

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing was convened by way of conference call to deal with the landlord's application for a monetary order for unpaid rent, an order to retain the security deposit and pet damage deposit in partial satisfaction of the claim, and to recover the filing fee from the tenants for the cost of this application.

At the outset of the hearing, the landlord's agent clarified the application, asking to amend it to include the loss of revenue for the months of November and December, 2009. The amendment was allowed.

All parties appeared, gave evidence and were given the opportunity to cross examine each other on their evidence.

A witness for the landlord was present at the outset of the hearing and was asked to remain outside the room until her testimony was to be heard. The witness, however, did not wait, and was not available to testify when called upon.

Issues(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to retain the security deposit and/or pet damage deposit in partial satisfaction of the claim?

Background and Evidence

This was a fixed-term tenancy that began on January 1, 2009 and was to expire on December 31, 2009. The tenants had rented another unit in the building in 2006, and

paid a pet damage deposit in the amount of \$367.00 on or about September 16, 2006 and paid a security deposit in the amount of \$425.00 on November 18, 2006. They then sub-leased this unit in September, 2008, and subsequently signed another Tenancy Agreement for the fixed term on or about January 1, 2009. The parties agree that the total deposits amount to \$792.00.

Rent is payable in the amount of \$919.00 per month plus \$10.00 per month for parking, due in advance on the 1st day of each month. I heard no evidence from either party about arrears for parking.

On September 28, 2009, the landlord received notice that the tenant would be vacating the unit early. The tenants found themselves in a financial bind that left them in a position to be unable to pay the rent. The landlord's agent spoke to the tenants and reiterated that it was a fixed-term tenancy and advised them that it was their obligation to sub-let the unit if they could not afford to stay. Rent was paid for the month of September, 2009, but not for October to December.

The landlord's agent testified that the claim is for \$2,757.00 for 3 months of rent, plus \$500.00 in liquidated damages, plus \$350.00 for cleaning estimates, totalling a claim of \$3,607.00. However, the application before me claims \$300.00 for cleaning estimates.

Invoices were provided to prove \$103.95 for carpet cleaning for that unit, plus \$248.00 for repairs and cleaning to the blinds. The landlord testified that although this amounts to \$351.95, the \$350.00 is what was applied for and the excess would be borne by the landlord. A move-in/move-out inspection report was provided in evidence, but the move-in portion is not readable. The tenants argued that the blinds were broken and soiled when they moved into the unit, as evidenced by the move-in inspection report, but they do not dispute the carpet cleaning.

The landlord's agent testified that he attempted to re-rent the unit almost immediately, and provided copies of invoices for advertisements placed in newspapers commencing September 30, 2009, and testified that due to the soft market for rentals in the area, the unit was not re-rented until February 1, 2010. The landlord is claiming loss of rent for

the months of October, November and December, 2009. The tenants do not dispute that rent is owed for October, 2009.

The landlord's agent further testified that the Tenancy Agreement, a copy of which was provided in evidence, states at item #2:

"Then, in addition to all other rights and remedies of the Landlord, the Tenant shall pay to the Landlord \$500.00 as a genuine pre-estimate of the damages suffered by the Landlord including (but not limited to) additional administrative costs associated with re-letting the premises. The Tenant further acknowledges that payment of such amount shall not preclude the Landlord from exercising its rights in law and in equity to commence a monetary claim against the Tenant including but not limited to claims for the costs of repairs to the premises and/or loss of rental income."

The landlord stated that this means that \$500.00 in liquidated damages would be charged as administration costs to re-rent the unit if the tenants vacated earlier than the date in the fixed term agreement.

The tenants testified that they spoke with the resident manager of the apartments, who understood that the tenants were having a tough time financially, and told them that there was a "hardship" clause that could be used to assist them. That clause was not in the Tenancy Agreement, however, the resident manager is the witness that did not remain in attendance and did not testify. The tenants stated that in the resident manager's effort to assist them, she told the tenants that this hardship clause would mean that they would be required to pay the \$500.00 in liquidated damages, plus \$300.00 for cleaning and rent for October, 2009, and then they would not be required to pay November and December rent. The landlord's agent argued that there is no such "hardship" clause, it's not in the Tenancy Agreement, and that there used to be a clause stating that liquidated damages would cost the tenants \$1,000.00, but it was reduced to \$500.00 some time ago.

The tenants testified that they would have moved even if they had the money to pay the rent due to mould issues, which caused serious breathing problems for them; the female tenant was required to use an inhaler. That issue was reported to the landlord in September, 2008 and finally repaired in April, 2009. Further, they testified that they did advertise to sublet the unit, but were not successful in finding another tenant.

The tenants further testified that after they gave their notice to vacate the unit, the landlord served them with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities.

The landlord's agent stated that he had another hearing to attend to, and this hearing was then concluded.

Analysis

Firstly, dealing with the claim for unpaid rent, I find that the tenants were obligated due to the fixed term tenancy to pay rent for the months of October, November and December, 2009 unless the landlord was able to re-rent the unit within those months. I find that the landlord made every attempt to mitigate its loss, and therefore, the tenant is obligated. I find that the landlord has established a claim for that loss, and that any "hardship" clause is not supported by the evidence.

With respect to the application for liquidated damages, Section 12 of the *Residential Tenancy Regulation* at Part 2 – Requirements for Tenancy Agreements, states as follows:

- 12 (1)** A landlord must ensure that a tenancy agreement is
 - (a) in writing,
 - (b) signed and dated by both the landlord and the tenant,
 - (c) in type no smaller than 8 point, and
 - (d) written so as to be easily read and understood by a reasonable person.

- (2) A landlord must ensure that the terms of a tenancy agreement required under section 13 of the Act [*requirements for tenancy agreements*] and section 13

[standard terms] of this regulation are set out in the tenancy agreement in a manner that makes them clearly distinguishable from terms that are not required under those sections.

I find that the clause in the Tenancy Agreement is not written so as to be easily read and understood by a reasonable person. Further, the landlord testified that it took until February 1, 2010 to re-rent the unit due to the soft market for rentals within the area. The argument by the landlord that the “liquidated damages” clause in the Tenancy Agreement is for administration costs in attempting to re-rent the unit is not supported because those costs would have been borne by the landlord in any event due to the soft market in rentals within the area.

With respect to the application by the landlord for carpet cleaning and for repairing and cleaning the blinds, the landlord has the burden of proving that the claim is justified. The move-in inspection report provided in advance of the hearing is not readable, and is argued by the tenants.

Conclusion

I find that the landlord has established a claim for a monetary order for unpaid rent for the fixed term of the agreement, and I order that the tenants pay to the landlord the rent due in the amount of \$2,757.00.

I further find that the landlord has established a claim in the amount of \$103.95 for carpet cleaning, however the claim for cleaning and repairing blinds is hereby dismissed without leave to reapply.

The landlord’s application for liquidated damages in the amount of \$500.00 is dismissed without leave to reapply.

The landlord is also entitled to recovery of the \$50.00 filing fee.

I order that the landlord retain the deposits and interest of \$816.78, which I have calculated in 2 parts according to the dates and amounts paid, in partial satisfaction of

the claim and I grant the landlord an order under section 67 for the balance due of \$2,094.17. This order may be filed in the Small Claims Court and enforced 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: March 25, 2010.

Dispute Resolution Officer