

DECISION

Dispute Codes MNR MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord to obtain a Monetary Order for unpaid rent, to retain the security deposit in partial satisfaction of their claim, and to recover the cost of the filing fee for this application from the tenant.

Service of the hearing documents, by the landlord to the tenant, was done in accordance with section 89 of the *Act*, sent via registered mail on March 25, 2009. Proof of Canada Post receipt numbers were provided in the landlord's evidence. The tenant was deemed to be served the hearing documents on March 30, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Both the landlord and tenant 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.

Issues(s) to be Decided

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

- Whether the landlord is entitled to a Monetary Order under section 67 of the *Act* for unpaid rent
- Whether the landlord is entitled to an order to retain the security deposit in partial satisfaction of their claim pursuant to section 38 of the *Act*

Background and Evidence

The tenancy was a month to month tenancy which began on November 15, 2000 and ended on February 28, 2009. Rent was payable on the first of each month in the

amount of \$835.00 and the tenant paid a security deposit of \$340.00 on October 14, 2000.

The landlord testified that the tenant provided written notice to end tenancy in a letter dated February 3, 2009 which the landlord stated was not received until February 4, 2009.

The landlord stated that she submitted into evidence a copy of a late notice to vacate form that was signed by the tenant on February 4, 2009 whereby the tenant agreed to pay March 2009 rent if the unit was not re-rented for the month of March 2009.

The landlord testified that an agreement was signed on March 17, 2009 to re-rent the unit effective April 1, 2009.

The landlord is submitting a claim for lost rent for March 2009 in the amount of \$835.00 and is requesting to retain the security deposit in partial satisfaction of their claim.

The tenant testified that she did submit notice to end tenancy late, in her February 3, 2009 letter, and that she did sign the "late notice to vacate" form.

The tenant stated that she feels the landlord did not meet their obligation to advertise the rental unit to try and re-rent the unit as quickly as possible and that the tenant should not be penalized because the landlord did not act quicker. The tenant testified that while the landlord had advertisements in the newspaper they were only for a 1 bedroom unit while her previous unit was a two bedroom unit. The tenant stated that she called the building manager and confirmed that they had not advertised the unit she was renting and that the tenant did not see an advertisement for a 2 bedroom unit in her old building in the paper until March 18, 2009.

The landlord disputed the tenant's testimony and asked how they could have signed an agreement to re-rent the unit on March 17, 2009 if they made no effort to do so until

March 18, 2009. The landlord testified that while the advertisements in the paper only listed a 1 bedroom unit, in error, that the 2 bedroom unit was shown to all prospective tenants.

Analysis

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant landlord 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, in this case the landlord, bears the burden of proof and the evidence furnished by the Applicant landlord 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

In regards to the landlord's right to claim damages from the tenant, 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.

Section 45 of the *Residential Tenancy Act* stipulates that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is the day

before the day in the month that rent is payable under the tenancy agreement. In this case I find that in order to comply with the *Act*, the tenant's notice would have had to been received by the landlord on January 31, 2009. As the notice was not received by the landlord until February 4, 2009 I find that the tenant has contravened the *Act* by ending the tenancy on February 28, 2009. Based on the aforementioned I find that the landlord has met the test for damage or loss as listed above and I hereby rule in favor of the landlord's claim for 1 month loss of rent for March 2009 in the amount of \$835.00.

The tenant contends that the landlord did not advertise the rental unit quickly enough and the tenant feels the landlord did not do whatever is reasonable to minimize their loss pursuant to section 7 of the *Residential Tenancy Act*. There was contradictory testimony in relation to this matter provided by the landlord. There was no definitive documentary evidence provided by either party to substantiate their testimony in relation to when the rental unit was advertised or shown to prospective tenants.

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.

The landlord filed an application to keep the tenant's security deposit on March 25, 2009. The documentary evidence proves that the tenant faxed her forwarding address to the landlord's office on Monday March 9, 2009 at 02:03 p.m. The landlord put their received stamp on the fax as a day later, March 10, 2009.

Section 38(6) of the *Act* stipulates that if a landlord does not make application for dispute resolution claiming against the security deposit within 15 days after the later of when the tenancy ended or when the tenant's forwarding address was received, then the landlord must pay the tenant double the amount of the security deposit.

Based on the evidence before me, I find that the tenant's forwarding address was received in the landlord's office on Monday March 9, 2009 at 2:03 p.m. and that the

landlord has failed to comply with section 38 (1) of the *Act*, as their application for dispute resolution was filed 16 days after receiving the tenant's forwarding address. Based on the above I hereby order the landlord to refund double the tenant's security deposit.

As the landlord has not primarily been successful in their application I hereby dismiss their claim to recover the cost of the filing fee from the tenant for this application.

Monetary Order – I find that both the landlord and tenant are entitled to a monetary claim to be offset against each other as follows:

Security Deposit Refund payable to the tenant @ double 340.00 x 2	\$680.00
Interest owed on the security deposit of \$340.00 from Oct. 14, 2000	<u>24.19</u>
TOTAL AMOUNT DUE THE TENANT	704.19
Monetary Award Due the Landlord for Loss of March 2009 Rent	<u>835.00</u>
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$130.81

Conclusion

I HEREBY FIND in favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for \$130.81. The order must be served on the respondent tenant and is enforceable through the Provincial Court as an order of that Court.

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: May 27, 2009.

Dispute Resolution Officer