

DECISION

Dispute Codes MND MNR MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for damage to the unit, unpaid rent or utilities, to keep all or part of the security deposit, and to recover the cost of the filing fee from the Tenants for this application.

Service of the hearing documents, by the Landlord to the Tenants, was not done in accordance with section 89 of the *Act*, as they were not sent via registered mail until August 18, 2009, four days after the Landlord was issued the hearing package. Both Tenants appeared and confirmed receipt of the hearing package so the hearing proceeded on its merits.

The Landlord and male Tenant appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, and were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross examine each other. I note the female Tenant was in the room with the male Tenant however she did not provide testimony.

All of the testimony and documentary evidence was carefully considered.

Issues(s) to be Decided

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

Background and Evidence

The undisputed facts are the month to month tenancy began on March 12, 2009 and ended as a result of the issuance of a 1 Month Notice to End Tenancy. The monthly rent was payable on the first of each month in the amount of \$650.00 and the Tenants paid a security deposit of \$325.00 plus a \$40.00 pool key deposit on March 12, 2009.

The Landlord testified that there was no outstanding rent, no move-in inspection report submitted into evidence, and the move-out inspection report submitted into evidence was dated August 4, 2009 and signed on August 6, 2009 in the absence of the Tenant.

The Landlord stated that he could not provide testimony in regards to whether the building manager made arrangements with the Tenant to attend the move-out inspection.

The Tenant testified that there was no move-in inspection report completed and they received no information as to how or when a move-out inspection would be completed.

The Tenant stated that he was served the 1 Month Notice to End Tenancy for Cause, in person by the resident manager, and that his relationship with the resident manager had deteriorated at that point. The Tenant argued that he had a discussion with the resident manager that they would attempt to be out of the rental unit as close to July 31, 2009 as possible however they were searching for a place to move to.

The Landlord confirmed the service of the 1 Month Notice to End Tenancy was done in person by the resident manager to the male Tenant on June 23, 2009, after three previous attempts to serve the notice.

The Tenant argued that they began their move out on July 31, 2009 and when they returned to the rental unit on August 1, 2009 they found that the lock had been changed and they could not gain entry into the rental unit to remove the rest of their possessions. The Tenant testified that they attempted to call the resident manager numerous times and that it was not until the Tenant used his aunt's phone that the resident manager finally answered the phone, as the resident manager did not recognize the number on his call display. The Tenant argued that he had to speak extremely nice to the resident manager and that it was very difficult for the Tenant to get the resident manager to agree to allow the Tenants a very short window of five hours between 1:00 pm and 6:00 pm on August 1, 2009 to enter the rental unit and remove the remainder of their possessions.

The Landlord testified that it is their company policy to change the lock on rental unit access doors, prior to acquiring an order of possession, if there was the appearance that the Tenants had vacated the rental unit and left the keys inside. The Landlord stated that he could not provide testimony as to if any notices to enter were posted on the door and he had no documentary evidence or testimony to provide in support that the Tenants abandoned the rental unit.

The Landlord advised that the resident manager was not able to be called into the hearing to provide testimony as he had to attend a medical appointment.

The Landlord argued that the Tenants turned off the power and left food to rot in the fridge causing the fridge to have to be thrown out at a cost of \$275.00. The Landlord is also seeking compensation of \$89.25 for carpet cleaning, \$78.75 for cleaning the rental unit, and unpaid rent late fees of \$84.00 as the Tenants did not vacate the rental unit until August 4, 2009.

The Tenant confirmed that the power was turned off around July 25, 2009, that they lived a few days without power, that they moved their possessions out on July 31, 2009 with the aid of the female caretaker who locked out the elevator and held doors for them during the move. The Tenant argued that there were only condiments contained in jars left in the fridge so they could not have caused enough damage to cause the fridge to be thrown out.

The Tenant testified that he provided the resident manager with his forwarding address and with the rental unit keys and the pool key on August 1, 2009 when they were given access to remove additional possessions. The Tenant confirmed that there were possessions left in the rental unit after 6:00 pm such as lawn chairs.

The Tenant testified that there were no notices posted to the rental unit door and that they did not leave any keys inside the rental unit that they handed the keys directly to the resident manager on August 1, 2009.

Analysis

I find that in order to justify payment of damage or loss 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 doing whatever is reasonable to minimize the damage or loss

In regards to the Landlord's 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.

The testimony supports that a move-in inspection report was not completed and there is no documentary evidence to support otherwise. In the absence of a completed move-in inspection report the Landlord has failed to prove the condition of the rental unit at the onset of the tenancy and the Landlord's right to claim against the security deposit has been extinguished pursuant to section 24 of the *Act*.

The Landlord is seeking a monetary claim of \$518.25 for damages and loss suffered by the Landlord, amounts all of which the Landlord submitted copies of receipts except for the \$84.00 in unpaid rent/late fees.

The Landlord confirmed that it is their company policy to change the locks to the rental unit, prior to obtaining an Order of Possession, to restrict the Tenants' access, an action that I find to be an egregious and intentional violation of sections 31 and 57 of the *Act*. In this case the Tenant was attempting to move out his possessions when the resident manager changed the lock on the rental unit causing the Tenants to beg and plead with the resident manager who only allowed them a specific window of time to access the rental unit and remove the rest of their possessions.

While the Landlord confirmed it is their policy to change locks, there is no evidence before me to support that the Tenants occupied the rental unit until August 4, 2009, in fact there is the presence of opposing testimony from the Tenant who confirmed that the unit was not abandoned, that keys were not left in the rental unit, and that the resident manager was personally served with the keys and the Tenants' forwarding address in writing, on August 1, 2009.

There is no evidence before me to support that the Tenants were notified of an opportunity to attend a move-out inspection. I find that the Landlord has failed to issue the Tenants with two opportunities to attend the move-out inspection and to issue the Tenants a final opportunity to attend, in accordance with section 35 of the *Act*.

The Landlord locked the Tenants out of the rental unit and allowed access for only a very short period of time to allow the Tenants to remove the remainder of their possessions which limited the amount of time the Tenants could have had to clean the rental unit or have the carpets steam cleaned. There is no evidence before me to support why no one attended the rental unit between August 1, 2009 and August 4, 2009 to attend to the rental unit to minimize the Landlord's loss, in accordance with section 7 of the Act. Based on the aforementioned I find the Landlord's have failed to prove the test for damage and loss as listed above and I hereby dismiss the Landlord's claim without leave to reapply.

As the Landlord has not been successful with his application I decline to award the Landlord with recovery of the filing fee.

The Landlord is hereby ordered to return the Tenants' security deposit of \$325.00 plus interest of \$0.00 plus \$40.00 key deposit for a total amount of \$365.00.

Conclusion

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

A copy of the Tenant's decision will be accompanied by a Monetary Order in the amount of \$365.00. This Order must be served on the Landlord 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: December 09, 2009.

Dispute Resolution Officer