Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

Tenant: MNSD, FF
Landlord: MND, MNR, MNDC, FF

Introduction

This hearing was convened in response to cross-applications by the parties for dispute resolution.

The tenant filed on **January 28, 2014** pursuant to the *Residential Tenancy Act* (the Act) for Orders as follows:

1. An Order for return of security deposit - Section 38
2. An Order to recover the filing fee for this application - Section 72.

The landlord filed on **April 22, 2014** for Orders as follows;

1. A monetary Order for damage / loss – Section 67
2. A monetary Order for Unpaid rent – section 67
3. An Order to recover the filing fee for this application ($50) - Section 72.

Both parties attended the hearing and were given an opportunity to discuss and settle their dispute, present *relevant* evidence, and make *relevant* submissions. Prior to concluding the hearing both parties acknowledged they had presented all of the *relevant* evidence that they wished to present. The parties each acknowledged receiving all the evidence of the other. The parties were apprised that despite their abundance of evidence only *relevant* evidence would be considered in the Decision.

Issue(s) to be Decided

Is the landlord entitled to the monetary amounts claimed?
Is the tenant entitled to the monetary amounts claimed?

Each party bears the burden of proving their respective claims.

Background and Evidence

The tenancy of this matter ended and possession reverted to the landlord. The undisputed evidence in this matter is as follows. The tenancy originated in 2012. The subject tenancy began May 01, 2013 as a written fixed-term tenancy agreement with an effective end date of April 30, 2014. The hearing had benefit of the written Tenancy Agreement. The rental unit was the *upstairs suite only* portion of a residential house/residential property. The lower portion, or *basement*, of the residential property comprises a separate rental unit, although it also contains laundry facilities for both rental units, and a utility room. At the outset of the original tenancy the landlord collected a security deposit in the amount of $612.50 of which the landlord retains $50.00. During the tenancy the payable rent was in the amount of $1225.00 due in advance on the first day of each month. The parties agree there was a *move in* inspection conducted by the parties although the hearing did not have benefit of the requisite report. The parties agree there was a *move out* condition inspection conducted between the tenant and an agent for the landlord, although it was not recorded on a condition inspection report for the parties to consider and determine as to the administration of the security deposit.

In their application the tenant states the tenancy ended January 01, 2014. They testified that they ceased occupying the rental unit December 15, 2013 although they retained the keys with a view to voiding and cleaning the unit by January 01, 2014.

Tenant's application

The parties agree the tenant did not agree to any deductions from the security deposit at the end of the tenancy. The landlord acknowledges they received the tenant's forwarding address January 01, 2014 by e-mail. The parties agree that e-mail communication was their primary method of written communication. The landlord sent the tenant $562.50 of the security deposit on January 24, 2014 and it was received by the tenant January 27, 2014. The tenant seeks compensation pursuant to Section 38 of the Act for double the security deposit.

Landlord's application

The parties agree the landlord received an e-mail from the tenant in mid-November 2013 stating they had found new accommodations and would vacate by January 01, 2014. The parties testified the landlord acted on the tenant's notice to vacate and began advertising the rental unit for January 01, 2014 in December 2013, but acknowledged that the month and season of the advertisement made it very difficult to find a new tenant for January 01, 2014. None the less the landlord was able to re-rent the unit for February 01, 2014. The tenant testified that they think that new tenants could have been found for January 01, 2014 had their rental unit been ready for that date. The landlord seeks loss of rent revenue for the month of January 2014 - $1225.00.

The parties provided evidence that the tenant vacated the rental unit as of December 15, 2014, although the tenant claims they visited the rental unit for mail and eventual cleaning, to the end of December 2013. During such a visit to the unit, the tenant informed the landlord by phone on December 22, 2013 that the hot water tank for the residential property in the utility room had failed / burst and the basement encountered water ingress as a result - causing damage to the flooring.

The landlord claims that as the residential property was left, by common definitions including that of their insurer, *vacant*, they were denied coverage for the remediation and repairs to the unit as a result of the burst hot water tank. The landlord provided a copy of their rental dwelling insurance folder stipulating their insurer would not insure damage occurring while the rental unit was *vacant*. As a result, the landlord paid for the restoration service and repairs to the flooring in the sum amount of $3012.88. The parties agree that the tenant is not accountable for the failure of the hot water tank. The landlord testified that they rely on their determination that had the tenant still occupied the rental unit on December 22, 2014 their insurer would likely have covered the necessary remediation. The tenant argued they still had possession of the rental unit until January 01, 2014 and were not aware they could not vacate the rental unit earlier than intended or how doing so would mitigate the landlord's insurance terms. The tenant testified they vacated primarily for the convenience of the landlord to better accommodate a new tenancy while maintaining some oversight of the unit.

The landlord claims that after January 01, 2014 their agent reported to them that a prospective new tenant had issue with the cleanliness of the rental unit. The agent reported the kitchen floor appeared to require cleaning and the lower walls were dirty. The tenant disagreed they caused the claimed un-cleanliness and suggested it was as the result of factors after the move out inspection conducted along with the agent. The tenant provided a recording of the move out inspection, claiming that in the absence of a condition inspection report being completed at the time of the inspection their recording reveals the condition of the unit at the time of the inspection.

Analysis

A copy of the Residential Tenancy Act, Regulations and other publications are available at www.rto.gov.bc.ca.

The onus is on the respective parties to prove their claims, on balance of probabilities. On preponderance of all the evidence submitted, and on balance of probabilities, I find as follows:

Tenant's claim

Sections 24 and 36 of the Act prescribes that if a landlord does not perform the required condition inspections and requisite reports at the start or end of the tenancy, the landlord's right to claim against the security deposit are extinguished. In addition, **Section 38(1)** of the Act provides as follows (emphasis added):

38(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

38(1)(a) the date the tenancy ends, and

38(1)(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord **must** do one of the following:

38(1)(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

38(1)(d) file an application for dispute resolution to make a claim against the security deposit or pet damage deposit.

I accept that in this tenancy *e-mail communication* was the primary method of written communication between the parties and therefore I find that e-mail communication and written communication as prescribed by Section 39(1)(b) are the same. I find that the landlord failed to repay the security deposit in full, or to make an application for dispute resolution within 15 days of receiving the tenant's forwarding address in writing and is therefore liable under section 38(6) which provides:

38(6) If a landlord does not comply with subsection (1), the landlord

38(6)(a) may not make a claim against the security deposit or any pet damage deposit, and

38(6)(b) **must** pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

As the landlord's right to claim against the security deposit were extinguished, the landlord was obligated under Section 38 to return the entire original amount of $612.50. Therefore, the amount which is *doubled* is the original $612.50 of the deposit. As a result I find the tenant has established an entitlement claim of $1225.00, from which I deduct $562.50 already returned to them, for an award of **$662.50.**

Landlord's claim

Under the *Act*, a party claiming a loss bears the burden of proof. Moreover, the applicant must satisfy each component of the following test established by **Section 7** of the Act, which states;

Liability for not complying with this Act or a tenancy agreement

7 *(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

In relevance to this matter, the test established by Section 7 is as follows,

1. Proof the loss exists,

2. Proof the loss was the result, *solely, of the actions of the other party (the tenant)* in violation of the *Act* or Tenancy Agreement

3. Verification of the actual amount required to compensate for the claimed loss.

4. Proof that the claimant (landlord) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the landlord bears the burden of establishing their claim on the balance of probabilities. The landlord must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the landlord must then provide evidence that can verify the actual monetary amount of the loss. Finally, the landlord must show that reasonable steps were taken to address the situation and to *mitigate or minimize* the loss incurred.

A tenant, who signs a fixed-term tenancy agreement – effectively a contract - is responsible for the rent to the end of the fixed-term. And, a landlord who claims for a loss is subject to their statutory duty pursuant to Section 7(2) of the Act to do what *is reasonable to minimize the loss.* In this matter I find that the landlord took reasonable steps to minimize the potential loss of rent revenue. As a result, I find that the landlord has established a claim of **$1225.00** for loss of revenue for January 2014.

The parties agreed that the compromised hot water tank was an unforeseen occurrence for which the tenant is not responsible. However, the landlord's claim for the resulting damaged flooring is not predicated on the tenant's contravention of the Act or the parties' Tenancy Agreement. Rather, the landlord's claim is predicated on the tenant not complying with the landlord's insurance policy – effectively, an agreement between the landlord and their insurer – and *not* an agreement nor conditions to which the tenant is a party. The landlord's insurance policy is an instrument of the landlord and their insurer, and not normally tethered to a tenant nor is the policy and terms normally ever known to a tenant – unless those terms form part of the Tenancy Agreement between the landlord and the tenant. I accept the tenant's argument that they could not have known that the terms of the landlord's insurance policy could or would operate to make them liable for such unforeseen costs as claimed by the landlord. The Tenancy

Agreement does not notify the tenant that if they breach the Tenancy Agreement they may be held liable for costs in excess of losses of rent revenue. I further find the Tenancy Agreement does not contain any provision or agreement of the parties binding the tenant to the landlord's insurer's conditions. As a result I find that the landlord has not provided proof that the damage caused by the failed hot water tank was the result, *solely, of the actions of the tenant* in *violation of the Act or Tenancy Agreement*, therefore **I dismiss** this portion of the landlord's claim, without leave to reapply.

I find that the landlord has not provided sufficient evidence that the rental unit was left unclean at the end of the tenancy. **I dismiss** this portion of the landlord's claim for $50.00 without leave to reapply.

As both parties are entitled to their filing fees they mathematically cancel each other. Therefore - *Calculation for Monetary Order:*

Landlord's award	$1225.00
Minus Tenant's award	*- $662.50*
Monetary award for landlord	**$562.50**

Conclusion

The parties' respective applications, in relevant part, have been granted. The balances of all claims are **dismissed**, without leave to reapply.

I grant the landlord a Monetary Order under Section 67 of the Act for the amount of **$562.50.** If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

This Decision is final and binding on both parties.

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: May 14, 2014

Residential Tenancy Branch