

DECISION

Dispute Codes MND MNR MNSD MNDC FF

Preliminary Issues

The landlords testified that they had submitted documentary evidence to the residential tenancy branch in support of their claim however there was no evidence on file or scanned into the computer file system. The tenants confirmed receipt of a copy of the landlords' documentary evidence and each tenant confirmed receipt of the Notice of Dispute Resolution Hearing.

Introduction

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

Service of the hearing documents, by the landlords to the tenants, was done in accordance with section 89 of the *Act*, sent via registered mail on March 13, 2009. Mail receipt numbers were provided in the landlord's verbal testimony. The each tenant was deemed to be served the hearing documents on March 18, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The landlords 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.

Issues(s) to be Decided

Are the landlord's entitled to a Monetary Order under Sections 38, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

This was a month to month tenancy which began on March 1, 2008 and ended on February 28, 2009. Rent was payable on the first of each month in the amount of \$1,750.00 and \$875.00 security deposit was paid by the tenants on March 1, 2008.

The landlords testified that a move-in inspection report was conducted on March 14, 2008 and a move-out inspection report was completed on February 28, 2009 which had one deficiency listed which related to cigarette smoke odour inside the rental unit.

The tenants testified and confirmed that the above information was correct and that they had signed the move-out inspection report stating that they did not agree with the issues surrounding the cigarette smoke odour inside the rental unit. The tenants advised that they provided the landlord with their forwarding address on February 28, 2009 and wrote it on the move-out inspection report.

The landlords stated that they are withdrawing their claim item #7 of \$391.10 for payment on the remaining Columbia Fuel bill as the tenants have now paid the balance due.

The landlords testified that when the tenants first moved in they had an arrangement with the landlords where the tenants would assume responsibility for the \$160.00 per month fuel costs and the fuel bill would stay in the landlords' names. The tenants issued a cheque of \$160.00 on September 17, 2008 as the monthly payment however the landlords lost the cheque before cashing it. The tenants agreed to put a stop payment on the lost cheque for a cost of \$10.00 and the tenants would reissue another payment in the amount of \$150.00. The landlords stated that the tenants have not reissued that payment.

The tenants testified in agreement to the events involving the lost fuel payment and agreed that they owed the landlords \$150.00 for the September 2008 fuel payment.

The landlords testified that at the onset of the tenancy the tenants were advised that the city utilities had to be put in their own name and that the male tenant told the landlords that he was experienced in changing over the utilities and that he would look after doing that. The landlords stated that the utilities in question were for water, sewer, and garbage pick up, billed from the city and mailed to the rental unit. The landlords testified that they were shocked when they received an overdue invoice of \$208.80 and a notice that an additional amount of \$289.04 was being transferred to property taxes for overdue utilities. The landlords stated that they had no idea that these utilities were not changed into the tenants' names as required, as the bills would have been sent to the rental unit, and the tenants never forwarded the bills to the landlords and never advised the landlords that mail was being sent to the rental unit in the landlords' names.

The tenants testified that they have no problems paying the utilities. The tenants confirmed that their agreement stipulated that the tenants were responsible for the utilities.

The landlords are claiming \$225.00 cleaning costs and \$28.00 for an Ozonater rental to remove smoke smell and nicotine from the walls. The landlords testified that the tenants put on their application for tenancy that they were non-smokers however the tenancy agreement does not stipulate "no smoking" in the rental unit. The landlords stated that during the tenancy, while they attended the rental unit, they saw cigarette ashes and butts inside the rental unit but that the landlords did not mention anything to the tenants about not smoking in the rental unit.

The tenants testified that there is a wood burning fireplace in the rental unit and that the smoke smell would have come from use of the fireplace. The tenants stated that they hired a professional cleaner to clean the rental unit and that they do not agree with the landlords' claims for additional cleaning costs. The tenants confirmed that they put on their application that they were non-smokers because at the time they applied the male tenant had quit smoking. The male tenant stated that he started to smoke again after occupying the rental unit but that he only smoked outside. The tenants confirmed that there was never any conversation about not smoking inside the rental unit.

Analysis

The landlords withdrew their claim of \$391.10 for the remaining fuel bill as the tenants have paid the outstanding balance.

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant landlords 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 landlords 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 landlords' right to claim damages from the tenants, 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.

Based on the testimony I find that the landlords have proven the test for damage or loss as listed above and that the tenants have admitted to being responsible for \$150.00 replacement fuel payment and \$497.84 (\$208.80 + \$289.04) for Utilities.

With respect to the claims of \$225.00 and \$28.00 for costs incurred to rid the rental unit of cigarette smoke, I find that the landlords have failed to proof the test for damage or loss as the tenants were never told that they could not smoke inside the rental unit nor does the tenancy agreement stipulate no smoking inside the rental unit.

As the landlords have been partially successful with their claim I find that the landlords are entitled to recover the cost of the filing fee for this application.

Monetary Order – I find that the landlords are entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the tenants' security deposit, and that the landlords are entitled to recover the filing fee from the tenants as follows:

Payment for fuel (replacement of lost cheque)	\$150.00
Utilities (\$208.80 + 289.04)	497.84
Filing fee	50.00
Sub total (Monetary Order in favor of the landlord)	\$697.84
Less Security Deposit of \$875.00 plus interest of \$10.97	-885.97
TOTAL OFF-SET AMOUNT DUE TO THE TENANTS	\$188.13

Conclusion

I HEREBY FIND in favor of the landlords' monetary claim and that the claim is to be offset against the security deposit with a balance payable from the landlords to the tenants.

A copy of the tenants' decision will be accompanied by a Monetary Order for \$188.13. The order must be served on the landlords 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: June 12, 2009.

Dispute Resolution Officer