



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MNDC MNSD FF

Introduction

This Dispute Resolution hearing was convened to deal with an application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act for moving costs, expenses incurred and loss of quiet enjoyment and diminished value of the tenancy. The total amount of the damages being claimed was \$1,990.87. The tenants were also seeking the return of \$200.00 from the security deposit that was withheld by the landlord and the \$50.00 fee paid by the tenant for this application.

Both the landlord and tenant were present and each gave affirmed testimony in turn.

Issues to be Decided

The tenant was seeking to receive a monetary order for the return of the security deposit retained by the landlord and monetary compensation for loss of value to the tenancy, damages and moving costs.

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

- Whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act. This determination is dependant upon the following:
 - Did the tenant pay a security deposit and pet damage deposit?
 - Did the tenant furnish a forwarding address in writing to the landlord?

- Did the tenant provide written consent at the end of the tenancy permitting the landlord to retain the security deposit or any portion thereof?
- Was any order issued permitting the landlord to retain the deposit?
- Has the tenant submitted proof that the claim for damages or loss is supported pursuant to *section 7* and *section 67* of the Act by establishing that the losses were incurred due to the actions of the landlord in violation of the Act or tenancy agreement?
 - Has the tenant proven that the amount or value being claimed is justified?
 - Has the tenant proven that the tenant made reasonable effort to minimize the damages?

The tenant has the burden of proof to establish that the deposit existed. The landlord has the burden of proof to show why the landlord had a legal right to retain the security deposit. In regards to the monetary claim for damages, the burden of proof is on the tenant/claimant.

Background and Evidence

The tenant testified that the tenancy began on October 1, 2008 and that the tenancy agreement stated that there was to be no smoking nor pets in the unit. The tenant testified that, shortly after the tenancy commenced, it was evident that the residents occupying the unit below theirs were permitted to freely smoke at will and the smoke from this unit was invading the tenant's unit. The tenant testified that as early as October 3, 2008, the landlord was contacted by telephone and told the tenant that nothing could be done about the smoking. The tenant testified that despite shutting the windows, the smoke continued to permeate the unit and was causing health issues with both occupants. The tenant testified that, in an effort to resolve the air contamination,

the tenants purchased two air purifying units at a cost of \$260.33. The receipts for this purchase were submitted. The tenant testified that by the 20th of October, the situation had become intolerable. The other residents refused to cease smoking on the balcony and the landlord would not, or could not, intervene. The tenants then verbally advised the landlord that they would be moving out as soon as possible for health reasons. The tenant testified that written notification was given to the landlord on October 28, 2008 advising the landlord that the tenants felt "*forced to break our lease*", and would be moving as of December 31, 2008. A subsequent letter to the landlord dated October 28, 2008, advised the landlord that they could not tolerate remaining for the month of November and felt it necessary to move out as soon as possible for medical reasons caused by the environment and stating that if it was possible for the landlord to find new tenants prior to November 1, 2008, the tenants would be most appreciative. Copies of this correspondence were submitted in evidence. The tenant furnished a written forwarding address to the landlord on October 31, 2008. The tenant has claimed the return of \$200.00 deposit, an abatement of \$1,400.00 for November 2008 rent paid after ending the tenancy, \$260.33 for the air filters, \$47.80 for change of address, moving expense for a co-op car for \$32.74 and reimbursement of the \$50.00 fee paid by the tenant for the application. The tenants had submitted the receipts into evidence to verify the expenditures.

The landlord testified that on October 1, 2008 the tenants entered into a fixed-term tenancy that was to continue until September 30, 2009. The landlord testified that the tenancy agreement signed by the tenant contained a liquidated damages clause providing that \$200.00 would be automatically payable should the tenant end the tenancy prematurely. A copy of this agreement was in evidence. The landlord testified that, although the suite was designated to be a no smoking unit, at no time was the building ever represented as a non-smoking building. The landlord testified that, despite learning about the tenant's problem with smoke from the balconies from nearby units, the landlord did not have the right or authority under the Act to restrict the smoking of these individuals. The landlord testified that no similar complaints had ever

been received from past occupants regarding smoke infusing the unit in question and the landlord was not aware of any means by which smoke could freely enter the unit, other than from outside of the building through open windows, a situation not within the landlord's control. The landlord testified that the tenant's written notice received on October 28, 2009, clearly stated that the tenancy would end on December 1, 2008. The landlord pointed out that, even if the landlord tried to re-rent for November 1, 2008, there was only three days of the month left during which to accomplish this. The landlord testified that it was able to mitigate its losses by finding a new tenant for December 1, 2008. In regards to the \$200.00 withheld from the tenant's \$700.00 security deposit, the landlord admitted that this was done but stated that it was pursuant to a provision within the tenancy agreement signed by the tenant in regards to liquidated damages for ending the tenancy. I note that the clause being referred to states, *"If the Tenant terminates this Tenancy before the date specified in Clause 4 of this Agreement, the Landlord shall charge and the Tenant agrees to pay the sum of \$200.00 in liquidated damages, which may be deducted from the Damage Deposit"*.

A copy of the "Statement of Damage Deposit" dated November 12, 2008, was also submitted into evidence.

.Analysis

Security Deposit Claim by Tenant

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 tenant's forwarding address a landlord must either:

- repay, as provided in subsection (8), 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 or pet damage deposit.

I find that the landlord retained a portion of the tenant's security deposit held in trust on behalf of the tenant and that the landlord did not make an application to retain the deposit or portion thereof.

The landlord had testified that the tenancy agreement signed by the parties contained a provision which allowed the landlord to automatically retain \$200.00 of the deposit as liquidated damages in the event that the tenant ended the tenancy prematurely. The landlord testified that it was following the agreement in keeping this amount from the deposit and returning the remainder. However section 20(e) of the Act, specifically prohibits the landlord from including a term that requires, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

Moreover, section 5 of the Act states that landlords and tenants may not avoid or contract out of the Act or the regulations and provides that any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that under the Act, the landlord was not entitled to retain the deposit. The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposit.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit.

I find that the portion of the tenant's security deposit wrongfully retained by the landlord was \$200.00 and that under the Act the tenant is entitled to a refund of \$400.00 which represents double the deposit.

Analysis: Damages and Compensation

Section 45 of the Act states that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that, (a) is not earlier than one month after the date the landlord receives the notice; and (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

The tenant acknowledged that under the Act and the agreement, written notice was required to be given one-month prior to vacating and based on this understanding, the tenant did pay rent for the month of November 2008. In addition, with a fixed term tenancy agreement, the tenant ending the agreement could even be responsible for any loss of rent or damages suffered by the landlord until the expiry date of the agreement. However, there is a requirement that the landlord act to minimize the losses by re-renting the vacant unit without delay, which this landlord did do.

In the case at hand, the tenant's position is that, because the unit was unfit for safe habitation, the tenant was forced to vacate the unit prior to November 2008. Therefore, despite violating the agreement, the tenant believes that the tenant should be entitled to compensation for rent paid for the period after the tenant had vacated. In regards to this claim for damages this represents the equivalent of 100% abatement for November's rent. I find that to support this claim, the tenant would need to establish that the landlord was at fault for the situation by contravening the Act in some respect.

Section 7 of the Act states that 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. Section 67 of the Act grants a

dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

Therefore in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, 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 tenant, 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 address the situation and to mitigate the damage or losses that were incurred

While there seems to be no doubt that, for the sake of their health, both tenants truly needed to vacate the unit due to a medical reaction to the smoke, I am not able to find

that the landlord was at fault for the situation and I can not pinpoint any violation of the Act on the part of the landlord in this matter. In fact, I find that the landlord was correct in stating that it did not have any power to restrict the existing tenants in regards to whether or where they could smoke. Section 14(2) of the Act does not permit a landlord to unilaterally impose new terms in an existing tenancy agreement. Based on the testimony of both parties, I find that there were no representations that the building was a smoke-free complex, although the tenants may have presumed that to be the case, in light of the fact that the tenant's own agreement restricted smoking. I find that the failure of this tenancy relationship was due to an unfortunate turn of events that caused grief and cost to the tenants and some inconvenience to the landlord as well. However, the tenant has not succeeded in satisfying all elements of the test for damages and has not met the burden of proof to support the compensation being claimed.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to total monetary compensation of \$450.00, comprised of \$400.00 for double the portion of the security deposit wrongfully retained and the \$50.00 fee paid by the tenant to file this application. I hereby grant a monetary order in the amount of \$450.00 in favour of the tenant. This order must be served on the respondent and if unpaid may be enforced in Small Claims Court if necessary.

The remainder of the tenant's application is dismissed without leave.

Dated: January 2009