

DECISION

Dispute Codes MNR MNSD FF
 MNDC MNSD FF

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking a Monetary Order for 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.

The Tenants filed seeking a Monetary Order for the return of double their security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Landlord.

Service of the hearing documents by the Landlord to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on December 24, 2009. The Tenant confirmed receipt of the Landlord's hearing documents.

Service of the hearing documents by the Tenants to the Landlord was done in accordance with section 89 of the *Act*, sent via registered mail on December 16, 2009. The Landlord confirmed receipt of the Tenants' hearing documents.

The Landlord, the female Tenant, and the Tenant's witness appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Is the Landlord entitled to a Monetary Order under sections 38 and 67 of the *Residential Tenancy Act*?

Are the Tenants entitled to a Monetary Order under sections 38 and 67 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed testimony was the month to month tenancy began on October 1, 2006 and ended when the Tenants vacated the rental unit near the end of June 2009. Rent was payable on the first of each month in the amount of \$881.00 and the Tenants paid a security deposit of \$425.00 on October 1, 2006. The Tenants' forwarding address was provided to the Landlord, in writing, when it was written on the "Security Deposit Refund Statement" form on June 29, 2009.

The Tenants' witness testified that she was the Tenants' teenage daughter and that she personally went to the Landlord on May 15, 2009 to advise them that her family was moving out of the rental unit on June 1, 2009, at which time the witness alleges that the Landlord advised her that they have to provide notice on the last day of the month or they would have to pay another for another month's rent. The witness claims that she went back on May 30, 2009 and completed the move out form but that she forgot to sign the form which was not brought to her attention until June 2, 2009.

When I asked the witness who signed the form she advised that her father did. The witness argued that she completed the form for her parents, as they do not speak English that well, and then her father signed the form.

The Landlord testified that she is the staff person who deals with the move out requests and she was not previously told about the Tenants providing an unsigned notice. The Landlord referred to her documentary evidence which supports her testimony that both

Tenants signed the notice of termination form dated June 2, 2009, agreeing that they would be responsible for one additional month's rent if the unit was not re-rented by July 1, 2009. The Landlord also referred to the security deposit refund statement which was signed by the male Tenant on June 29, 2009 whereby the Tenant agreed to deductions from the security deposit for \$881.00 loss of rent for July 2009 as the Landlord was not able to re-rent the unit. The Landlord testified that the unit was not re-rented until September 1, 2009 and the unit was vacant for the months of July 2009 and August 2009, even though the Landlord advertised the unit for rent on line and in the local newspaper.

The female Tenant testified and confirmed that both Tenants signed the notice of termination form and confirmed that the male Tenant signed the security deposit refund statement.

Analysis

All of the testimony and documentary evidence was carefully considered.

Section 7(1) of the Act provides that if a landlord or tenant does not comply with this Act, the Regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for the damage or loss which results. That being said, section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and

3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

Landlord's Application

In the presence of conflicting verbal testimony between the witness and the Landlord, on when or if verbal notice was provided, I must consider the documentary evidence which is signed by both Tenants and which confirms notice was received by the Landlord on June 2, 2009, and confirms that the Tenants will be liable for July 2009 rent if the unit is not re-rented by that time.

After careful review of the evidence I find that the written notice to end the tenancy was received by the Landlord on June 2, 2009, and that this notice was not provided in compliance with the Act. Section 45 of the Act provides that a Tenant may end a periodic tenancy by providing the Landlord with notice to end the tenancy on a date that is the day before the day in the month that rent is payable. In this case the Landlord would have had to receive the Tenants' notice no later than May 31, 2009. Therefore I find the Landlord has proven the test for damage or loss, as listed above, and I approve their claim of \$881.00 of loss of rent for July 2009.

As the Landlord has been successful with their claim I hereby award recovery of the \$50.00 filing fee.

Landlord's Monetary Claim

I find that the Landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit, plus interest calculated up to June 29, 2009 as follows:

Loss of Rent for July 2009	\$881.00
Filing fee	<u>50.00</u>
Subtotal (Monetary Order in favor of the landlord)	\$931.00
Less Security Deposit of \$425.00 plus interest of \$13.42	-438.42
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$492.58

Tenant's Application

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit to the tenant with interest or make application for dispute resolution claiming against the security deposit. That being said there is a provision under Section 38(4) of the *Act* which provides that a Landlord may retain an amount from a security deposit if at the end of the tenancy the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, which in this case excludes the Landlord from having to file an application for dispute resolution to retain the security deposit.

Based on the above, I find that the Landlord has not failed to comply with Sections 38(1) or 38(4) of the *Act* and therefore the Landlord is not subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposit and the landlord must pay the tenant double the amount of the security deposit.

As per the aforementioned, I find that the Tenants have not proven entitlement to return of double their security deposit. Having awarded the Landlord a monetary claim above which is offset against the security deposit, I hereby dismiss the Tenants' application.

As the Tenants have not been successful with their application, I decline to award recovery of the filing fee.

Conclusion

A copy of the Landlord's decision will be accompanied by a Monetary Order for **\$492.58**. The order must be served on the respondent Tenants 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: May 18, 2010.

Dispute Resolution Officer