



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNR

MNSD

FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for a monetary order for rent owed, late fees of \$25.00 per month, cleaning costs and an order to retain the security deposit in partial satisfaction of the claim, late fees and damages including cleaning and carpet cleaning.

Although served with the Application for Dispute Resolution and Notice of Hearing by registered mail, the tenant did not appear.

Issue(s) to be Decided

The issue to be determined, based on the testimony and evidence, is whether or not the landlord is entitled to monetary compensation for rental arrears and late fees owed and damages for cleaning.

Background and Evidence

The landlord testified that the tenancy began on November 1, 2008, at which time the tenant paid a security deposit of \$525.00. The landlord testified that the current rent was \$1,050.00 per month. The landlord testified that notice to terminate the tenancy was given by the tenant when, on October 31, 2009, the tenant filled out the landlord's pre-printed form titled, "*Notice to Vacate*" purporting to end the tenancy "*on or before noon on the last day of*" November

2009 and included the tenant's forwarding address. The landlord had submitted into evidence a copy of a pre-printed form titled, "*Negotiation of Payment of Rent*" dated November 4, 2009 and signed by the tenant. This form purported to be an agreement that the tenant would pay rent arrears of \$1,117.44 plus late fees of \$25.00 totaling \$1,142.44 and included a payment schedule for the arrears.

The landlord testified that the tenant did not participate in the move-out inspection and had submitted into evidence a copy of a tenancy agreement, and a copy of the Move-In/Move-Out Condition Inspection Report with the Move-Out portion unsigned by the tenant.

Also submitted into evidence was a copy of the tenant's ledger that included the charges for cleaning, carpet cleaning and the arbitration fee, as well as two late fees in the amount of \$25.00 for each of October and November 2009.

The landlord was claiming \$636.94 which included \$42.44 rental arrears for October 2009, \$405.00 rent owing for November 2009, a late charge of \$25.00 for October, a late charge of \$25.00 for November, \$94.50 for carpet cleaning, \$45.00 for cleaning and the \$50.00 fee for filing the application.

Analysis

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement.

I find that the tenant did not pay the rent when rent was due and accrued arrears of \$447.44, to which the landlord is entitled.

In regards to the \$25.00 late payment fees, the landlord had testified that this fee was imposed pursuant to the "*Negotiation of Payment of Rent*" contract signed by the tenant on November 4, 2009 in which the tenant agreed to pay the \$25.00 late payment fee.

Although section 7(1) (d) of the *Residential Tenancy Regulation*, (the *Regulation*), provides that a landlord can charge an administration fee of not more than \$25.00 for the return of a tenant's cheque by a financial institution or for late payment of rent, I note that section 72(2) of the *Regulation* prohibits the charging of this fee unless the tenancy agreement between the parties specifically provides for that fee. I note that the tenancy agreement in evidence verified that the parties had both agreed to a "*minimum charge*" of \$20.00 for late payments as a term of the tenancy agreement.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if ; (a) the term is inconsistent with the Act; (b) is unconscionable; or (c) is not expressed in a manner that clearly communicates rights and obligations under it. I find that the term in the agreement for a "*minimum*" charge is not sufficiently clear to warrant enforcement.

Moreover, I find that the landlord's actions in negotiating a subsequent agreement containing terms that differed from the original tenancy agreement, with late fees of \$25.00, was not compliant with section 14 of the Act. Section 5 of the Act also provides that landlords and tenants may not avoid or contract out of the Act or the regulations and that any attempt to do so is of no effect.

Accordingly I find that the portion of the landlord's application relating to the claim for \$50.00 in late fees must be dismissed.

In regards to an Applicant's right to claim damages from another party, such as cleaning costs, Section 7 of the Act states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, 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.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss 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 the claimed 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 this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence to verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant made a reasonable attempt to mitigate the damage or losses that were incurred.

Section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. In determining whether or not the tenant was in compliance with the Act in this regard, I find that a valid move-out condition inspection report signed by the tenant is important.

Section 35 of the Act requires that the landlord and tenant together must inspect the condition of the rental unit (a) on or after the day the tenant ceases to occupy the rental unit, or (b) on another mutually agreed day.

Section 23 and section 35 of the Act both state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and states that both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a

copy of that report in accordance with the regulations. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted.

In regards to the landlord's allegation that the tenant failed to cooperate in the landlord's effort to arrange a move-out inspection, the legislation does anticipate such situations and provides a process to follow. In particular, section 17 of the Regulation details exactly how the inspection must be arranged as follows:

- (1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
- (2) If the tenant is not available at a time offered under subsection (1),
 - (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
 - (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.
- (3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

Section 35(5) of the Act states that the landlord must make the inspection and complete and sign the report without the tenant if:

- (a) the landlord has complied with subsection (2), and
- (b) the tenant does not participate on either occasion.

Both sections 25 and 35 for the Start of Tenancy and the End of Tenancy Report requirements contain similar provisions as outlined above.

In this instance, the landlord conducted the move-out inspection without the tenant and failed to follow the formal process specified in the Act and the Regulation. Therefore, I find that the evidentiary weight of the Move-Out Inspection Report completed only by the landlord has been adversely affected.

While the landlord had submitted documentary evidence, which I have accepted as valid and that verifies that the landlord had paid for cleaning and carpet cleaning, this evidence would only satisfy element 3 of the test for damages.

Accordingly I find that the portion of the landlord's application relating to the claim for \$45.00 compensation for the extra cleaning and \$94.50 for the carpet cleaning must be dismissed.

I find that the landlord is entitled to a total monetary compensation in the amount of \$472.44, comprised of \$447.44 in rental arrears and a portion of the fee for filing the application in the amount of \$25.00.

Conclusion

I hereby order under section 67 that the landlord may retain \$472.44 from the tenant's security deposit and interest of \$526.31 and refund the remainder forthwith in accordance with section 38 of the Act. I have granted a monetary order in favour of the tenant for \$53.87. this order must be served on the landlord and can be enforced through Small Claims Court.

April 2010

Date of Decision

Dispute Resolution Officer