Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MND, MNSD, FF

Introduction

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for compensation for damage to the rental unit, to retain all or part of the security deposit and to recover the filing fee from the tenants for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Matters

At the start of the hearing the application was clarified with the landlord, who confirmed the claim was in relation to the costs of a tree, a plant and grass seed. The total sum claimed on the application was $215.00.

The parties confirmed that the security deposit has been returned to the tenants. The tenants said that the landlord returned $100.00 more than was paid and that sum will be returned to the landlord. Therefore, there was no claim against a deposit held by the landlord.

Issue(s) to be Decided

Is the landlord entitled to compensation for damage to the rental unit?

Is the landlord entitled to filing fee costs?

Background and Evidence

The landlord has claimed compensation as follows:

Hydrangea	$40.00
Dogwood tree	160.00
Grass seed	15.00
TOTAL	$215.00

The tenancy commenced on October 1, 2010 and ended on November 30, 2013.

A non- tenancy Branch condition inspection report was completed at the end of the tenancy and signed by the tenants and the landlords. The male landlord was present to complete the move-out inspection; the female landlord was not present and had signed the report prior to it being completed.

After the inspection was completed the landlord then completed the final page of the standard Residential Tenancy Branch condition inspection report; which indicated costs as claimed. That report was not given any weight as it was completed after the inspection had occurred, in the absence of the tenants.

The inspection report signed by the parties indicted an agreement by the tenants to replace a hydrangea plant that had been damaged and would be replaced by the tenants in May 2014. The report also indicated “tree, apparently died? Dogwood.”

The tenants said they purchased the adjoining property and built a home, which required use of the easement, resulting in some damage to the hydrangea plant. The tenants said that at the time of the inspection the landlord had declined payment of $40.00 for the plant. The landlord wishes to obtain a plant that is of the same quality as the one that was damaged and has now requested monetary compensation.

The tenants referenced a recording which had been supplied as evidence. This testimony was accepted, in the absence of listening to the recording during the hearing.

The parties provided disputed testimony in relation to an easement that ran alongside the property. The landlord said that local ordinances required the tenants to obtain their formal permission before altering the easement, but the landlord was not consulted. The landlord stated that the tenants are barred from altering the landscape of the rental property but that they used an excavator which removed grass on the property.

The landlord provided 5 faxed photographs, submitted as evidence via a Service BC office. Those photographs were barely legible. The landord described what each photo represented. The landlord requested that she be permitted to submit original copies of the photos to the Residential Tenancy Branch, after the hearing. That request was

declined as I could not be confident that the photographs would be in the same form as those before the tenants during the hearing. The landlord said she was told that the photographs sent via facsimile would be fine; however, I find that is reasonable to expect faxed copies would not transmit well. The tenants had copies of the landlord's photographs that appeared to have been photocopied; they were also able to discern some detail from those copies.

The tenants supplied 5 colour photographs of the residential property, including views of their adjoining property. One photograph taken showed an immature dogwood tree in the background; it had been purchased by the landlord in 2009. The tree was near the bottom of a set of stairs leading up to the rental home. A photo taken on May 14, 2011 showed the tree starting to leaf; all other vegetation in the photograph was in full leaf. The tenants took another photograph on May 16, 2012, which again showed the tree. In May 2012 the tree had what appeared to be dried leaves at the tips; the tenants said this was a result of the tree having died. The tree happened to appear as part of what were family photos taken.

The landlord said that the tenants caused damage to the tree and that they did not have the right to remove the tree from the property. The landlord stated the photos of the tree show it was alive in 2011 and that the 2012 photos were taken too early in the season, so leaves were not yet out.

The landlord stated that their whole yard was dug up by the tenants and that she does not know why she was not consulted about the tree. The landlord said she did not know what caused the tree to die, but that the tree was removed without their consent and should be replaced by the tenants. The landlord said she was given an estimate of replacement cost by a nursery.

The landlord quoted from Residential Tenancy Branch policy, which suggests:

> *The tenant must obtain the consent of the landlord prior to changing the landscaping on the residential property, including digging a garden, where no garden previously existed.*
>
> *Unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate.*

The tenants pointed to one photograph showing a rock retaining wall that had been built along the property line as part of their home construction; the wall runs directly alongside the set of stairs leading up to the rental unit. When comparing photos, the tenants stated that it was clear that the tree, even if it had not died, was not planted on the landlord's property. The landlord said her spouse is a surveyor and would have known if the tree was not on their property.

The landlord said that a section of their property was disturbed by the tenants and that the grass was not replaced. The tenants stated that a very narrow area at the front of the property, along the easement, was slightly disturbed during the time access to their property was obtained and that area was subsequently restored. The area that had to be dug up on the easement was for a sewer line. Once that work was completed the soil that had been dug from the easement was replaced and smoothed; this area did not originally have any lawn. The tenants provided a photograph of the back of the property taken in the fall which showed that the yard was rocky and did not have lawn.

The tenants said that the work completed in the easement was done as part of a building project; competed by a builder, not the tenants.

The landlord and tenants both agreed that the copy of the landlord's application they had before them included a hand-written notation next to the monetary sum, indicating furnace repair costs. This was not indicated on the copy of the application I had before me; or on the copy in the Residential Tenancy Branch system. Toward the end of the hearing the landlord raised this point by attempting to make submissions in relation to a claim for furnace repair. This matter had not been raised at the start of the hearing when the application and the details of the claim were reviewed and confirmed.

The landlord said she was told by a Residential Tenancy Branch staff member that she only needed to indicate the intention to claim costs. The landlord confirmed that the application had not been amended to increase the amount claimed and that no estimate of the cost for furnace repair was included in the amount of monetary Order requested on the application. The landlord was told that the maximum amount of the claim that could be considered was that indicated on the application served to the tenants. In the absence of an amended application, increasing the sum claimed, testimony in relation to furnace repairs was not heard.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

At the end of the tenancy the condition inspection report recorded the agreement of the parties in relation to the hydrangea plant; that the plant should be replaced in May 2014. This landlord has now requested monetary compensation rather than having the tenants replace the plant. I find, from the evidence before me, that the parties have agreement that the hydrangea will be replaced during the month of May 2014. I see no reason to alter that agreement, made in writing between the parties on the move-out condition inspection report. Therefore, I find that the landlord's application in relation to the plant

is premature and dismissed with leave to reapply should the tenants fail to replace the plant during the month of May 2014.

There was no evidence before me that the tenants had killed the tree; the landlord said that she did not know how the tree had died. There was no dispute the tree had died; this was recorded on the inspection report. In the absence of evidence of any negligence by the tenants or evidence that the tenants somehow killed the tree I find that the removal of the tree has resulted in no loss to the landlord. Even if the tenants had left the dead tree, the cost of replacement would fall to the landlord. Therefore, I find that the claim for tree replacement is dismissed.

In relation to work that was completed on the easement, I decline jurisdiction for grass seed costs. This work was completed as part of a construction project and did not take place as a result of the tenancy. It happens that it was the tenants who had purchased the property next door and that they were using the easement, but I find that use falls outside of the jurisdiction of the Act. Therefore, the claim for grass seed, to reseed the area in dispute is declined. There was no evidence to satisfy me, on the balance of probabilities, that the landlord's property had been excavated.

Conclusion

The application in relation to tree replacement is dismissed.

If the hydrangea is not replaced by the end of May 2014 the landlord may reapply requesting $40.00 in compensation.

Jurisdiction is declined in relation to grass seed costs.

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: April 04, 2014

Residential Tenancy Branch