

DECISION

Dispute Codes OPR MNSD MNR MND FF
 MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for an Order of Possession, a Monetary Order to keep all or part of the security deposit, for unpaid rent or utilities, for damage to the unit, and to recover the filing fee from the tenants.

Service of the hearing documents, by the landlord to the tenants, was done in accordance with section 89 of the *Act*, sent via registered mail on March 20, 2009. The tenant's were deemed to be served the hearing documents on March 25, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The landlord and tenants appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

Preliminary Issues

At the onset of the hearing the tenants advised that they had filed a cross application on April 27, 2009, for dispute resolution which included evidence in response to the landlord's application. After a brief discussion all parties were in agreement to hear both applications, as cross applications, even though the landlord had not yet been served with a copy of the tenant's application and evidence. So as not to prejudice one party over another the Dispute Resolution Officer read the evidence being considered over the telephone and a copy of the tenants' evidence from their cross application will be attached to this decision.

Issues(s) to be Decided

The issues to be decided on the landlord's application, based on the testimony and the evidence are:

- Whether the landlord is entitled to an Order of Possession under Section 55 of the *Residential Tenancy Act (Act)* for cause
- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent, for damages to the property
- Whether the landlord is entitled to a Monetary Claim under section 38 of the *Act* to keep all or part of the security deposit and to recover the filing fee from the tenant pursuant to section 72 of the *Act*

The issues to be decided on the landlord's application, based on the testimony and the evidence are:

- Whether the tenants are entitled to a Monetary Order for return of double of their security deposit pursuant to section 38 of the *Act*
- Whether the tenants are entitled to recover the filing fee for their application pursuant to section 72 of the *Act*

Background and Evidence

The tenancy was for a 1 year fixed term commencing on January 01, 2009 with rent of \$1,200.00 payable on the first of each month. The tenants paid a security deposit of \$600.00 on December 18, 2008. When the tenants took possession of the rental unit the landlord and tenant's came to a verbal agreement that \$600.00 rent would be paid on the 2nd of each month and \$600.00 rent would be paid on the 16th of each month.

The landlord advised that the tenants' rent payments bounced on January 2, 2009, January 16, 2009 and February 2, 2009. A chart below displays the payment history of the tenants' rent payments:

DESCRIPTION	CLEARED OR BOUNCED	BALANCE DUE
Dec. 18/09 Security Deposit Paid \$600.00	Cleared	\$0.00
Jan. 02/09 Rent Payment by Chq \$600.00	Bounced	600.00
Jan. 09/09 Rent Payment in Cash \$600.00	Cleared	0.00
Jan. 16/09 Rent Payment by Chq \$600.00	Bounced	600.00
Jan. 16/09 Rent Pymt by money order \$600.00	Cleared	0.00
Feb. 02/09 Rent Payment by Chq \$600.00	Bounced	600.00
Feb. 06/09 Rent Pymt by direct deposit \$600.00	Cleared	0.00
Feb 16/09 – no rent payment made		600.00

The landlord testified that a 1 Month Notice to end Tenancy, dated February 3, 2009, was sent registered mail to the tenants. The landlord did not know the exact date the registered mail was sent and did not have receipt numbers available. The tenants testified that they received the 1 Month Notice to End Tenancy on February 9, 2009.

The tenants did not apply to dispute the 1 Month Notice to End Tenancy, and testified that the landlord informed them on February 6, 2009 that an eviction notice was in the mail. The tenants stated that they tried to negotiate with the landlord so they could stay but the landlord refused. The tenants informed the landlord during the February 6, 2009 conversation that they would be out of the rental unit by the end of February 2009.

The tenants advised that they dealt with the landlord's Uncle when paying rent and if they had any issues with the rental property.

The tenants testified that they vacated the rental unit on February 27, 2009 and went to the landlord's Uncle's home to deliver the keys. The Uncle was not around so they left

the keys in the mailbox and then e-mailed the landlord a few minutes later to advise him that they had vacated the unit and that the keys were in the landlord's Uncle's mailbox .

The tenants stated that they e-mailed their forwarding address to the landlord during the first week of March 2009.

The landlord confirmed the tenant's testimony, and advised that the keys were located in the mail box on February 27, 2009.

The landlord has withdrawn his claim for an Order of Possession as the tenants have vacated the rental unit.

The landlord is requesting a monetary claim for damages caused to an exterior front window. The landlord claims that the exterior window was not broken when the tenants took possession of the rental unit and that it has cost him \$350.12 to replace the window.

The tenants testified that the move-in inspection took place during the evening on December 19, 2009 and included only the inside of the rental unit. The tenants stated that it was dark outside and they did not do a walk around the exterior with the landlord. The tenants advised that the rental unit was not vacant when they did the walk through as many of the landlord's possessions were still in the rental unit.

The tenants advised that they picked up the keys to the rental unit, from the landlord's Uncle, on December 31, 2009 but did not take possession until they moved in on January 1, 2009. The tenants testified that when they first arrived at the rental unit they noticed that the exterior window by the front door was cracked. The tenants submitted signed statements from witnesses, who assisted them with their moving into the rental unit, and who saw the cracked window.

The landlord confirmed that he vacated the rental unit on December 19, 2009 and that it sat vacant until the tenants moved in on January 1, 2009. The rental house is located

approximately 20 – 30 feet from a main roadway and there are no hedges or trees in front of the house.

The landlord has withdrawn his claim of \$50.00 for NSF fees as his bank did not charge him for the returned cheques.

The landlord testified that he is requesting \$250.00 in cleaning fees as he had to vacuum the carpet and wash the windows after the tenants moved out.

The tenants testified that they left the house clean, that they had vacuumed the carpet, and that the windows were in exactly the same condition as they were when they moved in 8 weeks prior to their move out.

The landlord is requesting \$481.25 in travel costs as he flew from his residence to the rental unit to try and re-rent the unit. The landlord stated that he hadn't planned to come back to the rental unit for one year, when the tenancy ended and so he felt he should have his travel costs reimbursed.

The tenants testified that the landlord did not contact them to request a move-out inspection and they have not received their damage deposit back. The tenants are claiming for double the security deposit and to recover their filing fee.

Analysis

In regards to an Applicant's right to claim damages from the Respondent, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, 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 sections 33 and 67 of the *Act*, the Applicant tenant 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 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

1. Landlord's Application

The landlord withdrew his request for an Order of Possession.

The landlord withdrew his claim of \$50.00 to recover NSF fees.

In this instance, the burden of proof is on 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 tenant.

The landlord is claiming \$600.00 for unpaid rent for February 2009. Based on the verbal testimony from both parties the tenant's occupied the rental unit for the full month of February 2009 and paid only half of the monthly rent. Based on the foregoing I find in favor of the landlord's claim for \$600.00 of unpaid rent.

The landlord has claimed a loss to repair an exterior window. The landlord failed to conduct an exterior move-in inspection, left the rental unit unattended for a period of twelve (12) days prior to the tenants taking possession, and there is no documentary evidence to support that the window was broken during the time that the tenants had

possession of the rental unit. The landlord provided evidence that the window was broken and the actual cost to repair the window however I find that the landlord has not proven that this damage or loss happened solely because of the actions or neglect of the tenants in violation of the *Act* or agreement. Based on the foregoing I am dismissing the landlord's claim without leave to reapply.

The landlord is requesting a monetary claim of \$250.00 to clean the rental unit. In the absence of documentary evidence to support that the rental unit was not cleaned by the tenants and that it cost the landlord \$250.00 to have it cleaned, I dismiss the landlord's claim without leave to reapply.

The landlord is claiming \$481.25 in travel costs to cover his expenses for having to come to the rental unit when the tenant's moved out. The testimony confirmed the landlord's statement that he was living in a different Province; however the landlord had a relative in the same town as the rental unit with whom the tenants paid rent to and whom the tenants were instructed to contact for assistance with the rental unit. One could question why the landlord did not request the assistance of his relative to re-rent the rental unit. The landlord claimed he wasn't prepared to return to the rental unit until the end of the one year lease so feels the tenant's should bear the cost of his flight, yet the tenants moved out of the rental unit because the landlord issued a Notice to End Tenancy and refused to negotiate to have the tenants remain. I find that the landlord has failed to prove that he suffered a loss solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement, and failed to mitigate his losses by enlisting the assistance of his relative to re-rent the unit. I hereby dismiss the landlord's claim without leave to reapply.

The landlord has not been primarily successful and so I cannot find in favor of his request to recover the filing fee and hereby dismiss his claim without leave to reapply.

2. Tenant's Application

The tenants are requesting the return of double their damage deposit. The landlord failed to retain the security deposit on March 14, 2009 which is within 15 days of the

landlord receiving the tenants' forwarding address. As the landlord complied with the *Residential Tenancy Act* in applying to retain the security deposit, I hereby dismiss the tenants' application.

The tenants had applied to recover the cost of the filing fee from the landlord. There is documentary evidence that confirms that the tenants qualified for a fee waiver and did not pay a fee. I find that there is no fee to recover as the fee was never paid, and I hereby dismiss the tenants' claim to recover the filing fee.

Conclusion

1. Landlord's Application

The landlord withdrew his request for an Order of Possession.

The landlord withdrew his claim of \$50.00 to recover NSF fees.

I HEREBY find in favour of the landlords Monetary Claim of \$600.00 for unpaid rent to be offset against the tenants' security deposit.

I HEREBY DISMISS the landlord's claim for repair costs to replace the exterior window, without leave to reapply.

I HEREBY DISMISS the landlord's claim for cleaning costs without leave to reapply.

I HEREBY DISMISS the landlord's claim for travel costs without leave to reapply.

I HEREBY DISMISS the landlord's request to recover the filing fee without leave to reapply.

2. Tenant's Application

I HEREBY DISMISS the tenants' application for double the damage deposit, without leave to reapply.

I HEREBY DISMISS the tenants' request to recover the filing fee, without leave to reapply.

I HEREBY GRANT a Monetary Claim in favour of the landlord in the amount of \$600.00 and Order that the claim be setoff against the security deposit of \$600.00 plus interest of \$0.32, leaving \$0.32 payable to the tenants.

As the balance owing to the tenants is less than \$1.00, an official Order will not be issued.

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: April 30, 2009.

Dispute Resolution Officer