

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing was convened by way of conference call on February 5, 2010 and continued on May 5, 2010. The landlord applied for a monetary order for damage to the unit, site or property and for unpaid rent or utilities; for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order to retain the security deposit in partial satisfaction of the claim, and to recover the filing fee from the tenant for the cost of this application.

During the hearing, the landlord applied to amend the application to show unpaid rent for October, as opposed to September, 2009. The application is hereby so amended.

Issues(s) to be Decided

Is the landlord entitled to a monetary order for damage to the unit, site or property?

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

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Is the landlord entitled to retain the security deposit in partial satisfaction of the claim?

Background and Evidence

This tenancy began on September 1, 2006 as a fixed term tenancy which expired on August 31, 2007 and then reverted to a month-to-month tenancy. The tenant passed away on September 9, 2009 in the rental unit and the named executor is the brother of the deceased tenant.

Rent in the amount of \$740.00 is payable on the 1st day of each month, and the tenant paid a security deposit in the amount of \$355.00 on August 15, 2006.

The parties testified that the deceased died in the unit and was discovered about 4 hours later. The landlord's agent testified that the odour permeated throughout the unit and into the common hallway.

The landlord is claiming unpaid rent for the month of October, 2009 and \$25.00 late fee, as well as cleaning costs at \$90.00, \$50.00 for drapery cleaning, \$420.00 for painting the unit and \$1,518.01 for new carpets.

The executors testified that they attended the unit in an effort to clean the unit and end the tenancy properly for the deceased. They testified that the drapes had been cleaned about one month before the death of the tenant, and therefore didn't feel they needed to be cleaned again, however, the oven, fridge and general cleaning in the unit was done by the executors.

On September 11, 2009, they hired Busy Boys carpet cleaners who cleaned and deodorized the carpet however the stain came through. They then called the insurance company, who sent a restoration company. Ash Restorations attended on the 12th of September, 2009, inspected the unit and said they would remove the carpet and then paint once the carpets were removed. Once the carpets were removed, Wawanesa Insurance Company advised the tenants that the landlord should contact their insurer because an error had been made; the carpet was part of the building, not part of the tenant's insurance. The insurance carried by the deceased was not a condominium insurance policy, but a tenant's package only. The executors advised the landlord of this on September 19, 2009.

The tenants also testified that they would have cleaned more after the paint and carpet work was finished, but the insurance company advised that it's up to the landlord to report it to their insurers, and the landlord's agent was being very uncooperative. The landlord refused to call the insurance company, and the tenants testified that an insurance company called her, but she hung up the phone and refused to talk to the insurance agent. The landlord's agent testified that she wasn't convinced the person on the phone was from an insurance company, although the man identified himself as an agent from the insurance company.

The landlord's agent further testified that the tenants did not clean the hood over the range in the kitchen, or light fixtures or the inside of the windows in the unit. She provided a receipt from Miss Milly in the amount of \$102.38 and hand-wrote 2 other quotations on the photocopied receipt: Bright Clean at \$118.75 including GST and Merry Maids at \$180.00 + GST. No receipts for Bright Clean or Merry Maids were provided.

In the circumstances, the tenant agreed to pay \$45.00 for the cost of cleaning, \$740.00 for rent for the month of October, 2009 and \$1,062.61 for new carpets, but the landlord refused the offer.

Analysis

With respect to the damage claims by the landlord, I must apply the 4 part test:

- a) That the damage or loss exists;
- b) That the damage or loss occurred because of a breach of the *Act* or tenancy agreement;
- c) The amount of cost associated to that damage or loss;
- d) What efforts the claiming party made to mitigate, or reduce the cost associated with that damage or loss.

The burden of proof lies on the landlord to prove all 4 parts of the test. It's clear in the circumstances that the landlord is claiming out-of-pocket expenses for cleaning as a result of the tenant failing to comply with the *Act* and tenancy agreement by failing to thoroughly clean the apartment, and has therefore satisfied the first 2 elements.

However, handwriting quotations on a photocopied receipt does not amount to proof of the cost associated to that damage or loss. Further, and most importantly, I find that the landlord has failed to prove any mitigation. The landlord's agent refused to talk to the insurance company, and relied only on Residential Tenancy Policy Guideline #19 which states that the executor becomes the assignee of the tenancy in the event of the death of the tenant, and this dispute resolution process to attempt to have the executors pay from the estate any amount she claims. However, the *Residential Tenancy Act* states:

7 (1) 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 damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

The legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed, and I find that the landlord's failure to contact the insurance company, and failure to speak to the insurer that called her, does not satisfy the requirement. It's clear that the carpets should not have been removed because of the insurance coverage carried by the deceased tenant however the landlord then had an obligation to minimize that loss and failed to make any attempts to do so.

Conclusion

I find that the landlord has failed to establish a claim for late fees in rental payments in the amount of \$25.00 and the landlord has withdrawn that claim. I dismiss that portion of the application without leave to reapply.

I find that the landlord failed to do anything to minimize the loss associated with the end of the tenancy, and therefore, the application for painting and carpet replacements is dismissed without leave to reapply.

I find that the landlord has established a claim for \$740.00 for loss of rental revenue. The landlord is also entitled to recovery of the \$50.00 filing fee. I order that the landlord retain the deposit and interest of \$366.45 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$423.55. 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: May 17, 2010.

Dispute Resolution Officer