



Dispute Resolution Services

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

Decision

Dispute Codes: MND MNDC MNR MNSD FF

Introduction

The hearing was convened to deal with an application by the tenant for the return of the \$450.00 security deposit under the Act. The tenant had terminated the tenancy on short notice due to safety concerns and conditions that the tenant felt made it impossible for the tenant to remain. The tenant was also seeking reimbursement for the \$50.00 fee paid by the tenant for this application.

This Dispute Resolution hearing was also convened to deal with an application by the landlord for a monetary claim for \$900.00 rent owed for the month of December 2008, \$450.00 loss of rent for the month of January 2009, \$100 owed for the quarterly payment of municipal water and \$121.00 for damage to a door.

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

Issues to be Decided for the Tenant's Application

The tenant was seeking to receive a monetary order for the return of the security deposit retained by the landlord and was also seeking to defend against the landlord's claim to keep the deposit and the landlord's claim for damages stemming from the tenant's early ending of the tenancy.

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?
- Did the tenant furnish a forwarding address in writing to the landlord?
- Did the tenant provide written consent to the landlord permitting the landlord to retain the security deposit at the end of the tenancy?
- 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 damages, payment of arrears in rent for the month of December 2008 and compensation for one month's rent loss due to inadequate notice by the tenant.

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

- Whether the landlord is entitled to monetary compensation under section 67 of the *Act* for loss of rent and damages. This determination is dependant upon answers to the following questions:
 - Has the landlord submitted proof that the specific amounts being claimed are validly owed by the tenant to this landlord?
 - 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?
 - there was a violation of the *Act* or *Agreement* by the tenant?

- has the landlord proven that the amount or value being claimed is justified and
- has the landlord made reasonable effort to minimize the damages?

The tenant has the burden of proof to establish that the deposit existed and that 15 days had expired from the time that the tenancy ended without the landlord either refunding the deposit or making application to keep it. The landlord has the burden of proof to show that compensation for rent and damages is warranted.

Background and Evidence

The landlord testified that the tenancy began on October 1, 2008 with rent set at \$900.00 per month and that a security deposit was paid in the amount of \$450.00. The landlord testified that on December 2, 2008 the landlord received a written notice that the tenant intended to vacate the unit effective December 5, 2008. The evidence included a copy of the tenant's written notice dated December 1, 2008 containing the tenant's reasons for leaving and a forwarding address. The landlord testified that the tenant did not pay rent for the month of December properly due on December 1, 2008 and that under the Act the tenant was also required to give one month notice, which the tenant failed to do. The landlord testified that the short notice resulted in a further loss of rent of \$450.00 representing one-half a month because the landlord was not able to re-rent the unit until mid January 2009, despite having advertised in the newspaper, on-line and with a notice posted outside. The landlord stated that the tenant also left without paying the quarterly charge for water in the amount of \$100.00 pursuant to the tenancy agreement signed by the tenant. The landlord testified that during the tenancy the tenant damaged a door resulting in costs of \$121.00 and submitted into evidence an invoice confirming this amount. A copy of the move-out inspection report was also in evidence signed by the tenant on December 8, 2008 and confirmed that the tenant acknowledged that a door was damaged. However on this form the tenant disputed the

landlord's claims in the assessment and indicated that the costs being claimed were excessive. The tenant also made a notation that the "*terms of tenancy contract breached*" by the landlord. The landlord's total claim was for \$1,571.00 and the landlord was asking for an order to retain the security deposit in partial satisfaction of the claim.

While the tenant acknowledged having given short notice under the Act for ending the tenancy, the tenant disputed the landlord's claim for rent for the month of December on the basis that the tenant felt that she had to move out for the safety of the family due to serious breaches of the tenancy agreement by the landlord who had allegedly informed the tenant that keys were to be given to a contractor to enter the tenant's unit at will. The tenant testified that she was aware that she could have made an application for dispute resolution to ensure that the Act was enforced. However, the tenant testified that she felt that this would take too long and decided that she must take matters into her own hands to protect the security of her family by abruptly ending the tenancy. The tenant testified that because of the landlord's serious breach the tenant should therefore not be held responsible to pay rent for the month of December 2008. In regards to the landlord's claim for rent loss for a partial month in January, the tenant disputed the landlord's testimony that reasonable efforts were made to minimize losses and did not agree that \$450.00 loss of rent was warranted. The tenant testified that the unit could have been rented for January 1, 2009, given that the landlord had almost the entire month of December to find a tenant.

The tenant also testified that the tenancy actually ended on December 5, 2008, although the tenant retained the keys and the move-out inspection was not completed until December 8, 2008. The tenant testified that the landlord was solely responsible for the delay in the inspection. The tenant disputed the costs claimed by the landlord for the door repair and testified that the charge of labour at \$40.00 per hour for two hours seemed excessive.

Analysis: Landlord's Application

Landlord's Claim for Compensation

Rent Owed

In regards to rent and water utility charges claimed by the landlord for the month of December, I note that section 26 (1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. I find that by failing to pay the rent on December 1, 2008, the tenant did not comply with the Act. I find that the tenant's defence for not paying the rent when rent was due, that being the tenant's allegation that the landlord had purportedly engaged in serious violations of the Act and agreement, even if true, still would not release the tenant from this obligation under the Act. Therefore, I find that the landlord was also entitled to monetary compensation for the rental arrears for the month of December 2008.

Under the tenancy agreement, the tenant was required to pay a quarterly flat fee for water usage in the amount of \$100.00 for the period from October 1, 2008 until December 31, 2008. This was not paid. The tenant ended the tenancy prior to the end of December and I find that the water usage would have ceased near the beginning of the month. Accordingly, I find that the landlord is entitled to be reimbursed a proportionate amount of \$66.00 for the water utilities.

Loss of Rent and Damages

The landlord also claimed a loss of rent and damages. In regards to an Applicant's right to claim damages from the another party, 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.

I find that 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 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 address the situation and to mitigate the damage or losses that were incurred.

Section 45 of the Act states that a tenant may end a periodic tenancy by giving the landlord written 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.

I find that under the Act, a notice to end tenancy given by the tenant on or after December 1, 2008, would not be effective before January 31, 2009 and I find that the tenant would be responsible for any loss of rent during that period.

I find that the tenant ended the tenancy without proper notice under the Act which would leave the tenant liable to compensate the landlord for losses incurred, with the proviso that the landlord must do whatever is reasonable to minimize the loss.

The landlord testified that the unit was advertised extensively and claimed that a rent reduction was necessary to finally get the unit rented. The tenant disputed the landlord's claims.

I note that the burden of proof is on the claimant that the landlord did not provide evidence of the advertisements, nor of the mid-month rental. That being said, it is evident that the landlord must have made some effort to re-rent, otherwise the unit would have remained vacant for the month of January 2009. On this basis, I find that the landlord has met the landlord's obligation to take steps to reduce the loss. Despite the absence of supportive evidence on mitigation, I find that each of the four elements of the test for damages have been satisfied. Therefore I find that the landlord is entitled to be reimbursed a portion of lost of rent in the amount of \$300.00.

In regards to the damaged door, I find that the landlord must be compensated a proportionate amount of \$90.00 in recognition of the fact that the replacement door was new and the damaged door was several years old.

Analysis: Tenant's Application

Return of Security Deposit

The landlord has made application to retain the deposit for claimed damages and rent owed while the tenant has made application for the return of the security deposit.

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.

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. The tenant's testimony and the evidence submitted by the tenant offered verification that the tenancy ended on December 5, 2008. If this is found to be true, then the landlord's application for dispute resolution requesting an order that the deposit be retained by the landlord must have been filed on or before December 20, 2008, otherwise, according to section 38, the landlord would be required to repay double the deposit to the tenant.

The landlord testified that although the tenant's written notice specified that the tenancy would end on December 5, 2008, the tenant retained the keys and was in sole possession of the unit until the actual move-out inspection was completed. Evidence and testimony from both parties confirmed that this occurred on December 8, 2008.

Based on the above, I find that the landlord would have been required to either return the deposit or file an application to keep the security deposit to satisfy a debt or damages, by December 23, 2008. Records show that the landlord's application was received by Residential Tenancy Branch on December 22, 2008.

In regards to a tenant's right to the return of the deposit, regardless of any other factors, the deposit is always considered to be funds held in trust for the tenant. In this instance, I find that, under the Act, the landlord is validly entitled to retain the deposit in partial satisfaction of the compensation owed to the landlord by the tenant and I find that

the tenant's claim for the return of the deposit and reimbursement of the filing fee must therefore be dismissed.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to total monetary compensation of \$1,406.00, comprised of \$900.00 rent owed for the month of December 2008, \$66.00 water utilities owed from October 1, 2008 until December 8, 2008, \$300.00 partial loss of rent for the month of January 2009, \$90.00 compensation for the damage to the door and \$50.00 for the fee paid for this application.

I order that the landlord retain the security deposit and interest of \$451.70 in partial satisfaction of the claim, leaving a balance due of \$954.30. I hereby grant the Landlord an order under section 67 for \$954.30. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The tenant's application is dismissed in its entirety without leave to reapply.

Dated: January 2009