

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application for a Monetary Order for damage to the rental unit; unpaid rent; damage or loss under the Act, regulations or tenancy agreement; and, recovery of the filing fee. Both parties appeared at the hearing and confirmed service of documents upon them. The parties were provided the opportunity to be heard and to respond to the submissions of the other party.

Issues(s) to be Decided

1. Has the landlord established an entitlement to compensation for loss of rent, and if so, the amount?
2. Has the landlord established an entitlement to compensation for liquidated damages and advertising costs?
3. Has the landlord established an entitlement to compensation for damage to the rental unit?
4. Is the landlord entitled to retain the tenant's security deposit and accrued interest?

Background and Evidence

I was provided undisputed evidence as follows. The landlord and tenant entered into an initial fixed term tenancy agreement for the rental unit starting December 1, 2004 (the first tenancy). The tenant paid a \$1,110.00 security deposit at the beginning of the first tenancy. During the next five years the parties entered into new fixed term tenancies with the most recent starting December 1, 2008 and an expiration date of April 30, 2010 (the last tenancy). Each tenancy agreement entered into between the parties required the tenant to vacate the rental unit at the expiration of the agreement; however, before the expiry date the parties would enter into a new tenancy agreement. On October 2,

2009 the tenant gave the landlord notice to end the tenancy effective November 30, 2009 via email which the landlord accepted as being given to the landlord. The tenant vacated the rental unit November 30, 2009. The landlord secured a replacement tenancy that commenced March 24, 2010. The unit was re-rented for the reduced rental rate of \$2,295.00 per month.

The last tenancy agreement required the tenant to pay rent of \$2,520.00 on the 1st day of every month. The tenancy agreement provided that the landlord may charge the tenant liquidated damages of \$500.00, advertising costs, and rent in the event the landlord was unable to procure a new tenant.

The landlord is requesting recovery of the following amounts from the tenant:

Loss of rent December 1, 2009 – March 23, 2010	\$ 9,429.87
Rent reduction for March 23, 2010 – April 30, 2010	283.08
Lease break fee (liquidated damages)	500.00
Advertising costs	1,732.79
Wall repair	60.00
Cleaning of tile floors	118.30
Filing fee	<u>50.00</u>
Total claim	\$ 12,174.04

Upon enquiry, the landlord provided the following statements. Advertising efforts commenced October 2, 2009 on the landlord's website, October 9, 2009 on Craigslist, October 10, 2009 in the newspaper and November 2009 on Usedvictoria.com. The landlord received no response to the advertisements in October 2009 and in November 2009 informed the tenant he would be responsible for paying rent for December 2009. The rental unit was advertised for \$2,520.00 until February 2010 when the advertised rent was reduced to \$2,295.00. From October 2009 through March 2010 approximately 20 people viewed the unit but only two prospective tenants were found. One prospective tenant took a unit elsewhere and the other entered into negotiations with

the landlord but the parties could not reach an agreement. One of the terms the parties could not agree on was the term of the tenancy whereby the prospective tenant desired a tenancy on month-to-month basis.

The tenant explained that it was the landlord's insistence that the tenancy agreements were for fixed terms requiring the tenant would have to vacate at the end of each term. It was the tenant's submission that this is a way to increase rent beyond the allowable rent increase permitted by the Act and market rent.

The landlord was asked why the landlord desired vacancy at the end of each fixed term to which the landlord explained the owner wanted the ability to regain possession of the rental unit for the owner's own purposes. When the ability to end a tenancy for landlord's use by way of a 2 Month Notice to End Tenancy for Landlord's Use was raised, the landlord responded by stating that a 2 Month Notice cannot be used where the owner wishes to regain possession in order to sell the unit.

The tenant submitted that the rent paid by the tenant at the end of the tenancy was not indicative of market rent. The tenant explained that the tenant had tried unsuccessfully to negotiate a lesser amount of rent when the last tenancy was being negotiated but claimed the landlord was insistent on a certain amount of rent or the tenant would have to vacate the rental unit. The landlord refuted the tenant's submission by stating the tenant was not forced to enter into a new tenancy agreement.

The tenant submitted that the landlord did not take every available step to find a replacement tenant as the landlord did not advertise on social networking websites. Further, the advertised rental rate of \$2,520.00 was above market rates and the landlord did not reduce the advertised rate to the market rent until many months had passed. Eventually renting the unit for \$2,295.00 is indicative of the market rent for the unit. The landlord was of the position that sufficient efforts were made to advertise the rental unit and that a soft rental market was the reason the unit took so long to rent and at a lower rate.

The tenant submitted that the landlord had also fundamentally changed the terms of tenancy for prospective tenants as the landlord advertised the unit as a no pet unit, yet the tenant was permitted to have a cat in the unit. The tenant was of the position that the demographics of prospective tenants for such a unit would include many people with a pet. The landlord acknowledged their advertisements did include a statement of no pets but claimed that prospective tenants with a pet were considered. The tenant countered the landlord's position by claiming many prospective tenants with a pet would simply not enquire about the rental unit where an advertisement states no pets are allowed.

The tenant acknowledged that he had not pursued subletting the rental unit but was of the position he was an excellent tenant for five years and gave the landlord nearly two months of notice to end tenancy. The tenant acknowledged the termination date of the last tenancy was extended to April 30, 2010 at the request of the tenant. The tenant explained that he had requested a later expiration date as he was planning to travel and did not want to change his plans to move in November 2009. His plans did change and he decided to end the tenancy when he purchased his own home.

With respect to damages, the landlord claimed that one wall required painting to cover holes from bedside lamps installed by the tenant. As well, the tile floors required additional scraping and cleaning to remove a sticky pattern left by the tenant's area rug. The tenant acknowledged holes were left in the bedroom wall due to wall-mounted lights. The tenant also acknowledged that marks were left on the tile floors from the tenant's area rug but claimed that he was not told the tiles would mark easily or that an area rug could not be placed on the tiles. The tenant claimed that he tried to clean the tiles as best he could.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of

probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation is the reason the party making the application incurred damages or loss;
3. Verification of the amount of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Loss of Rent

It is clear the tenancy agreement was for a fixed term set to expire on April 30, 2010 and that the tenant breached this term of the agreement. The amount of loss of rent has been substantiated by the landlord. Therefore, I find the landlord satisfied the first and third test for damages, as outlined above.

In this case, the rental unit was vacant from December 1, 2009 until March 23, 2010 which I find is a lengthy period of time. In summary, the landlord attributed the length of time to the softening of the rental market for higher-end rental units and the tenant attributed the length of time to the landlord advertising a rental rate above market value for many months, advertising the unit as no pet unit and failing to advertise the rental unit on other websites. Upon consideration of all of the evidence before me, I make the following findings.

Although the tenant had agreed to pay rent of \$2,520.00 during the last tenancy agreement the agreement in itself does not satisfy me that the market rental rate for this unit was \$2,520.00 per month when the tenancy ended. I accept that it was the landlord's insistence that the tenancy agreement require the tenant to vacate at the expiration of each tenancy agreement as there is clearly a benefit to the landlord for such a term. I find the landlord structured the term of the tenancy agreement for the benefit of the landlord so that at the end of each fixed term the tenant would have to

renegotiate the term of the tenancy or face having to vacate the rental unit. Therefore, I find the tenant's argument that the requirement to vacate the rental unit at the expiration of the tenancy agreement put the landlord in a position to increase rent beyond market rent to be a reasonable one.

In support of the landlord's position that the advertised rate was at market value, the landlord provided a document written by a person who claims there were other units in the same residential property being rented for higher rent. However, the details of such tenancies were not before me to analyze and I cannot find this information sufficient to determine the rental unit was being advertising at or below market rate. Nor, did I find another unit in a different location being managed by the same landlord to be evidence of a slow market as other reasons could influence the reason the other unit did not rent quickly.

Having heard the rental unit rented for \$2,295.00 per month shortly after the advertised rate was decreased to \$2,295.00 per month I find it likely the market value for this unit was closer to \$2,295.00 than \$2,520.00 at the end of the tenancy. I find it reasonable that a landlord is expected to have knowledge of the market rental rates for their units and that the landlord waited for an unreasonable length of time before decreasing the advertised rental rate. I find the landlord's delay in decreasing the advertised rent rate contributed significantly to the loss of rent incurred.

I further find that a fixed term requiring the tenant to vacate at the end of the fixed term, or renegotiate the tenancy agreement, is not desirable by many prospective tenants. Having heard the landlord could not come to terms with one prospective tenant over the term of the tenancy, I find the landlord's requirements with respect to the term (duration) of the tenancy likely deterred at least one prospective tenant.

In addition, upon review of the advertisements for the rental unit I find the landlord advertised the unit for rent as a non-smoking and no pet unit as indicated by the NS/NP that appeared in the advertisements. Having heard the tenant had a pet and the

landlord advertised the unit as a no pet unit I find the landlord likely deterred many prospective tenants with pets. While the landlord may have been receptive to tenants with a pet, clearly this was not advertised to perspective tenants and I find the tenant's submission that some tenants would simply not enquire about the unit to be a reasonable one. Therefore, I find the landlord did not take reasonable efforts to market the unit to a broader range of prospective tenants by advertising that a pet may be considered.

I find the landlord did advertise in many different forms and I do not find the tenant's assertion that the landlord should have advertised on social networking sites to have merit.

In light of the above considerations, I find that the landlord would have likely re-rented the unit much sooner had the landlord determined the market rent of the rental unit upon being notified the tenant would be ending the tenancy and advertising the rental unit at or near the market rent. Even if the landlord was of the belief that \$2,520.00 was market rent for the unit, upon receiving very little interest from prospective tenants in October and November 2009 I find it reasonable that the landlord would have reduced the advertised rate much sooner than February 2010. By failing to establish the market value of the rental unit much sooner, by advertising the unit as a no-pet unit, and by not taking every reasonable step to reach a mutual agreement with prospective tenants in respect of the term of the tenancy, I find the landlord responsible for the loss of rent of \$2,295.00 for the months of December 2009 through April 2010.

I find the tenant had a contractual obligation until April 30, 2010 and the tenant is responsible for the difference between market rent of \$2,295.00 and the contractual amount of rent of \$2,520.00 for the months of December 2009 through April 2010. Therefore, I award the landlord loss of rent in the amount of \$1,125.00 ($\225.00×5 months).

Lease Break fee

I find the tenancy agreement provides that the tenant agreed to pay a fee of \$500.00 in the event the tenant gives notice to terminate the tenancy agreement prior to the expiration date. I find this term is a liquidated damages clause that is intended to offset costs associated with procuring a new tenant. I do not find the amount is unreasonable and I do not find it is a penalty. Therefore, I find the tenant responsible for paying the lease break fee of \$500.00.

Advertising costs

Based upon review of the tenancy agreement, I find that charging the lease break fee does not preclude the landlord from claiming other losses or damages associated with an early termination of the tenancy agreement. I am satisfied the landlord incurred advertising costs to attract a replacement tenant; however, I find the landlord is only entitled to recover a portion of the amount claimed against the tenant. As I previously found that the landlord failed to take sufficient action to attract a replacement tenant in a more timely manner, I find it reasonable to award the landlord advertising costs incurred in the months of October and November 2009 only. The landlord is awarded \$654.94 for advertising costs and must bear the cost of the advertising for December 2009 onwards.

Damages

At the end of a tenancy, the Act requires the tenant to leave the rental unit reasonably clean and undamaged. Reasonable wear and tear is not damage and a tenant is not responsible for amounts incurred to make repairs for normal wear and tear. As the tenant acknowledged creating holes in the bedroom wall, I find the holes constitute damage and I award the landlord \$60.00 for repairing the wall.

I have reviewed the tenancy agreement and do not find there is a specific term prohibiting the tenant from placing area rugs on the floors. I do not find it unexpected or unreasonable that a tenant would place an area rug on tile floors. It is not in dispute that the area rug underlay left a pattern on the tile floor. The landlord did not claim for damage to the tile floors but has claimed to recover costs associated with additional

cleaning to remove the sticky residue left on the tiles. While I accept that the tenant made an attempt to clean the residue from the tiles, I am satisfied that additional cleaning was required to remove the sticky substance left behind from the area rug underlay. Therefore, I grant the landlord's claim for additional floor cleaning of \$118.30.

Monetary Order

I have found the landlord has established an entitlement to a portion of the amount claimed by the landlord and I award that proportion of the filing fee to the landlord. I have awarded the following amounts to the landlord and I have offset the security deposit and interest held in trust for the tenant against the amounts awarded to the landlord as follows:

Loss of rent	\$ 1,125.00
Liquidated damages	500.00
Advertising costs	654.94
Wall repair	60.00
Tile floor cleaning	118.30
Filing fee (proportionate amount)	10.18
Less: security deposit and interest	<u>(1,144.98)</u>
Monetary Order for landlord	\$ 1,323.44

The landlord must serve the Monetary Order upon the tenant and may file it in Provincial Court (Small Claims) to enforce as an Order of that court.

Conclusion

The landlord was partially successful in this application. The landlord has been authorized to retain the tenant's security deposit and interest and is provided a Monetary Order for the balance of \$1,323.44 to serve upon the tenant.

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 26, 2010.

Dispute Resolution Officer