Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNR Monetary Order for Rent Owed

MNSD The Return 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 landlord for a monetary order to retain the security deposit for damages and loss and reimbursement for the cost of filing this application. The hearing was also convened to hear a cross-application by the tenant to obtain a monetary order for money owed or compensation for damage or loss under the Act, for the return of the tenant's security deposit and reimbursement for the cost of filing this application.

Issues to be Decided for the Landlord's Application.

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

- Whether the landlord is entitled to retain the security deposit as compensation under section 67 of the *Act* for loss of rent and damages. This determination is requires answers to the following questions:
    - When did the tenancy end and when did the tenant provide the forwarding address in writing?

- Has the landlord proven 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 in violation of the Act.

    - verifiable proof that the landlord made reasonable effort to minimize the damages under section 7(2) of the Act

Issues to be Decided for the Tenant's Application

The tenant was seeking compensation for loss to the value of the tenancy and reimbursement for loss of enjoyment of the suite. The issues to be determined based on the testimony and the evidence are:

- Whether or not the tenant was entitled to a reduction in rent based on the landlord's restriction of, or failure to provide, services and facilities that were required by the Act or included in rent as part of the agreement.

- Whether the tenant is entitled to monetary compensation under section 67 of the *Act* for loss of rent and damages by proving that the claim for damages or loss is supported and establishing:

    - Proof that the damages or losses were incurred due to the actions of the landlord in violation of the Act or Agreement

    - proof by the tenant that the actual amount or value being claimed is justified

    - proof that the tenant made reasonable effort to minimize the damages under section 7(2) of the Act

For the landlord's application, the landlord has a burden of proof to establish that the tenant failed to comply with the Act and that this failure resulted in damages or losses for the landlord that would permit the retention of the security deposit and that the landlord made application to keep the deposit within 15 days of receiving the tenant's forwarding address..

To support the tenant's application, the tenant has the burden of proof to establish that the landlord failed to fulfill the landlord's duties under the Act and that this caused a reduced value of the tenancy or resulted in damages and losses for which the tenant should be compensated.

Preliminary Matter

The tenant has raised the concern that the parties named by the landlord in the landlord's application are not correct. The tenant pointed out that the first name of the second respondent shown in the application should be changed. The tenant pointed out that there are three additional tenants that were not included by the landlord in the landlord's application, but who are parties in this dispute.

In regards to the wrongly named tenant, the parties have agreed to amend the landlord's application to correct the first name. In regards to the additional parties, I note that only one individual signed the tenancy agreement and that paragraph 17(h) specified that only the tenants who are named on the tenancy agreement would be considered as tenants unless a written request to add new tenants was received and approved in writing by the landlord. I find that the evidence did not include any written notification by the tenant to the landlord requesting that additional tenants move in, nor was any evidence submitted verifying that the landlord agreed in writing to add new tenants to the agreement. Therefore, I find that the first individual named in the landlord's application is the only party to the tenancy agreement with this landlord.

Another preliminary issue raised by the tenant was that the landlord's company was not registered. The definition of landlord for the purpose of the Act is as follows:

"landlord", in relation to a rental unit, includes any of the following:

(a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,

(i) permits occupation of the rental unit under a tenancy agreement, or

(ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;

(b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);

(c) a person, other than a tenant occupying the rental unit, who

(i) is entitled to possession of the rental unit, and

(ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;

(d) a former landlord, when the context requires this;

Therefore I find that the parties shown as “applicant” on the landlord’s application including both the named individual with whom the tenant dealt and the business name that was indicated meet the definition of landlord, regardless of whether or not the company name was registered.

Background and Evidence – Landlord’s Application

The landlord testified that the tenancy began in August 2008 and that the parties entered into a fixed-term tenancy agreement expiring on July 30, 2009, with rent set at $2,200.00 per month. The landlord testified that that a security deposit was paid by the tenants in the amount of $1,100.00. The landlord testified that the tenant paid rent for the month of December 2008 but then on December 11, 2008, suddenly gave notice to move effective December 14, 2008. The landlord submitted into evidence a copy of the tenancy agreement and a copy of the tenant’s notice ending the tenancy. The landlord also submitted a copy of the move-in inspection report dated August 8, 2008, signed by both the landlord and tenant showing that the unit was in “good condition” and “fair

condition" except for some missing light bulbs and lampshades. The landlord testified that the landlord's claim is based on the fact that the tenant violated the tenancy agreement by ending the tenancy prior to the expiry date. Although the landlord made attempts to rent the unit for January 1, 2009, he was not successful and incurred a loss of one-month's rent for January in the amount of $2,200.00. The landlord testified that his efforts to re-rent included advertising the unit by posting the vacancy at the college campus, on Craig's List and with other free on-line resources. The landlord did not submit any copies of these advertisements. The landlord testified prior to the tenant moving out, the landlord was notified of a mold problem and that this complaint was addressed without delay and that all of the necessary repair work was completed between December 19th, 2008 and December 26th, 2008. The landlord testified that efforts to re-rent were not delayed by the landlord's repair work on the unit. The landlord testified that the showing of the unit was impeded during December by the fact that the tenant's possessions were still on site for a period of time after the tenant had vacated. The landlord testified that the unit was finally re-rented for February 2009. However, the landlord did not supply evidence verifying the date that the new tenancy began.

The tenant agreed that the tenant ended the tenancy in mid-December prior to the expiry date of the fixed term, but that this was done for health and safety reasons due to a serious violation of the Act by the landlord in failing to prevent and correct a mold problem that was reported by the tenant to the landlord on December 6, 2008. The tenant testified that moving out was the only option due to the dangers presented by mold spore contamination that could occur during the repair work. The tenant testified that the landlord did not consult an expert and this task therefore fell to the tenant, in order to protect his own interests. The tenant had submitted a report from a Certified Residential Mold Inspector offering an opinion that the "indoor environment in the home poses a health risk." To the tenant, this report constituted a clear indication that it was not safe to remain in the unit during the repairs. The tenant testified that while the landlord did initiate repairs, the landlord would not negotiate providing alternate accommodation nor accept any input from the tenant's in regards to how and by whom

the repair work should proceed. The tenant testified that the landlord did offer to permit the tenant to inspect the quality of repair work after-the-fact. However the tenant was aware that once the wall was closed in, particularly if the remedial work did not involve a mold-removal specialist, there would be no way to determine whether or not the problem was completely eradicated and the mold could continue to grow unseen. The tenant testified that it was clear that the drywall contractors hired by the landlord were not qualified to remediate the serious and extensive mold problem that existed in the unit. The tenant pointed out that the contractors did not wear any protective gear such as filters to prevent inhaling the microbial spores while on the job. The tenant was of the opinion that returning to the unit, even after the landlord's workers had finished would not likely be safe, given that detecting the return of mold, should it occur, would involve a long period of time during which the tenant would again be exposed to the hazards. The tenant's witnesses supported the tenant's testimony.

The tenant challenged the landlord's claim that reasonable efforts were made to re-rent the unit without delay, pointing out that the landlord had half a month during December to find another tenant for January 1, 2009. The tenant disputed the allegation that the tenant's possessions impeded re-renting and testified that the items were stored in the garage.

Analysis – Landlord's Application

The landlord has requested retention of the security deposit as partial satisfaction for damages and losses being claimed by the landlord.

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 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.

In this instance, the landlord made an application to retain the security deposit based on the fact that the tenant violated the tenancy agreement by ending the tenancy prior to the expiry date and losses suffered as a result. Regardless of any other factors, the deposit is always considered to be funds held in trust for the tenant and the landlord only has the right to retain the deposit if the landlord establishes a valid claim of loss or damages and receives a monetary order to retain the deposit in partial satisfaction of the compensation found to be owed to the landlord by the tenant.

In the matter before me, I find that the tenant gave inadequate notice under the tenancy agreement and that this violation resulted in a loss to the landlord.

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:

<u>Test For Damage and Loss Claims</u>

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

I find that the tenant did commit a violation of the agreement and the Act. Even without a lease, under the Act a tenant must give written notice of one month and it must also be effective the day before the day rent is due. In this instance, where notice was given in mid-December, the effective date could not be earlier than January 31, 2009. Section 45(2) of the Act stats that a tenant may end a fixed term 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,
>
> (b) **is not earlier than the date specified in the tenancy agreement as the end of the tenancy,** and
>
> (c) 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. (my emphasis).

I find that the tenant's notice was inadequate under the agreement as the termination of the tenancy was not in compliance with the terms agreed-upon by the parties. Therefore, under normal circumstances, the tenant would be liable for any damages or losses incurred due to this violation.

The tenant has defended this action. However, any contravention of the Act or agreement by one party does not automatically indemnify the other party against its own violations. I do not accept the tenant's argument that the tenant's violation was somehow excused due to the landlords' alleged failure to comply with the Act or

agreement. Even if the landlord was found to be in violation of the Act, there is no provision in the Act that extends immunity for a reciprocal breach on the part of a tenant. I find that, regardless of what transgressions may or may not have existed, the tenant did not have the right to operate outside of the Act or agreement, including arbitrarily ending the tenancy prior to expiry of the fixed term or at the very least without adequate notice.

Therefore, it is clear that elements one, two and three of the test for damages have been met. In regards to the landlord's obligation under section 7 of the Act to take reasonable steps to mitigate the damages and loss, I find that although the landlord did not provide evidence of the advertising, the landlord engaged in some effort to mitigate the loss, by virtue of the fact that the landlord did succeed in re-renting the unit for February 2009.

However, I also find that the landlord's ability to re-rent would likely have been delayed for a week or two by the remedial construction work going on in December 2008. The landlord's testimony was that for period of approximately one week, between December 19 and 26th, the landlord was repairing the unit.

In regards to the amount of the loss attributable to the tenant's actions, I find that the landlord's entitlement for loss of rent for the month of January would be restricted to a partial amount because of the delay in the re-rental process imposed by the construction process and find that compensation is warranted for half of January and I find that the monetary entitlement for damages and losses should be set at $1,100.00.

Background and Evidence – Tenant's Application

The tenant testified that mold was discovered on December 5, 2008 and that the tenant contacted the landlord. Later, the tenant engaged a qualified mold inspector who examined the premises and advised the tenants to stay elsewhere until the mold remediation was completed. In evidence was a one-page report from a Certified Residential Mold Inspector dated December 5, 2008 stating that the mold growth poses

a health risk. The tenant testified that the landlord attended the property on December 8, with a contractor. The tenant testified that the expectation was that the landlord would proceed to deal with the mold situation in a timely and appropriate manner. On December 10, 2008, the tenant communicated with the landlord confirming that the landlord must engage a specialist in mold remediation, that the tenants need to be kept informed and that alternate accommodation would be required. However, it became clear to the tenant that the landlord had not employed specialists in mold removal and prevention, but had instead hired construction tradespersons specializing in drywall and wall replacement. The tenant testified that the residents in the unit expressed concerns regarding this but that their objections were ignored by the landlord. The landlord rejected the idea that a mold expert should oversee the work and that the tenant and residents should be offered alternate accommodation during the mold removal. The tenant felt that the landlord's suggestion that the remediation work be inspected afterwards was unreasonable. The tenant believed that once the new drywall had covered the area, there would be no way to know whether the mold was completely eliminated and prevented from returning. The tenant testified that the landlord was not sensitive to the tenant's genuine health concerns, in particular the possible exposure to mold spores during the repair work, and merely commented that if the tenant was not satisfied with the landlord's handling of the situation then perhaps the tenant should "just pack up and leave".

The tenant felt that there was no other choice but to end the tenancy and on December 11, 2008 the tenant provided written notice that the tenant would be vacating the unit on December 14, 2009. The tenant 's position is that the tenant was forced to end the tenancy early because of the landlord's failure to maintain the unit by preventing the pervasive mold problem and the landlord's subsequent failure to properly address the mold problem once it was discovered. The tenant stated that the landlord contravened section32 of the Act which states that landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law making it suitable for occupation by a tenant. The

tenant pointed out that a suite with mold would not be suitable for occupation by a tenant by virtue of the serious health risks associated with mold infusion. In damages, the tenant is claiming a rent abatement for the total rent paid during the five months that the tenant had occupied the unit from August 1, 2008 until December 31, 2008 at $2,200.00 per month totalling $11,000.00.

The tenant testified that the landlord failed to conduct a move-out condition inspection and as such the landlord is not entitled to make a claim against the security deposit. The tenant is claiming for the return of the security deposit of $1,100.00 and interest The tenant has also made a claim for the $100.00 cost of filing the tenant's application.

Tenant's Application – Analysis

The tenant has acknowledged terminating the agreement prior to its expiry.

The tenant's Notice of Termination dated December 11, 2009, identified section 45(3) as the basis for ending the tenancy. The notice indicated that that the "*REASON FOR TERMINATION*" was "*The failure of the Landlord to provide and maintain residential property in state of decoration and repair to comply with the health, safety and housing standards required by law: including presence and inadequate safeguards against conditions of contamination by mold*."

However, I find that section 45(3) only applies if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure.

I find that the discovery of and subsequent reporting of mold occurred on December 5, 2008 and that the landlord's initial intervention began on December 8, 2009, only three days later. The first written notice to the landlord regarding this matter was an email dated December 10, 2008 recapping and confirming conversations between the parties on this subject. I find that the landlord did not unduly delay addressing the problem after it was reported. Moreover, by ending the tenancy on December 11, 2008, I find that the tenant failed to afford the landlord a reasonable amount of time in which to

address the issue of concern. Therefore, I find that the criteria under section 45(3) was not sufficiently met.

I also find that there was no violation of section 32 of the Act by the landlord for most of the tenancy. There was no evidence presented that the landlord was aware of a problem with mold prior to December 5, 2008. In fact, even the residents did not discover mold infusion prior to that date. I find that, once the problem was reported, the landlord did not unduly delay in taking action, albeit not the course of action that the tenant would have preferred. In order to find a landlord in noncompliance with a section 32 of the Act, it would be necessary for the tenant to establish proof that the landlord knew about problems making the suite unsuitable for safe occupation and refused to correct the problem. I find that this was not established and I must reject the tenant's claim for 10% rent abatement for the four months preceding the discovery of mold.

In regards to the month of December, 2008, I find that the facts, evidence and testimony from both parties do support a determination that the suite, at the very least, could not be inhabited for health reasons during the actual remedial work regardless of the fact that the construction was localized in certain areas. I accept the evidence put forth by the tenant showing that there are medical risks associated with exposure to mold spores during the removal process. Moreover, I find that during the short period preceding the mold remediation from December 5, 2008 to December 19, 2008 that involved the inspection of the internal walls and the removal of some drywall to inspect the situation, the tenant had some valid concerns about remaining in the unit. In fact, the tenant's concerns were sufficient to cause the tenant to contact a mold specialist, an action that evidently did not interest the landlord. Although during the hearing the landlord did state that he was not adverse to finding alternate accommodation for the tenants, I found no evidence that the landlord offered, or even indicated a willingness to negotiate this subject.

I find that the tenancy was disrupted by the discovery of mold on December 5th, 2008 and that the tenancy was significantly devalued by that particular turn of events. While

the tenant may have violated the agreement by terminating the tenancy, the fact is, that even if the tenant had honored the agreement and preserved the tenancy, including acceptance of the repairs, the value of the tenancy would still have been impacted during the period from December 5, 2008 until the end of the month. I find that the tenant had paid full rent for the month of December for a period during which the tenancy was seriously devalued. I find that this would warrant a rent abatement of 75% for the month of December in the amount of $1,650.00.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to damages in the amount of $1,100.00 for loss of rent for a portion of the month of January 2009. I order that the landlord retain this amount from the security deposit and interest of $1,109.29 satisfaction of the claim leaving a balance due of $9.29 in favour of the tenant. The remainder of the landlord's application is dismissed without leave.

I find that the tenant has established entitlement to monetary compensation under section 67 of the Act in the amount of $1,659.29, comprised of $1,650.00 rent abatement for the devaluation of the tenancy in December 2008 and $9.29 for the remaining security deposit owed to the tenant. I hereby grant the Landlord a monetary order for $1,659.29. 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 remainder of the tenant's application is dismissed without leave.

Each party will bear its own filing costs.

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March, 2009 _____

Date of Decision Dispute Resolution Officer