

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order to retain the security deposit in partial satisfaction of the claim. Both parties participated in the conference call hearing.

Issue to be Decided

Is the landlord entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began in October 2008. It was initially set for a one year fixed term which was renewed for a further year, set to expire on September 30, 2010. At the end of the tenancy the rent payable for the unit was \$925.00 per month. The tenant paid a \$450.00 security deposit at the outset of the tenancy. On January 28, 2010 the tenant gave the landlord written notice that she would be vacating the rental unit on March 1, 2010 and agreed to pay liquidated damages pursuant to a provision in the tenancy agreement.

The tenant paid liquidated damages on February 25, 2010. The landlord responded to the tenant's payment of liquidated damages by advising her in a letter dated February 26 that the landlord expected her to continue to pay rent until the unit was re-rented.

On February 28 the parties conducted an inspection of the rental unit and the landlord filled out a condition inspection report which indicated that there were a number of deficiencies in cleaning. The parties agreed at the time of the inspection the landlord pointed out to the tenant a number of problem areas in the unit and that the tenant used a rag and a bottle of household cleaner to clean those items as they were brought to her attention. The landlord testified that the tenant refused to sign the condition inspection

report. The tenant testified that she did not agree with the condition inspection report and wanted to make some changes to it, but the landlord would not give her permission to do so and advised her to leave.

The landlord claims for loss of income for the months of March and April, \$80.00 for the cleaning she performed at the end of the tenancy and a further \$400.00 for cleaning she did periodically through the months of March and April in order to maintain the unit in a condition that would attract prospective tenants. The landlord further claims recovery of the \$50.00 filing fee she paid to bring her application.

Analysis

The liquidated damages provision provides 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 \$420.00 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty. Liquidated damages covers the landlord's costs of 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.

I find the provision to be poorly worded and unclear. While it clearly states that if the tenant wishes to end the tenancy early, she could pay liquidated damages in which case the landlord had the option of treating the tenancy as being at an end, the second sentence begins "In such event" which could mean "in the event the tenant ends the fixed term early" or "in the event the landlord elects to treat the agreement as being at an end" or both. In this case, the landlord expressly stated that she did not consider the agreement as being at an end but wished to hold the tenant to the strict terms of the contract. However, given the unclear wording of the liquidated damages provision, I find that the provision can easily be construed to mean that upon payment and acceptance of liquidated damages, the agreement is at an end. While this is not the manner in which the landlord wishes to interpret the contract, I find that the rule of *contra proferentum* applies. This is a rule of contractual interpretation which provides

that an ambiguous term in a contract is construed against the party that imposed the term, which in this case is the landlord.

I therefore interpret the liquidated damages provision to mean that upon payment and acceptance of liquidated damages, the landlord elected to treat the tenancy agreement as being at an end. Because the landlord accepted the end of the tenancy as of February 28, 2010, I find that the tenant cannot be held responsible for loss of income beyond the end of the tenancy and accordingly I dismiss the landlord's claim for loss of income for March and April as is the claim for cleaning performed by the landlord during those months.

The landlord gave oral testimony that the rental unit was not sufficiently cleaned. The tenant gave oral testimony that the rental unit had been sufficiently cleaned. The landlord provided no evidence to corroborate her claim other than the condition inspection report which the tenant had refused to sign because she did not agree with the landlord's representation of the condition of the suite. The landlord has the burden of proving her claim on the balance of probabilities. In other words, the landlord must prove that it is more likely than not that the rental unit was not sufficiently cleaned. In this case, I have no reason to question the credibility of either party and no basis on which to make a finding of credibility. In the absence of further evidence to show that the rental unit was not sufficiently cleaned, which could have taken the form of witness statements or photographs, I find that the landlord has failed to prove her claim. The claim for cleaning is dismissed.

As the landlord has been wholly unsuccessful in her claim, she must bear the cost of the filing fee.

Residential Tenancy Policy Guideline #17-2 provides as follows:

The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit, or
- a tenant's application for the return of the deposit

unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance

of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

I find that the tenant has not extinguished her right to the return of the deposit as she participated in the condition inspection of the unit. In the spirit of administrative efficiency and pursuant to the terms of the Residential Tenancy Policy Guidelines, I order that the landlord forthwith return to the tenant the \$450.00 security deposit together with the \$1.70 in interest which has accrued to the date of this judgment. I grant the tenant a monetary order under section 67 for \$451.70. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The landlord's claim is dismissed in its entirety. The tenant is granted a monetary order for \$451.70 which represents the security deposit and interest.

Dated: April 27, 2010
