Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF, MND

This hearing dealt with cross applications. The landlord is seeking a monetary order and an order to retain the security deposit in partial satisfaction of the claim. The tenant has filed an application seeking the return of double the security deposit and a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement. Both parties participated in the conference call hearing. Both parties gave affirmed evidence.

Issue to be Decided

Is either party entitled to a monetary order as claimed?

Background, Evidence and Analysis

The relationship between the parties is an acrimonious one. Each party made allegations of “fraud” and “lying” numerous times throughout the hearing. The communication between the parties was so damaged they refused to contact each other to discuss any of the issues prior to filing their applications.

As explained to the parties during the hearing, the onus or burden of proof is on the party making the claim. In this case, **each party must prove their own claim**. When one party provides evidence of the facts in one way, and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails.

I address the claims and my findings around each as follows.

Tenants First Claim – The tenants are seeking the equivalent of two months' rent ($850.00 X 2= $1700.00) as compensation. The tenants stated that the landlord issued a Two Month Notice to End Tenancy for Landlords Use of Property on October 29, 2013 with an effective date of December 31, 2013. The tenants stated that they moved out on that day. The tenants stated the landlord issued the notice in bad faith and that he has never lived in the unit.

The landlord disputed this claim. The landlord stated that he has been living in the unit since February 8, 2014. The landlord stated he would have moved in earlier but due to the condition of the unit at move out he needed time to clean and repair the unit. The landlord provided documentation from the upstairs tenant of the home that confirmed that he has resided there and continues to reside in the basement as he stated. The tenants have been unable to provide sufficient evidence to prove this claim and I therefore dismiss this portion of their application.

Tenants and Landlord Claim to security deposit– The tenants are seeking the return of double the security deposit. The tenants stated that they provided their forwarding address in writing on February 26, 2014. The tenants stated that the landlord has not returned their security deposit to date. The landlord is seeking to retain the security deposit for damages and cleaning to the unit. A condition inspection report was not conducted at move in. The landlord stated this house was a brand new house and that the tenants were the first tenants to occupy the brand new suite in 2009. The tenants stated that they were the second tenants to reside there. The tenants stated that they moved in 2010.

Sections 24 and 38 of the Act address this situation as follows:

Consequences for tenant and landlord if report requirements not met

24 (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if

(a) the landlord has complied with section 23 (3) *[2 opportunities for inspection]*, and

(b) the tenant has not participated on either occasion.

(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.

Return of security deposit and pet damage deposit

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

(a) the date the tenancy ends, and

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

the landlord must do one of the following:

(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;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

The landlord did file his application within 15 days of receiving the tenants forwarding address so the doubling provision of the Act is not applicable. However, the landlord had extinguished his right to any claim against the deposit as he had not conducted the move in condition inspection report as required by the Act. I find that the tenants are entitled to the return of their $425.00 security deposit.

Landlords Claim for Cleaning and Damages – Although the landlord has extinguished his right from claiming against the deposit that does not limit his ability to make a separate monetary claim as alleged for cleaning and damages. The landlord is seeking a total amount of $941.38. The breakdown of costs are as follows: $157.50 for the repair of the burnt kitchen counter top, $295.00 for cleaning the suite and shampooing the carpets, $326.38 for the costs of materials for repairing and painting of drywall, $60.00 for rubbish removal and 10 hours labour at minimum wage of $102.50 to complete the work. As stated earlier in this decision the primary issue is whether the tenants moved into the unit when it was a brand new unit or were they the second party to occupy the unit. Each party submitted a letter that supported each of their positions however neither party submitted a tenancy agreement, even though both stated that there is an agreement that would verify their claim.

The tenants stated that they had caused a kitchen fire and damaged the counter. The tenants stated that they had offered to pay for it originally but now choose to dispute the claim. The tenants acknowledged that they had left some garbage behind but it was an oversight and not done on purpose. When the tenant was asked about the condition of the unit she stated there “was a small hole in the wall but other than that the suite was new”.

The landlord stated that he was not asking for compensation for the small hole as mentioned by the tenant. The tenant was also silent as to whether she had cleaned the unit and shampooed the carpets as required by the Residential Tenancy Policy Guidelines. The landlord provided detailed documentation and receipts to support this claim. The landlord also provided quotes from professional services companies that would have made the total much higher. The landlord stated numerous times he tried to mitigate the costs as required and said “I’m not trying to rip you off”. I found the landlord to be clear, concise and consistent when providing his evidence. The tenant was inconsistent and lacked credibility. She disputed the landlords’ entire claim yet in her own testimony acknowledged the majority of it. Based on all of the above I find that the landlord is entitled to the amount as claimed of $941.38.

In summary, the tenant is entitled to $425.00.

The landlord is entitled to $941.38.

Section 72 of the Act allows for the “offsetting” of repayments. As both parties have been awarded an amount during this hearing I will apply the tenants’ award against the landlords leaving an amount of $516.38 to the landlord.

As neither party has been completely successful in their application I decline to make a finding in the matter of the filing fees and each party must bear that cost.

The landlord has established a claim for $516.38. I order that the landlord retain the $425.00 deposit in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of $91.38. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

The landlord is granted a monetary order for $91.38.

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: July 2, 2014

Residential Tenancy Branch