Decision

Dispute Codes:

MNSD The Return or Retention of the Security Deposit

MNDC Money Owed or Compensation for Damage or Loss

FF Recover the Filing Fee for this Application from the Respondent

Introduction

The hearing was convened to deal with an application by the tenant for the return of double the $675.00 security deposit and interest under the Act, and a monetary order for the equivalent of 5 days rent. The tenant was also seeking reimbursement for the $50.00 fee paid for this application.

This Dispute Resolution hearing was also convened to deal with a cross application by the landlord for a monetary claim for damages. Although the amount indicated on the landlord's application was $925.00, an additional claim for damages was also attached as evidence. During the hearing the landlord testified that the actual claim was for $7,258.48, comprised of $959.53 for cleaning and repairs to the unit and $6,298.95 losses incurred by the landlord for delays in renovations caused by the actions of the tenant during the tenancy.

The landlord was also seeking reimbursement for the $50.00 fee paid for this application. Both the landlord and tenant were present and each gave testimony in turn.

Issues to be Decided for the Tenant's Application

The issues to be determined based on the testimony and the evidence are:

- Whether the tenant is entitled to the return of double the security deposit pursuant to section 38 of the Act. This determination is dependant upon the following:
  - Did the tenant pay a security deposit?

- Did the tenant furnish a forwarding address in writing to the landlord?
- Did the landlord make an application to retain the deposit within 15 days of the end of the tenancy and provision of the forwarding address?

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for cleaning, damage and other costs. The issues to be determined based on the testimony and the evidence are:

- Has the landlord submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing on a balance of probabilities that:
    - the costs were incurred due to the actions of the tenant.
    - the costs occurred due to a violation of the Act or Agreement
    - proof of the amount or value being claimed.
    - Proof that a reasonable effort has been made to minimize the damages

The tenant had the burden of proof to establish that the deposit existed and that 15 days had expired from the time that the tenancy ended and forwarding address was given, without the landlord either refunding all of the deposit or making application to keep it. The landlord had the burden of proof to show that the monetary compensation for damages and loss was warranted as claimed.

Background

The tenancy began in April 2008. A Two-Month Notice to End Tenancy for Landlord Use was issued on August 19, 2009 and A One-Month Notice to End Tenancy for Cause was issued August 21, 2009. The tenancy ended on October 26, 2009 pursuant to the One-Month Notice of August 21, 2009. The most current rent was $1,400.00 and a deposit of $675.00 was paid. No move-in condition inspection report was completed.

The landlord had received an Order of Possession based on the August 21, 2009 One-Month Notice to End Tenancy for Cause that was upheld at a hearing held on October 14, 2009. This had been a hearing held on the tenant's application seeking to cancel the notice and also included a monetary claim by the tenant for compensation for loss of quiet enjoyment due to renovations and disturbances by the landlord. The tenant's application was dismissed and the landlord was therefore granted an Order of Possession based on the One-Month Notice. The Order was served on the tenant and the tenant vacated on October 26, 2009.

Evidence: Tenant's Application

The tenant testified that she had given the landlord a forwarding address in writing on October 26, 2009 and prior to that date as well.. The tenant was seeking the return of double the deposit because the landlord did not return the deposit nor make application to keep it within 15 days.

The tenant was also claiming a refund of the portion of rent that the tenant paid covering the time period from October 26, 2009 to October 31, 2009 on the basis that the tenant had paid for the full month but the tenancy was terminated early, approximately one week before the end of the month of October 2009, pursuant to the Order of Possession granted at the October 14, 2009 hearing and served by the landlord.

The landlord acknowledged that the $675.00 deposit was paid at the start of the tenancy, that the forwarding address was given and that no refund was sent to the tenant within the 15 days. However, the landlord pointed out that the tenant failed to cooperate in the move-out inspection during which the damages occurring during the tenancy would be assessed. The landlord testified that the tenant's failure to fulfill this responsibility would affect the tenant's right to claim the return of the deposit.

Analysis: Tenant's Application

I find that section 38 of the Act deals with the rights and obligations of landlords and tenants in regards to the return of security deposit and pet damage deposit. Section 38(1) states that within 15 days of the end of the tenancy and receiving the forwarding address a landlord must either: repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations; or make an application for dispute resolution claiming against the security deposit.

I find that the landlord was in possession of the tenant's security deposit held in trust on behalf of the tenant at the time that the tenancy ended. I find that, because the tenancy was terminated and the forwarding address was given, to comply with the Act the landlord must either have returned the deposit or made an application for dispute resolution seeking to keep the deposit within the following 15 days. I find that this was not done and therefore a violation of the Act occurred.

Section 38(6) If a landlord does not act within the above deadline, the landlord; (a) may not make a claim against the security deposit or any pet damage deposit, and; (b) must pay the tenant double the amount of the security deposit.

In regards to the move-out inspection, I find that both section 23(3) of the Act covering move-in inspections and section 35 of the Act for the move-out inspections state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and both the landlord and tenant must sign the condition inspection report after which the landlord must give the tenant a copy of that report in accordance with the regulations. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

In regards to the landlord's allegation that the tenant did not cooperate, the Act has provisions that anticipate such situations. In particular, section 17 of the Regulation details exactly how the inspection must be arranged as follows:

(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant *by providing the tenant with a notice in the approved form.*

(3) When giving each other an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

The Act states that the landlord must make the inspection and complete and sign the report without the tenant if: (a) the landlord has complied with subsection (3), and (b) the tenant does not participate on either occasion.

In this instance, the landlord admitted that a move-in inspection report was not completed and stated that the move-out inspection was thwarted by the tenant's non-cooperation.

A condition inspection report must be done with both parties present a soon as the unit has been vacated as required by the Act. Failing that, the landlord can complete the inspection in the absence of the tenant by following all of the required steps and must be prepared to prove that this was done. I find the practice followed by this landlord relating to the condition inspection was not in compliance with the Act in several respects and therefore I find that the landlord cannot rely on section 36(1) to establish that the tenant had extinguished her right to claim the deposit by refusing to cooperate in the move-out inspection.

Under section 38(6)(b) of the Act, I find that the tenant is entitled to receive double the $675.00 retained by the landlord equalling $1,350.00, plus interest of $23.91 on the original deposit paid for a total monetary refund of $1,373.91.

In addition to the above, I find that, prior to issuing the One-Month Notice to End Tenancy for Cause under section 47 of the Act, the landlord had already issued a Two-Month Notice for Landlord's Use under section 49(6)(b) which allows the landlord to end the tenancy for landlord's use if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to renovate or repair the rental unit in a manner that requires the rental unit to be vacant. A copy of the Notice and a document verifying that the tenant signed receipt of this Two-Month Notice on August 19, 2009, was in evidence.

I find that section 51(1) provides that a tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

I find that despite the fact that the tenancy was actually ended earlier for cause, pursuant to section 47 of the Act, the landlord's issuing of the Two-Month Notice to End Tenancy for Landlord's Use legally entitled the tenant to receive the equivalent of one month rent under section 51(1) of the Act.

Accordingly, I find that in addition to the above, the tenant is entitled to monetary compensation of $1,400.00.

Based on the proven facts and evidence, I find that the tenant is entitled to total monetary compensation of $2,773.91.

Evidence: Landlord's Application

The landlord testified that the tenant left the unit in a damaged and dirty condition. The landlord submitted photographic evidence showing damage allegedly caused by the tenant and a video-taped tour of the rental unit filmed after the tenant had vacated. The landlord stated that the $959.53 expenditures being claimed included the following:

- Damaged drywall with holes that required, totalling $157.50 comprised of 4.5 hours of labour valued at $35.00 per hour entailing 2 hours to fill the holes, 1 hour to sand, 1 hour to re-fill and 30 minutes
- Gouges in the trim costing $52.50 requiring 1.5 hours of labour at $35.00 per hour
- $401.75 for replacement of torn wallpaper entailing $245.00 in labour for 3 hours to remove and 4 hours to install at $35.00 per hour, plus cost of 2 rolls of paper for $156.75.
- $203.60 for carpet cleaning
- $75.00 for insufficient cleaning entailing 3.75 hours at $20.00 per hour
- $67.18 for the cost of a replacement interior door damaged by tenant

The landlord testified that the tenant had used large wall anchors which were left in the wall and had to be removed. The landlord felt that the lifting wallpaper should have been reported by the tenant during the tenancy at which time it could be repaired. The landlord testified that the paper was approximately 5 years old and that the door was about 30 years old. The landlord had submitted into evidence an invoice for $203.60 for the carpet cleaning. No other invoices were submitted.

The landlord pointed out that, the landlord's claim of $959.53 did not include all costs and that in fact, in the interest of showing good faith, the landlord had had decided not to submit claims for portions of the labour and other costs such as replacing light bulbs.

In regards to the claim for $6,298.95 for losses due to the tenant's actions in violation of the Act, the landlord testified that the interference of the tenant had resulted in these

extra costs which would not have been incurred otherwise. The landlord submitted a copy of a proposal dated November 2, 2009 and a copy of an invoice dated November 19, 2009 to support that the amount was charged to the landlord for the installation of siding on the exterior of the building. The landlord testified that the intention of the landlord was to obtain estimates and purchase supplies in advance of the renovations being planned so that the work could commence immediately after the tenant vacated as planned under the Two-Month Notice effective on November 1, 2009.

The landlord testified that with all the preparation done in advance, he had planned to install the siding himself without delay. This was to be completed by the landlord in his spare time prior to the advance of the cold/rainy season, saving a substantial amount of money for labour. However, because the tenant had refused to cooperate and grant access to the landlord for the purpose of doing the preliminary work, the landlord was delayed to the extent that it was necessary to hire external contractors to do the siding to have it done before the weather turned. The landlord testified that the delay caused by the tenant's refusing access, discouraging contractors from taking the jobs, accusing the landlord of harassment, writing letters, making the previous application for dispute resolution and involving the police, had impeded the landlord from going forward with the estimates and the work and thereby pushed the start of the installation work into daylight saving time and the approach of seasonal bad weather conditions that made it impossible for the landlord to do the work himself. The landlord pointed out that it was established as a fact at the previous hearing that the tenant was not complying with the Act and had placed the landlord's property at risk, which justified an Order of Possession ending the tenancy based on cause. The landlord testified that the tenant's conduct had resulted in the landlord being forced to spend the extra $6,298.95 in outside labour and the landlord feels that the tenant should compensate for this.

The tenant disputed the landlord's claims of cleaning costs and damage to the unit. The tenant stated that the unit was left in a reasonably clean condition, but acknowledged that the carpets were not shampooed and explained that this was due to the landlord's

stated intention that estimators would be entering the premises and renovation work on the unit would commence thereafter. The tenant admitted to leaving two wall anchors in the drywall and also agreed some gouges in the trim may have been caused by the tenant. The tenant testified that she was not aware of any damage to the door. The tenant pointed out that the landlord did not submit invoices for the cost of materials allegedly used to repair the damage. The tenant testified that the amounts claimed for the cleaning and repairs inside the rental unit were not justified.

In regards to the alleged delays in the siding work caused by the tenant's refusal to grant access, the tenant testified that she did consent to allow access to the landlord and the landlord's contractors on several occasions. The tenant conceded that she had denied the landlord once when the landlord decided to change the scheduled time on short notice after the tenant had already done all the requested preparation for the earlier agreed-upon appointment. The tenant admitted that access was also denied when the window of time given by the landlord spanned five hours, which the tenant felt was unreasonable. The tenant testified that she had dealt with some of the contractors directly and had permitted estimates to be done by the tradespersons without the landlord having to request the access. The tenant's position was that neither the alleged delay nor purported expenditures had resulted from the conduct of the tenant. The tenant stated that she was not responsible for the landlord's revised plan and his own choice to have professionals do the work instead of installing the siding himself. The tenant pointed out that any work in which completion was contingent upon good weather may or may not be possible, regardless of whether or not the tenant was involved in the matter. The tenant felt that the loss claim by the landlord had no merit.

Analysis: Landlord's Application

An applicant's right to claim damages from another party is covered under, section 7 of the Act which states that if a landlord or tenant does not comply with this Act, regulations or tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer authority to determine the amount. The party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to mitigate the damage or losses that were incurred.

I find that section 32 of the Act imposes responsibilities on both the landlord and the tenant for the care and cleanliness of a unit. A landlord must maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant and a tenant must maintain

reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. While a tenant of a rental unit must repair damage that is caused by the actions or neglect of the tenant, a tenant is not required to make repairs for reasonable wear and tear.

Section 37(20 of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Section 29(1) of the Act states landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless notice is given in writing at least 24 hours and not more than 30 days before the entry, and the notice must include the following data, (i) the purpose for entering, which must be reasonable; and (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees. According to section 29(2) of the Act, the landlord is entitled to do a monthly inspection but must still comply with the requirements described above.

In regards to the landlord's claims for cleaning, I find that the unit was left in reasonably clean condition with a few exceptions. I find that a tenant would not be responsible to move appliances which were not on casters to clean behind them. Based on the evidence, I set the amount of compensation for the cleaning at $50.00. I also find that the landlord is entitled to be compensated for the cost of cleaning the carpets in the amount of $203.60.

In regards to the claim for repairs, I find that the landlord's failure to conduct a Move-In Condition Inspection Report makes it difficult to verify when damage was done. With a four-year tenancy, there is also an issue of normal wear and tear, for which the tenant is not liable under the Act.

While I find that the landlord's claim of $157.50 for wall repairs may have some merit, I accept the tenant's testimony that some anchors pre-existed the tenancy and find that the landlord is entitled to a portion of the claim in the amount of $60.00 for the walls.

The tenant had acknowledged that some gouges in the trim may have been caused during the tenancy and I find that the claim of $52.50 to repair this is warranted.

In regards to the cracked door, I find that the average useful life of an interior door, according to insurance tables, is 20 years and therefore, even if it was found that the tenant had damaged the door, the pro-rated value would be nil. In regards to the wallpaper damage, I find that the average useful life of paint or wall paper is set at 4 years and therefore I find that the cost of replacement exceeds the existing value of the wall finish. Accordingly, I find that the portion of the landlord's application relating to compensation for the door and the wallpaper must be dismissed.

The landlord's total compensation for cleaning and repairs is $366.10.

In regards to the other expenditures, I find that the landlord's claim for $6,298.95 relies on proving that the tenant violated the Act by denying the landlord access, and it must be established that, had the tenant not violated the Act, the landlord would not have incurred these costs. I find that the landlord has successfully proven the expenditure, and has also provided solid evidence that the tenant was found to have acted in violation of the Act at least sufficient to end the tenancy, as found at the previous hearing. However, whether the tenant's violation of the Act was the cause of the delay and whether the delay then resulted in the extra expenditure of $6,298.95, are two connecting factors that must be determined as valid, in order to meet element 2 of the test for damages above. I find that the landlord gave verbal testimony to establish this critical link. However, I also find that this verbal testimony was challenged by the respondent.

It is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof. In other words, the applicant, in this case the landlord, has the onus of proving during these proceedings, that the compensation being claimed as damages is justified under the Act.

I find that, in a dispute where evidence consists of conflicting and contested verbal testimony, in the absence of independent documentary evidence, then the party who bears the burden of proof is not likely to prevail.

In this instance I find that the parties were at odds with one another's facts and had a difference of opinion as to what happened to cause the expenditures and why. However, I find it is not necessary to determine which version is more credible nor which set of "facts" is more believable because the claimant has not succeeded in sufficiently proving that all elements in the test for damages were satisfied.

In addition, I find that, had things gone according to the landlord's renovation plan, the landlord would still have been required to spend his own time and labour completing the siding job. I note that the landlord had assigned the value of his own labour to be worth $35.00 per hour for the other claims in the application. However, in the claim for $6,298.95 installation costs against the tenant , I find that the landlord had neglected to deduct the estimated value of his anticipated labour from the total amount of the monetary claim against the tenant for siding installation.

In any case, as the burden of proof has not been adequately met, I find that the portion of the landlord's application seeking $6,298.95 must be dismissed.

Given the above, I find that the landlord is entitled to total monetary compensation in the amount of $366.10, comprised of $50.00 for cleaning, $203.60 for carpet cleaning, $60.00 for the wall repairs and $52.50 to repair gouges in the trim.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to total monetary compensation of $366.10. The remainder of the landlord's application is dismissed without leave.

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to monetary compensation of $2,823.91 comprised of $1,373.91

for double the security deposit and interest, $1,400.00 compensation under section 51(1) and the $50.00 paid for the application. After deducting the amount owed to the landlord, I find that the tenant is entitled to receive a monetary order for $2,457.81.

I hereby issue a monetary order in favour of the tenant in the amount of $2,457.81. This order must be served on the Respondent landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

January 2010 _____

Date of Decision

Dispute Resolution Officer