Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, FF
MNDC, MNSD

Introduction

This hearing was convened by way of conference call concerning applications made by the landlords and by the tenant. The landlords have applied for a monetary order for damage to the unit, site or property; for an order permitting the landlords to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of the application. The tenant has applied for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement and for a monetary order for return of all or part of the pet damage deposit or security deposit.

All parties attended and each gave affirmed testimony. The tenant was also represented by legal counsel. The parties provided evidentiary material to the Residential Tenancy Branch and to each other prior to the commencement of the hearing, and were given the opportunity to cross examine each other on the testimony and evidence provided. No issues with respect to service or delivery of documents or evidence were raised, and all evidence and testimony has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Have the landlords established a monetary claim as against the tenant for damage to the unit, site or property?
- Should the landlords be permitted to keep all or part of the security deposit in full or partial satisfaction of the claim?
- Has the tenant established a monetary claim as against the landlords for return of all or part or double the amount of the security deposit?
- Has the tenant established a monetary claim as against the landlords for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, and more specifically for recovery of rent paid due to a frustrated tenancy?

Background and Evidence

The first landlord testified that this month-to-month tenancy began on December 1, 2012 although the tenant had resided in the rental unit prior to that as a roommate of another tenant. When the other tenant moved out, the landlords and the tenant entered into a tenancy agreement, a copy of which has been provided by the tenant. It is signed by both landlords and the tenant and is dated December 20, 2011. The tenancy is stated to start on December 1, 2012 on a month-to-month basis. The tenancy ended on May 31, 2014. Rent in the amount of $670.00 per month was payable in advance on the 2nd day of each month, which was raised to $690.00 after a year, and there are no rental arrears. At the outset of the tenancy the landlords collected a security deposit from the tenant in the amount of $335.00 which is still held in trust by the landlords, and no pet damage deposit was collected. A move-in condition inspection report was completed by the parties at the commencement of the tenancy, but a move-out condition inspection report was not completed at the end of the tenancy.

The landlord further testified that the tenant moved out of the rental unit due to a flood that occurred on May 4, 2014 caused by the removal of a sump pump; the tenant had removed it from the drain and vacated that day. When the landlord arrived at the rental unit the same day, it had been removed and the landlord put it back into the patio drain. The landlords, the tenant and the tenant's roommate were all present, and the tenant told the landlords she wasn't going to continue to live there and that the bedroom was wet. Within 10 or 15 minutes of the sump pump being in the drain again, the water started to recede.

The landlord had borrowed the sump pump on or about April 27, 2014 for another job, which was returned.

There have been 5 incidents of flooding of the rental unit, but not all of them were during this tenancy. The landlords installed the sump pump in April, 2014. Having removed it, the latest flood on May 4, 2014 was the fault of the tenant. The landlords claim the cost of restoration in the amount of $2,528.30 and have provided an invoice in that amount.

The landlords have also provided a break-down of hours the landlords spent cleaning the rental unit after the tenant moved out. It states that the work was performed May 22 to 26, 2014 and shows a total of 18.75 hours. The landlords claim $18.00 per hour, or $337.50 from the tenant.

The landlord also testified that the tenant had never complained or told the landlords about mold in the rental unit but did mention that the rental unit was moist. The tenant was advised that the restoration would be completed by May 10, 2014 and were prepared to pay compensation but the tenant declined saying that the tenancy was frustrated. However, the tenant's room-mate wanted to stay. The landlords advised that the roommate could complete an application for tenancy and that if the tenant moved out, the roommate would either be approved as a tenant or would have to move

out when the tenant moved out. The roommate stayed in the rental unit for a few days and was also seen on the property until the end of May.

The landlords received a document on May 6, 2014 from the tenant requesting that the security deposit of $337.50 and $605.32 of May's rent be returned due to a frustrated tenancy agreement, and advising that the tenant would not be returning to the rental unit. The landlords researched "frustration" and disagreed that the tenancy was frustrated. The landlords wrote a letter to the tenant on May 20, 2014 stating that the tenant caused the flood.

The landlord further testified that the no one from the Restoration Company or previous tenants had ever mentioned mold in the rental unit, or on clothing or a smell of mold, nor did the tenant or the roommate ever mention that the sump pump was in the way on the patio.

The other landlord testified that he is responsible for maintenance of the rental unit. There have been 5 incidents of flooding since the landlords purchased the house 9 years ago. The sump pump was installed in February, 2014 after that flood, and the landlord had borrowed it on April 27 assuring the tenant it would be returned the following day. The landlord returned April 29 to ensure that it was working. He testified that the tenant claimed it wasn't returned and that no one told her it had to be left in the drain, but the tenant called the landlord and asked the landlord to put it back. The landlord never told the tenant to do anything with it; it was the landlord's responsibility. The landlord agrees that the sump pump was inconveniently placed but no one tripped on it.

The landlord also testified that the tenant has resided in the rental unit for several years and the landlord has always responded to maintenance issues. The tenant had originally moved in as a roommate of a tenant in November, 2007. An overland flood had occurred in 2010 and there were 2 incidents prior to that. After the latest flooding incident, there was no mold or damp drywall to repair and new tenants have not complained about mold or mold smell or dampness in the rental unit. After the overland flood in 2010 caused by a broken water main, the insurance company paid the tenant $171.00 for the cost of running the pump and the landlord paid the $47.00 electric bill. The landlords and the tenant cleaned up, but the tenant was not offered any other compensation.

The landlords received the tenant's forwarding address in writing on May 20, 2014 and responded by advising the tenant that the landlords agreed to end the tenancy effective the end of May but did not agree that the tenant was entitled to recover any rent or the security deposit. A copy of the tenant's note has been provided by the landlords and it is dated May 6, 2014 and shows a marking that it was received May 6, 2014 with an initial of the landlord. A copy of the landlords' response has also been provided, which is dated May 20, 2014.

The tenant testified that she moved into the rental unit on December 1, 2008 as a roommate of a tenant. The property flooded, and the tenants were offered no assistance by the landlords, and the tenant's father fixed the problem because the landlords didn't know what to do.

The tenant further testified that mold was noticed from 2010 to 2014 in the rental unit on clothing and both closets which were mentioned to the landlords. The landlord told the tenant to keep an eye on it and that he didn't have time to deal with the situation. The tenant spent 8 hours to clean the house and when compensation was requested the landlords advised that the rent hadn't been raised and that was the compensation.

The tenant also testified that the pump was in the way, and turned off and on every so often, and the tenant paid the hydro bill. The landlords paid the hydro bill from May 9 to 31 after the tenant moved out.

The tenant further testified that after the landlord returned the pump, he left it out of the drain. The tenant's roommate put it in the drain the morning of the flood and the tenant called the landlords. When they showed up, the tenant told them that she would not clean the rental unit again.

The tenant moved out all belongings on May 4, 2014 but the roommate could not move his stuff out because fans were blocking the doorways. He was also stuck in there for another night because he didn't have any place to go and stayed with a friend in the building, not in the rental unit. The tenant saw a notice on the door of the rental unit on May 6, 2014 stating that the locks would be changed on May 8, so the tenant believed she had no access to clean. She stated that the landlords claim $18.00 per hour for cleaning it, but the tenant's time was worth nothing.

When the flood occurred in 2010 the landlords offered return of part of the rent and some money for hydro.

During the tenancy the landlord saw that the sump pump was not in the drain numerous times and never commented or mentioned it to the tenant. Prior to the May, 2014 incident, the landlord had left the pump out of the drain when he brought it back.

When asked if the tenant had shown the landlords mold, the tenant replied that the landlords showed no interest in dealing with it. The tenant mentioned to the landlords on one occasion that the pump was in the way, but not in writing, and never asked the landlords about removing it.

The tenant claims the security deposit and a portion of rent paid for the month of May, 2014, for a total claim of $940.32.

Both parties have provided photographs, and the tenant has provided 7 letters from witnesses, who did not attend the hearing and did not give oral testimony.

Analysis

Firstly, with respect to the tenant's claim that the tenancy was frustrated, I refer to Residential Tenancy Branch Policy Guideline 34 – Frustration – which states:

> A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.
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> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

In this case, the landlord testified that since November, 2007 when the tenant originally moved in, an overland flood occurred in 2010 and there were 2 incidents prior to that. After the first flood the landlords and the tenant took steps to remediate the situation and the tenancy continued. After the flood in May, 2014 the landlords again took steps to remediate but the tenant moved out of the rental unit. Had the tenant stayed, the landlords would have been obligated to pay for the tenant's expenses to live elsewhere until remediation was finished. If that remediation was not expected to take more than 7 or 10 days, which I find was the case, it cannot be found that the circumstances totally affected the effect and consequences of the contract. I am satisfied that the tenant was frustrated, but the tenancy was not because the contract could still be fulfilled according to its terms.

Having found that the tenancy was not frustrated, the landlords were entitled to one month's notice of the tenant's intention to vacate the rental unit, but the landlords waived that right in their letter to the tenant on May 20, 2014. Therefore, I also find that the tenant's claim for return of a portion of May's rent is not justified.

With respect to the landlords' claim for damage to the unit, site or property, in order to be successful in such a claim, the onus is on the landlords to satisfy the 4-part test:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the tenant's failure to comply with the *Residential Tenancy Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. What efforts the landlords made to mitigate such damage or loss.

The landlords both testified that the sump pump was taken by the landlord and returned. One of the landlords testified that he put it in the drain. The tenant testified that the landlord did not return it to the drain and did not tell the tenant that it had to remain

there. I am not satisfied in the evidence before me whether the tenant caused the flood by removing it from the drain or if the landlord returned it but didn't put it in the drain. Therefore, I find that the landlord has failed to establish element 2 in the test for damages with respect to the restoration claim.

With respect to the balance of the landlords' claim for damages, I have reviewed the photographs and digital evidence, but I have not been provided with a copy of the move-in condition inspection report. The *Act* requires a landlord to ensure that the move-in and move-out condition inspection reports are completed and that the tenant is given at least 2 opportunities to complete them with the landlord. In this case, the last flood occurred and the tenant departed right after. The landlords stated that the rental unit was ready to be lived in again by May 10, but the tenant refused to return claiming that the tenancy was frustrated. The landlords had an obligation to arrange the move-out condition inspection with the tenant but failed to do so. The landlords retained the rent money for May and agreed in writing to end the tenancy at the end of that month but the tenant found a notice on May 6 to the tenant stating that the locks would be changed on May 8, giving the tenant no time to return to clean.

A tenant is required to leave a rental unit reasonably clean and undamaged except for normal wear and tear. I have reviewed the list provided by the landlords and the invoice of the Restoration Company and note that both include a cost for cleaning floors. Any award must not put the landlords in a better financial position than they would be if the parties had complied with the *Act.* I also note that the list of work performed provided by the landlords contain items that I would find as normal wear and tear, such as removing and cleaning light fixtures, paint touch-up, washing behind appliances, repairing curtain rods. A landlord is not entitled to claim the cost of pristine cleaning or repair that a landlord may want for future tenancies, only items that are beyond normal wear and tear. I also find that re-installing closet doors and carpet were items that were caused by the flood, which is not the tenant's responsibility. In the circumstances, I find that the landlords have failed to establish elements 2 and 3 in the test for damages.

Having found that the landlords have not complied with the *Act* respecting the move-out condition inspection, I must find that the landlords' right to claim against the security deposit for damages is extinguished.

The *Act* requires a landlord to return a tenant's security deposit within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing, or must apply for dispute resolution claiming against the security deposit within that 15 day period. If the landlord fails to do so, the landlord must be ordered to repay the tenant double the amount. In this case, I find that the tenancy ended on May 31, 2014 and the landlords received the tenant's forwarding address in writing on May 6, 2014 and applied for dispute resolution on July 25, 2014. In the circumstances I find that the tenant is entitled to double recovery, or $670.00.

Conclusion

For the reasons set out above, the landlords' application is hereby dismissed without leave to reapply.

I hereby grant a monetary order in favour of the tenant as against the landlords pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $670.00.

This order is final and binding and may be enforced.

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: September 24, 2014

Residential Tenancy Branch