

Decision

Dispute Codes: MND, MNDC, MNSD, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order as compensation for damage to the unit, compensation for damage or loss under the Act, regulation or tenancy agreement, retention of the security deposit, and recovery of the filing fee. Both parties participated in the hearing and gave affirmed testimony.

Issues to be decided

- Whether the landlord is entitled to any or all of the above under the Act, regulation or tenancy agreement

Background and Evidence

Pursuant to a written tenancy agreement, the fixed term of tenancy was from April 1, 2009 to March 31, 2010. Rent in the amount of \$2,250.00 was payable in advance on the first day of each month. A security deposit of \$1,125.00.00 was collected on February 17, 2009. As well, a pet damage deposit in the total amount of \$600.00 was collected near the outset of tenancy. A move-in condition inspection and report were completed on March 26, 2009.

The parties do not dispute that by way of e-mail dated November 11, 2009, the tenant gave notice of her intent to end the tenancy. The tenant informed the landlord that the unit would be available to new tenants “by the end of business on December 15, 2009.” However, the tenant indicated that she was prepared to vacate the unit effective December 1, 2009 if new tenants were found by that time. Subsequently, by way of the tenant’s advertisement on craigslist, new renters took possession of the unit on December 1, 2009, and on that same date the tenant vacated the unit. A move-out condition inspection and report were completed on December 1, 2009, and the tenant testified that the full amount of her pet damage deposit of \$600.00 was returned.

Arising in part from NSF cheques provided to the landlord by the new renters, the landlord later issued a 10 day notice to end tenancy to the new renters dated January 14, 2010.

In this application the landlord seeks liquidated damages in the amount of \$1,125.00, \$72.50 calculated as pro-rated rent for December 1, 2009, \$50.00 for “mantle damage,” and recovery of the \$50.00 filing fee.

Analysis

Section 45 of the Act addresses **Tenant’s notice**, and provides in part as follows:

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Based on the documentary evidence and testimony of the parties, I find that the tenant’s notice to end the tenancy does not comply with the above statutory provisions.

The written tenancy agreement entered into and signed by the parties provides in clause # 5 for “Liquidated Damages” as follows:

If the tenant ends the fixed term tenancy before the end of the original term as set out in (B) above, the landlord may treat this Agreement as being at an end. In such event, the sum of \$1,125.00 will be paid by the tenant as liquidated damages, and not as a penalty. Liquidated damages covers the landlord’s costs

for re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.

Residential Tenancy Policy Guideline # 4 addresses “Liquidated Damages” and provides in part as follows:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent.

Following consideration of the documentary evidence and the testimony of the parties, I find that the subject liquidated damages clause is valid, and is not a penalty clause.

Accordingly, I find that the landlord has established entitlement to liquidated damages specified in the tenancy agreement in the amount of \$1,125.00.

Notwithstanding that the landlord later issued a 10 day notice to end tenancy for unpaid rent to the new renters, I find that as the new renters took possession of the unit effective December 1, 2009, the landlord is not entitled to compensation from the tenant for pro-rated rent for the day of December 1, 2009. In the result, this aspect of the landlord's application is dismissed.

Further, in the absence of receipts or other documentary evidence that repairs were undertaken to the mantle, and in the absence of the tenant's written authorization for the landlord to withhold a specific amount from her security deposit for repair of such damage, this aspect of the landlord's claim is hereby dismissed.

As the landlord has achieved some success in this application, I find that the landlord is entitled to recovery of the \$50.00 filing fee.

I order that the landlord retain the security deposit of \$1,125.00 in partial satisfaction of the claim, and I grant the landlord a monetary order under section 67 of the Act for the balance owed of \$50.00.

Conclusion

Pursuant to section 67 of the Act, I hereby issue a monetary order in favour of the landlord in the amount of \$50.00, and I order the tenant to FORTHWITH pay this amount to the landlord. Should it be necessary, this order may be served on the tenant, filed in the Small Claims Court and enforced as an order of that Court.

Dispute Resolution Officer