Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("*Act*") for:

- a monetary order for unpaid rent, pursuant to section 67;
- authorization to retain the tenants' security and pet damage deposits (collectively "deposits"), pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

One of three tenants, "tenant NK," did not attend this hearing, which lasted approximately 103 minutes. The landlord's agent, MA ("landlord"), the two tenants, "tenant JK" and "tenant YK," and the tenants' lawyer attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed that she had authority to represent the landlord named in this application, who she said is her father, as an agent at this hearing. Tenant JK confirmed that he had authority to speak on behalf of tenant NK, as an agent at this hearing. The two tenants confirmed that their lawyer had authority to speak on behalf of all three tenants (collectively "tenants") at this hearing.

The tenants' lawyer confirmed receipt of the landlord's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that all three tenants were duly served with the landlord's application.

The landlord confirmed receipt of the tenants' written evidence package on the day before this hearing, by way of email. The tenants' lawyer claimed that it was sent late because he was retained late by the tenants. I received the evidence at the Residential Tenancy Branch ("RTB") on May 19, 2017. The landlord testified that she did not have any objection to me considering the written evidence because she had reviewed it and was prepared to respond to it verbally during the hearing. This is despite the fact that the landlord received it by email, contrary to section 88 of the *Act*, and she received it

late, less than 7 days before the hearing and contrary to Rule 3.15 of the RTB *Rules of Procedure*. The written evidence consisted mainly of emails and text messages between the landlord, tenants and the landlord's agent. Accordingly, I considered the tenants' written evidence package at the hearing and in my decision because the landlord consented, the landlord reviewed and responded to it and because the landlord was a party to the above communications prior to the hearing.

Issues to be Decided

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to retain the tenants' deposits?

Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on February 5, 2016 for a fixed term to end on January 31, 2017, after which the tenants were required to move out unless both parties could agree to another fixed term. The tenants vacated the rental unit on November 3, 2016. Monthly rent was payable on the first day of each month. The rent was initially $2,550.00 and then it was changed to $2,700.00 as of August 2016. A security deposit of $1,350.00 and a pet damage deposit of $1,350.00 were paid by the tenants and the landlord continues to retain both deposits in full. Both parties signed a written tenancy agreement and a copy was provided for this hearing.

Both parties agreed that move-in and move-out condition inspection reports were completed for this tenancy. Both parties agreed that the move-out condition inspection report indicates no damages or repairs upon move-out. The landlord stated that she completed the move-in condition inspection report herself, while she had her agent complete the move-out condition inspection report because she was not comfortable dealing with the tenants directly. The landlord agreed that she did not have written permission to keep any amount from the tenants' deposits and that her application to keep the deposits was filed on November 16, 2016. The landlord acknowledged that her agent received the tenants' written forwarding address by way of a text message on November 3, 2016.

The landlord seeks a monetary award of $11,147.31 plus the $100.00 filing fee paid for this application.

The landlord seeks $8,100.00 for a loss of rent from November 2016 to January 2017. The landlord claims $2,700.00 for each of the above three months. The landlord maintained that the tenants signed a fixed term tenancy agreement to end on January 31, 2017 and they moved out early on November 3, 2016 without providing notice. Both parties agreed that they had a previous RTB hearing on October 3, 2016 and that a different Arbitrator issued the landlord a two-day order of possession for unpaid rent, pursuant to a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. Both parties agreed that the landlord served this order to the tenants who vacated the rental unit within the two-day time period, by November 3, 2016. The file number for the previous hearing appears on the front page of this decision.

The landlord said that because the tenants paid their rent late, they were served with a 10 Day Notice and subsequently an order of possession. She said that the tenants violated their tenancy agreement by failing to pay rent on time. The landlord claimed that she was unable to re-rent the unit and the landlord moved back in after January 2017. She said that no efforts were made to re-rent the unit because the tenants damaged it to such a great extent that it had to be extensively repaired and that was done by January 2017. The landlord explained that it was a low season for rentals when the tenants vacated and she was also busy with her own full-time job.

The tenants dispute the landlord's claims for unpaid rent, stating that they peacefully vacated the rental unit pursuant to the two-day order of possession. They further stated that the landlord failed to mitigate losses, did not suffer a loss of rent because the unit was not re-rented, and the landlord simply moved back in to the unit after the fixed term ended.

The landlord seeks $2,205.00 to repaint the entire rental unit. The landlord provided a quote, dated May 21, 2015, for $2,000.00 plus tax from the previous tenancy, claiming that she used the same company from 2015 to repaint the unit in 2017. She said that she was "confident" that the landlord paid $2,205.00 for the repainting and that it was done sometime in January 2017. The landlord provided a quotation, dated November 13, 2016, from the same company used in 2015 but did not submit a receipt for the work done. She said that the rental unit smelled like the tenants' dog, as well as heavy smoke. She said that the tenants also caused numerous holes in every wall of the rental unit and that they patched them up but did not use matching paint, which was not noticed by her agent on the move-out inspection because the paint was still fresh and it

had not fully dried yet. She said that the smell was not noticed because the windows were all open during the move-out inspection and she did not know why the agent did not close the windows during the inspection. She said that all the walls in the rental unit had to be repainted for the above reasons and that the last major paint job was done in May 2015 when the previous tenants moved out. The landlord provided emails from her agent indicating that when he did the move-out condition inspection on November 2, 2016, he did not notice the patchwork or the smells but he did notice both on November 7, 2016, when he returned. The landlord provided photographs of the walls on both of the above dates, before and after the paint dried. The landlord also provided emails from another person who visited the rental unit indicating that she noticed “dog” and “smoke” smells inside the rental unit after the tenants vacated.

The tenants dispute the landlord’s painting costs, claiming that the receipt from 2015 cannot compare to the amount being claimed in 2017. The tenants maintained that they did not smoke inside the rental unit, the landlord was aware of their dog, and the landlord simply wanted to repaint the unit according to her own preferences. The tenants provided an email from the treasurer of the strata company of the property, which states that during the tenants’ tenancy, she did not notice any dog or food smells, and there were no signs of damage or dirt beyond reasonable wear and tear.

The landlord seeks $120.00 to clean the carpets at the rental unit. The landlord provided a receipt, dated June 1, 2015, stating that the same company was used in January 2017 so the price would be the same. The landlord did not provide a receipt for the above cost. She said that the smoke and dog smells were so bad that the carpets had to be cleaned and it was not noticed by her agent on the move-out condition inspection because all the windows were open.

The tenants dispute the landlord’s claim, stating that they paid to rent a carpet cleaning machine and properly cleaned the carpets before vacating the rental unit. They claimed that they submitted a receipt to the landlord and the RTB on the date of this hearing, but neither I nor the landlord received a copy, so I notified the tenants that I could not consider such a receipt in my decision.

The landlord seeks $210.00 for replanting the perennials at the rental unit. The landlord provided an invoice, dated November 15, 2016, for this cost. The landlord did not submit a receipt but said that the work was done. She claimed that she submitted photographs and emails at the previous RTB hearing regarding this damage claim and she thought the information would be transferred to this current file. The landlord said that the strata company put in the perennial plants and the tenants removed them

without the landlord's permission and failed to restore them when they vacated. She explained that she does not know why this damage was not noted on the move-out condition inspection report.

The tenants dispute the landlord's claim for restoring perennials, stating that there is no strata conformity clause provided by the landlord regarding the perennials. They claimed that the landlord gave verbal permission to remove the perennials and she saw the work done at the rental unit. They explained that they removed the perennials because they had berries that were poisonous for dogs. Tenant JK stated that he is an arborist who replaced the perennials with other flowers and plants that improved the area and he was not told by the landlord to restore the perennials when he vacated.

The landlord seeks $337.31 for fixing the broken shower handle in the master bathtub at the rental unit. The landlord provided an invoice, dated October 9, 2016, for this cost. The landlord did not provide a receipt. The landlord said that the tenants broke the shower handle at the rental unit while the tenancy was still ongoing. She claimed that it was not regular wear and tear and that repairs were done as per the invoice.

The tenants dispute this cost, stating that there was no external damage to the shower handle. Tenant YK stated that she could not shut off the water in the master bathtub and that she told the landlord who did not reply to her. She claimed that she then called the plumber who in turn called the landlord. The landlord maintained that she sent in her handyman but he notified her that a plumber was required so the landlord then hired a plumber. Tenant YK stated that the plumber found a broken piece inside and fixed it. She said that she did not damage the shower handle and it was an internal issue.

The landlord seeks $150.00 to replace the chandelier shades. The landlord did not provide any receipts or invoices for the above amount but claimed that the work was done. She said that she got the above number "off the top of my head" because her father mentioned it in passing to her. The landlord stated that the tenants broke two glass covers on the chandelier at the rental unit and that she was notified about this by the tenants, who told her to replace it. She claimed that the chandelier was approximately five to six years old and that she had difficulty finding the unique shades. The tenants dispute the landlord's claim, stating that the landlord failed to provide any documentary proof of the cost.

The landlord seeks $25.00 to replace the broken thermostat at the rental unit. The landlord did not provide any receipts or invoices for the above amount but claimed that the work was done and the above amount did not include any labour costs. She said that she got the above number "off the top of my head." The tenants dispute the

landlord's claim, stating that the landlord failed to provide any documentary proof of the cost.

Analysis

Overall, I found that the landlord was largely unprepared for this hearing. She did not have all of her written evidence in front of her during the hearing and was asking me what documents I had in front of me and what they said. She maintained that she did not submit the receipts for the damages being claimed because I could use old receipts from a previous tenancy in 2015 to assume the cost of repairs in 2017. When I asked the landlord specific questions about her claims, she repeatedly became upset and told me to refer to the documents. She claimed that she could not speak on behalf of her agent and when I asked why he did not appear at this hearing to testify, she stated that she believed his emails and text messages on file were sufficient.

The landlord claimed that most of her emails and evidence in support of this current application, were produced for the previous RTB hearing in October 2016, so it should have been transferred to this current file. When I informed her that it had not been transferred over and she had to file the relevant documents with the current application, she became upset and claimed that she could submit them after the hearing or that I was "welcome to reschedule" the hearing to a later date so that she could submit her documents. When I informed her that she had filed her application on November 16, 2016 and she had until May 25, 2017, a period of over six months to prepare her claim, she explained that she was "busy," had a "full-time job," and she was simply helping her elderly father with the rental unit. I notified the landlord that I would not reschedule the hearing and she had more than enough time to prepare for this hearing and submit her documents, particularly given the fact that she had already been through the RTB process recently in October 2016.

Throughout the hearing, the landlord repeatedly mentioned the time and claimed that she had a work meeting to go to, so she needed to leave. I informed her that she could exit the conference at any time but if she had not provided her evidence to support her claims by the time she exited the call, her claims would be dismissed, since it is the applicant's burden to prove the claim. Of note, the majority of the 103-minute hearing time was spent listening to the landlord's submissions.

Burden of Proof

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim on a balance of

probabilities. In this case, to prove a loss, the landlord must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Loss of Rent

Although the parties had a fixed term tenancy agreement in place until January 31, 2017 and the tenants did not provide written notice to the landlord to move out, they were not required to do so, since the landlord served them with a two-day order of possession, issued by an RTB Arbitrator at the previous hearing. The tenants were required to vacate, as per the order, and did so, within the two days indicated on the order. The landlord chose to exercise his right to serve and enforce the order at the time that he did.

Moreover, I find that the landlord did not re-rent the unit to new tenants. The landlord, by her own testimony, did not make any efforts to re-rent the unit by placing advertisements, conducting showings of the unit or screening potential applicants. The landlord moved back into the rental unit after January 2017. The landlord provided insufficient evidence as to why the above repairs took three months to complete, such that the unit could not be re-rented. Therefore, I find that the landlord failed to show that any losses were suffered and failed to satisfy the above four-part test. On a balance of probabilities and for the reasons stated above, I dismiss the landlord's claim for $8,100.00 for a loss of rent from November 1, 2016 to January 31, 2017.

Damages

I dismiss the landlord's claim for $2,205.00 for painting and $120.00 for carpet cleaning at the rental unit. The landlord did not indicate these damages in the move-out condition inspection report. The landlord did not provide any receipts for the painting or the carpet cleaning, to confirm when the work was done or how much was actually paid for the work. The landlord only provided an estimate for $2,205.00 from November 13, 2016 which indicates "quote for complete painting everywhere and fixing all damages done to the walls." Yet, the work was apparently completed sometime in January 2017.

It does not state what the damages are, what is being fixed, and why painting is required “everywhere.” It does not even note the smell that the landlord complained was the biggest reason why painting was required. The landlord claimed that she did not have the above invoice in front of her during the hearing but the work was done and she was “confident” that $2,205.00 was paid to repaint the unit. The landlord did not provide any invoice or estimate for the carpet cleaning in January 2017.

I do not accept the landlord’s suggestion that a receipt, dated May 21, 2015, from a previous tenancy, should be used to assume that the same painting needs to be done in January 2017, for these tenants after they moved out. I similarly do not accept the landlord’s suggestion that a receipt, dated June 1, 2015, from a previous tenancy, should be used to assume that the same carpet cleaning needs to be done in January 2017, for these tenants after they moved out. The landlord said that because she used the same companies who provided the previous receipts, it was comparable. I disagree.

I dismiss the landlord’s claim for $210.00 for replanting the perennials at the rental unit. The landlord did not indicate this damage in the move-out condition inspection report. The landlord did not provide a receipt to confirm when the work was done or how much was actually paid for the work. The landlord only provided an estimate for $210.00 from November 15, 2016, while claiming that the work was done sometime in January 2017.

I dismiss the landlord’s claim for $337.31 for fixing the master bathtub. The landlord claimed that the tenants broke the shower handle while they were still living in the rental unit. Yet, the landlord did not indicate this unpaid charge in the move-out condition inspection report. Further, the landlord did not provide any receipt to confirm how much was actually paid for the work. The landlord only provided an estimate for $337.31 from October 9, 2016. The tenants claimed that they did not cause the above damage and the landlord has insufficient evidence that they did. Contrary to the landlord’s contention, there is no evidence in the landlord’s estimate that the tenants broke the shower handle, it just indicates “broken.” The tenants claim that they reported the issue to the landlord right away when they could not shut off the water so the landlord had a handyman and plumber come in to fix it. It is the landlord’s obligation to repair and maintain the rental unit as per section 32 of the *Act*. Accordingly, I find that it is the landlord’s responsibility to bear this cost since there is insufficient evidence that the tenants caused the damage.

I dismiss the landlord’s claims for $150.00 for replacing the chandelier shades and $25.00 for replacing the broken thermostat at the rental unit. The landlord did not indicate these damages in the move-out condition inspection report. The landlord did

not provide any receipts, invoices or estimates for the above amounts. The landlord invented the above amounts during the hearing, indicating that it was "off the top of my head."

Other Costs and Deposits

As the landlord was completely unsuccessful in this application, I find that the landlord is not entitled to recover the $100.00 filing fee paid for this application.

The landlord continues to hold the tenants' security and pet damage deposits, totalling $2,700.00. No interest is payable on the deposits during the period of this tenancy. As per Residential Tenancy Policy Guideline 17, since the landlord applied to retain the deposits, I am also required to deal with its return to the tenants even though they have not filed an application. Accordingly, I order the landlord to return the tenants' entire security and pet damage deposits, totalling $2,700.00, to the tenants within 15 days of receiving this decision. I find that the tenants are not entitled to double the value of their deposits because the landlord filed this claim within 15 days of the end of the tenancy.

Conclusion

I order the landlord to return the tenants' entire security and pet damage deposits, totalling $2,700.00, to the tenants within 15 days of receiving this decision.

I issue a monetary order in the tenants' favour in the amount of $2,700.00 against the landlord. The landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The landlord's entire application is dismissed without leave to reapply.
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 29, 2017

Residential Tenancy Branch