumber who worked on the kitchen sink but argued that it was the same amount of money to unclog the bathroom sink so he did not submit that bill. He said that the plumber had to come twice to work on that bathroom sink; the first time on October 30, 2013 and a second time after the move out inspection was completed, he provided photos of both times showing the hair that was pulled from the sink.

The Tenants testified and initially disputed all of the items being claimed by the Landlord. They pointed to the tenancy agreement addendum in the Landlord's evidence where it describes at # 6, "EARLY TERMINATION". The Tenants argued that the way they understood this clause was that they could end their fixed term tenancy early, if they gave the Landlord one month notice and they paid the $950.00 as the breaking the lease fee. They now agree to pay the $950.00 but not the $1,940.00 claimed by the Landlord for lost rent.

The Tenants argued that the Landlord should not be granted compensation for painting. They said that the unit had not been painted in several years and they know that because one of the Tenants had sublet the unit from the previous tenant since July 2012. They did get a paint match but argued that they were told that no paint would match after the walls had faded over the years. The scuff marks and hole in the wall that

the Landlord referred to were inside a shoe closet which they argued was normal wear and tear.

The Tenants testified that the unit was furnished when they moved in during the sublet period. Also, at the time the move in condition inspection report form was completed March 6, 2013, the unit was fully furnished, as they never vacated the unit before signing the new tenancy agreement. While they should have been more careful they did not lift up the bed to see if the bed frame had made scratches prior to them subletting or moving into the unit. As for the living room and dining room floor damage they consider that to normal wear and tear. They argued they should not have to pay for flooring because it was not replaced with the same laminate product and no receipts were provided by the Landlord.

The Tenants agreed that the baseboards were damaged and most likely that damage was caused by their two dogs. Therefore, they were not disputing the $50.00 claim for the baseboard repair.

The Tenants stated that when they first informed the Landlord that the bathroom sink was not draining properly he told them they would have to pay for the cost of the plumber and when they said they could not afford to pay for a plumber the Landlord refused to bring in the plumber. It was not until they gave their notice and there were problems with the kitchen sink that the Landlord arranged for the plumber. They argued that the hair clog could have accumulated over time and therefore, could be the result of numerous tenancies and not just theirs.

In closing the Tenants argued that actual receipts were not provided for the Landlord's claims and they questioned why the Landlord was entitled to hold onto their deposits for longer than 15 days.

The Landlord advised that his parents have owned this building for about five or six years. The building was built in 1972 and the Tenants' unit was fully renovated and painted in the winter of 2010/2011. The Landlord said that during the move out inspection the Tenants refused to agree for him to keep the security deposit for the early termination fee so that is why they are going for the "actual amount lost for the liquidated damage".

Analysis

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;
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation;

3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Only when the applicant has met the burden of proof for all four criteria will an award be granted for damage or loss.

The landlord prepared a tenancy agreement using the form published by the Residential Tenancy Branch and the parties executed this document. The form produced by the Residential Tenancy Branch provides a space to indicate if any addendums have been created that form part of the tenancy agreement. In this case the Landlords prepared a one page addendum listing fourteen additional terms. Term # 6 reads as follows:

> *EARLY TERMINATION: If the Tenant ends the tenancy before the expiration of the original term, he agrees to pay to the Landlord the sum equal to the security deposit as liquidated damages and not as a penalty to cover the administration cost of re-renting the premises. This voluntary payment by the Tenant of the aforementioned liquidated damages to the Landlord* ***is agreed to be in addition to any other rights or remedies available to the Landlord under the Residential Tenancy Act*** *[emphasis added].*

The *Residential Tenancy Policy Guideline # 4* provides that a liquidated damages clause is a clause in a tenancy agreement where the parties are to agree in advance on the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into.

In explaining his claim for $1,940.00 the Landlord stated that he was seeking “liquid damages” [sic] which included lost rent because the Tenants refused to sign over their security deposit during the move out inspection.

Section 45(2) of the Act provides that a tenant may end a fixed term tenancy agreement by providing notice to end the tenancy on a date that is not earlier than the end of the fixed term.

In this case the Tenants ended the tenancy prior to the end of the fixed term, in breach of section 45(2) of the Act, which caused the Landlord to suffer a loss of rent for the months of November 2013 to March 2014. Based on the “EARLY TERMINATION” clause, I find the Landlord was not prevented from seeking remedy for the loss of rent suffered due to the Tenants’ aforementioned breach. Accordingly I find the Landlord has met the burden of proof and I award him **$1,940.00** for loss of rent.

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

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.

After careful consideration of the foregoing, and the Landlord's documentary evidence, I find the Tenants breached sections 32(3) and 37(2) of the Act, leaving the rental unit with some damage at the end of the tenancy.

Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to reduce the replacement cost by the depreciation of the original item. In order to estimate depreciation of the replaced item, I have referred to the normal useful life of items as provided in *Residential Tenancy Policy Guideline 40.*

The normal useful life of interior paint is four years and this unit was last painted in the winter of 2010/2011. I accept the Tenants' submission that it becomes increasingly more difficult to match colored paint when the walls are exposed to sunlight, dryness or moisture, that causes the original paint color to fade. That being said, the Tenants were provided the brand name and paint code numbers from the Landlord but chose not to use that information, which may have contributed to their paint not matching the original color.

The normal useful life of laminate flooring is ten to fifteen years, depending on the level of quality of the flooring. The Landlord claimed $150.00 for damage caused to laminate flooring that was not repaired and not replaced. Rather, they removed some of the flooring and replaced it with ceramic tile. No receipts were provided showing the cost of the work.

The Tenants did not dispute that the baseboard was damaged and suspected that the damage may have been caused by their dogs. The Landlord claimed an estimated amount of $50.00.

Residential Tenancy Policy Guideline #16 states that an Arbitrator may award "nominal damages" which are a minimal award. These damages may be awarded where there has been no significant loss or there is insufficient evidence to prove the actual cost of a loss. Nominal damages are an affirmation that there has been an infraction of a legal right.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

As per the foregoing I find the Landlord has met the burden of proof that they suffered a loss and in the absence of the actual costs incurred to remedy that loss I award them nominal damages for painting, floor damage, and damage to the baseboard, in the amount of **$100.00.**

The *Residential Tenancy Policy Guideline # 1* provides that a landlord is required to provide general maintenance and repairs to the rental property, while a tenant is required to provide general surface cleaning and day to day maintenance.

Based on the above, I find the Landlord provided insufficient evidence to prove the Tenants breached the Act and that breach caused the bathroom sink to plug. Rather, I accept the Tenants' argument that the hair clog developed over a period of time, possibly over several tenancies, and therefore, they could not be held solely responsible for the plumbing costs, as that would fall under a landlord's maintenance. Accordingly, I dismiss the Landlord's claim for plumbing costs, without leave to reapply.

The Landlord has been partially successful with their application; therefore I award partial recovery of the filing fee in the amount of **$40.00.**

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 deposit, 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 Tenant's security and pet deposits in full or file for dispute resolution no later than October 15, 2013. The Landlord did not file their application until November 06, 2013.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and 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 deposit and the landlord must pay the tenant double the security deposit.

The *Residential Tenancy Policy Guideline # 17* states as follows:

> *The Arbitrator will order the return of double the deposit if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing.*

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against double the Tenants' security and pet deposit plus interest as follows:

Loss of Rent	$1,940.00

Nominal Damages	100.00
Filing Fee	40.00
SUBTOTAL	$2,080.00
LESS: Security Deposit $950.00 x 2	-1,900.00
Pet Deposit $950.00 x 2	-1,900.00
Interest on the deposits	-0.00
Offset amount due to the TENANTS	**$1,720.00**

The Landlord is hereby ordered to return to the Tenants the offset balance of pet and security deposits in the amount of **$1,720.00**, forthwith.

Conclusion

The Tenants have been issued a Monetary Order in the amount of **$1,720.00.** This Order is legally binding and must be served upon the Landlord. In the event that the Landlord does not comply with this Order it may be filed with the Province of British Columbia Small Claims Court 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: February 27, 2014

Residential Tenancy Branch