

DECISION

Dispute Codes MNR MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Applicant to obtain a Monetary Order for unpaid rent, to retain the security deposit as liquidated damages, and to recover the cost of the filing fee from the Respondent for this application.

Service of the hearing documents, by the Applicant to the Respondent, was sent via registered mail to the Respondent's Parent's address on June 12, 2009. Mail receipt numbers were provided in the Applicant's verbal testimony. The Respondent confirmed receipt of the hearing package.

The Applicant, her spouse, and the Respondent 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

Is the Applicant entitled to an Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Background and Evidence

The Applicant testified that the Respondent entered into a legally binding tenancy agreement on April 22, 2009, whereby the Respondent agreed to occupy the rental unit for a fixed term beginning on May 1, 2009 and expiring on the last day of April 2010.

Rent was to be payable on the first of each month in the amount of \$1,195.00 and the Respondent paid a security deposit in the amount of \$597.50 on April 22, 2009.

The Applicant argued that an agreement was made with the Respondent whereby the Respondent was to attend the rental unit on May 1, 2009 to pick up the keys and to take occupancy, however the Respondent failed to show up. The Applicant stated that later on May 1, 2009 a friend of the Respondent's called the Applicant to advise that the Respondent would not be moving in on May 1, 2009 but that she would be moving in later.

The Applicant testified that she was not informed until approximately May 12, 2009 that the Respondent was not well and would not be moving into the rental unit.

The Respondent testified that she was admitted into hospital on May 1, 2009 and was not released until June 26, 2009. The Respondent feels very sorry that this situation has come to dispute resolution and that it was never her intention to create this situation.

The Applicant confirmed receipt of the Respondent's evidence on July 20, 2009 which stipulates that the Applicant did not have capacity to enter into a legal contract during the month of April 2009. The Applicant is seeking to retain the Respondent's security deposit as liquidated damages and lost rent for May 2009 in the amount of \$1,195.00 because they were not able to re-rent the unit until June 6, 2009.

Analysis

The Applicant did not serve the Respondent with the Notice of Dispute Resolution in accordance with section 89 of the Act, as they sent the notice via registered mail to an address where the Respondent's Parents resided and not the respondent; however the Respondent appeared at the hearing and acknowledged receipt of the package which allowed this hearing to proceed.

I find that in order to justify payment of damages or loss under sections 67 of the *Act*, 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, in this case the Applicant, 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 doing whatever is reasonable to minimize the damage or loss

In regards to the 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.

In order for a legally binding contract or tenancy agreement to exist the following must be present:

- Consensus, whereby an offer is made and accepted; and
- Consideration, in this case the Applicant receives payment in return for the Respondent acquiring possession of a rental unit; and
- Capacity, whereby all parties have the fundamental ability to be accountable for their actions and possess the mental ability to understand the nature and effects of their actions.

The Respondent submitted documentary evidence written by two medical physicians who stated that the Respondent did not have the capacity to enter into a contract during the month of April 2009. Based on the aforementioned I find that there is no proof before me to substantiate that the loss suffered by the Applicant happened solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement and therefore I hereby dismiss the Applicant's application, without leave to reapply.

As the Applicant was not successful in their application I find that they are not entitled to recover the cost of the filing fee from the Respondent.

The Applicant is hereby ordered to return the Respondent's security deposit of \$597.50 plus interest of \$0.00.

Conclusion

I HEREBY DISMISS the Applicant's application, without leave to reapply.

A copy of the Respondent's decision will be accompanied by a Monetary Order for \$597.50. The order must be served on the Applicant 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: September 18, 2009.

Dispute Resolution Officer