DECISION

Dispute Codes MND MNR MNSD MNDC FF
MNR MNDC MNSD OLC FF O

Introduction

This hearing convened on April 12, 2010, and reconvened for two and one half hours for the present session on June 7, 2010. This decision should be read in conjunction with my interim decision of April 12, 2010.

The parties were advised their testimony would continue under the affirmation they accepted during the April 12, 2010 hearing. Both parties confirmed they received a copy of the interim decision dated April 12, 2010 and were given the opportunity to present concerns or questions they had pertaining to the interim decision.

The Landlord advised that she did not have questions about the interim decision however she did state the Tenant did not make her aware of the electrical issues until November 27, 2009.

The Tenant requested an explanation of the items listed under the heading "Issues to be Decided" as she thought the Landlord was not entitled to request keeping the security and pet deposits. I explained that the issues to be decided are a listing of what was applied for on each of the Landlord and Tenant's applications and that they were listed for the purpose for me to provide an analysis later in the decision along with my decision.

Issues to be Decided

Is the Landlord entitled to a Monetary Order a) for damage to the unit, site or property, and b) for unpaid rent or utilities, and c) to keep all or part of the pet and or security deposit, and d) for money owed for damage or loss under the Act, regulation or tenancy agreement, under sections 38, 67, and 72 of the *Residential Tenancy Act*?

Is the Tenant entitled to a Monetary Order a) for the cost of emergency repairs, and b) money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, and c) return of all or part of the security and or pet deposit under sections 38 and 67 of the *Residential Tenancy Act*?

Is the Tenant entitled to an Order to have the Landlord comply with the Act under section 62 of the *Residential Tenancy Act*?

Background and Evidence

The Tenant stated she was seeking a monetary order of $2,657.59 which consists of: $300.00 for the return of overpaid rent; $183.75 for costs to compile her evidence, $41.74 ($18.83 + $22.91) for medications to treat her injury and stress; $483.60 to reimburse vacation time taken; $388.50 of moving expenses; the return of double her security and pet deposit in the amount of $1,210.00 (2 x $480.00 plus 2 x $125.00); and the recovery of the $50.00 filing fee.

The Tenant argued she calculated the overpayment of rent from the original and duplicate receipts provided in evidence by the Landlord. The Tenant could not provide specific dates of how or when the overpayment occurred and stated she determined this amount by taking the total amount paid, as listed on the receipts, compared to the amount of rent payable. The Tenant argued her rent was initially $975.00 per month which switched to $1,000.00 per month and later reduced to $775.00 per month. The Tenant was not able to provide testimony of the dates the rent changes came into effect.

The Landlord's position was the Tenant owed for unpaid rent and referred to her documentary evidence of a typed document which lists a month and a dollar amount of rents paid between April 2008 and November 2009. The Landlord testified the rent was $975.00 effective April 1, 2008, $1,000.00 effective June 1, 2008, and $775.00 effective April 2009.

The Tenant referred to her previous testimony and documentary evidence in support of her claim of $183.75 which is what she paid her mother for costs to compile her evidence in support of her dispute resolution application.

The Tenant acknowledged she was not entitled to be reimbursed for her medication costs of $41.74 but she submitted them as proof she required the medication.

The Tenant referred to her documentary evidence to support her testimony that she chose to be paid vacation time, instead of sick pay, for the period she was off work to move and recover from the stress of dealing with the electrical problems, finding a place to move to, planning for Christmas, and looking after her six year old child.

The Tenant testified and confirmed the Landlord was advised of the latest electrical problem on November 27, 2009. The Tenant acknowledged there was a previous issue with the electricity which occurred after the hot water tank was replaced and which was not repaired until a month or so after the installation of the hot water tank. The Tenant argued the upstairs unit was vacant for a long time and that she did not experience the major problems until tenants moved into the upstairs unit near the end of November 2009, a time when it was cold outside and the electric heaters were being used by both the upper and lower units. The Tenant stated the Landlord had rented out the garage to someone who was using electric tools and drawing on the power source which added to the problems of the breakers switching off and the problems with the electrical system.

The Landlord refuted the Tenant's testimony by stating she was only ever told about the hot water tank problems and the problem with the electrical system which began on November 27, 2009. The Landlord argued the Tenant had power in "most of the rooms and there were only a couple of rooms that did not have power for heat". The Landlord claimed she repeatedly offered the Tenant to stay at the Landlord's private residence, during the Landlord's absence, until such time the Landlord returned from her vacation and could attend to the electrical issue.

The Landlord testified she contacted the hydro company twice on November 27, 2009 and requested they check the exterior power lines. There were no problems found with the overhead wires which is when the Landlord contacted the electrical company who said they could not attend the unit for a couple of days.

The Landlord stated she left for her vacation on November 30, 2009 and returned December 8, 2009. The Landlord argued she made arrangements with the electrical company on November 30, 2009 to look into the problems at which time the Landlord left the electrical company keys to the rental unit. The Landlord stated she left a letter for the Tenant in-between her screen door and entrance door however the Tenant argued she never received the alleged letter. The Tenant argued the electrical company never called her to provide notice to enter the rental unit and that it was not until she had contacted the Landlord that she was told which electrical company would be attending the unit to look into the problem. The Tenant argued that when she heard nothing back from either the electrical company or the Landlord she called the City and requested they conduct an inspection. The electrician and the electrical inspector attended the rental unit on December 8, 2009 and determined what needed to be done for a temporary fix. The electrical company performed the temporary fix on December 13, 2009, at which time the Tenant was told to use lamps instead of the overhead lights, not to use the oven when the washing machine was going, and not to have heat on in a couple of the rooms.

The Landlord argued the Tenant did not pay rent for December 2009. Initially the Landlord stated the Tenant provided her with verbal notice to end the tenancy on November 17, 2009 and later the Landlord corrected herself to say the verbal notice was provided on December 17, 2009 to end the tenancy on December 31, 2009. The Tenant confirmed the verbal notice was provided on December 17, 2009 and argued that the Landlord mutually agreed to end the tenancy given the current state of the electrical problems in the rental unit.

When I questioned the Landlord about what was said during the conversation she had with the Tenant on December 17, 2009, the Landlord kept repeating the Tenant did not provide her with written notice to end the tenancy. I then asked the Landlord what she had done to re-rent the unit after being told the Tenant was ending the tenancy and the Landlord stated "how could I rent it as there were electrical issues". The Landlord

confirmed all four suites are still vacant and are being completely gutted to fix the electrical problems.

The Tenant and Landlord both confirmed the Tenant provided the Landlord with a forwarding address, in writing, on approximately December 29, 2009. The Landlord confirmed that she has not returned the security and or pet deposit, the Landlord does not have an order issued by the Residential Tenancy Branch granting her permission to retain the security and pet deposit; the Landlord does not have the Tenant's written permission to keep the security and pet deposit; and the Landlord filed her application for dispute resolution to keep the security and pet deposit on March 3, 2010.

The Tenant confirmed she was withdrawing her request to have the Landlord ordered to make emergency repairs, for other reasons, and her request to have the Landlord comply with the Act as her tenancy has ended.

The Landlord testified she is seeking a monetary order of $1,799.60 which is comprised of $775.00 for December 2009 rent, $600.00 for rental arrears, $124.60 for paint, and $300.00 for labour to repaint the rental unit.

The Landlord argued the Tenant failed to pay December 2009 rent of $775.00 and did not vacate the rental unit completely until December 27, 2009. The Tenant confirmed she did not pay December 2009 rent and argued she did not occupy the unit for the entire month because of the electrical problems, lack of heat, and the verbal discussion with the Landlord on December 17, 2009 during which the Tenant told the Landlord she would be moving and not paying for December's rent.

The Landlord referred to her documentary evidence of copies of original and duplicate receipts issued to the Tenant for rent payments and the Landlord's list which displays a month and an amount, in support of her claim that the Tenant is in arrears for $600.00. The Tenant argued the Landlord never provided accurate accounting of the rent payments she made and that the Landlord requested to pick up all of the Tenant's receipts, took them away, and then returned them with additional receipts marked "duplicate" as an attempt to get her books in order after all of the problems started.

The Landlord is seeking $424.60 for the cost of paint and labour to repaint the unit. The Landlord argued the Tenant was given permission to paint her daughter's bedroom pink but that she told the Tenant she would have to return the bedroom to the original color at the end of the Tenancy. The Landlord claimed the Tenant painted other rooms in the rental unit without her permission and the amount she is claiming is to return the entire suite to the original base color. The Landlord confirmed she had seen that the Tenant painted the other rooms back in September or October 2009 and that she asked the Tenant why she had painted and the Tenant claimed she was bored. The Landlord confirmed she had no further discussions with the Tenant about the painting; the Landlord took no further action to request the Tenant repaint the unit as the painting had

already been done. The Landlord claimed the rental unit had been painted all one color just prior to the beginning of the tenancy in 2008 and had been painted every two years prior to that. The Landlord confirmed she did not provide evidence in support of her testimony of when the unit was painted and by whom. The Tenant argued the Landlord gave her permission to paint her daughter's room pink and at no time did the Landlord say the room had to be returned to the original color. The Tenant referred to the documentary evidence of the tenancy agreement and argued the Landlord added the note about repainting the bedroom after the tenancy agreement was entered into. The Tenant testified the rental unit was not painted by a professional in 2008 and was not painted a neutral color throughout. The Tenant argued that each room had different colors and had "touch up" painting completed by a neighbour.

In closing the Tenant stated the Landlord new well before December 17, 2009, that the tenancy would be ending as they had several discussions in relation to the electrical issues. The Tenant argued the Landlord did not provide receipts for the paint and labour charges and argued the unit was not previously painted as claimed by the Landlord. The Tenant also argued that from November 27, 2009 onward the Landlord, bank appraisers, and contractors continued to enter the rental unit without prior notice. The Tenant stated that she had returned home on two or three occasions to find people either exiting her unit or still inside without her prior knowledge.

The Landlord argued that she told the Tenant trades people would be entering the unit and confirmed she did not provide prior written notice and did not request permission day to day. The Landlord confirmed she left keys to the rental unit with the electrical company and did not instruct the electrical company that they had to call the Tenant prior to entering the unit. The Landlord then confirmed the rental unit was previously painted by a neighbour, she did not supply receipts for the paint and the labour as the unit is currently gutted and has not been repainted at this time, and that she was not going to argue for the painting. The Landlord stated she was sorry for the problems the Tenant had to suffer.

Analysis

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

Section 26 of the Act provides that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. Upon careful review of the evidence I find the Tenant failed to pay the December 1, 2009 rent of $775.00, in contravention of section 26 of the Act, and therefore I hereby approve the Landlord's claim of $775.00 for unpaid rent for December 2009.

The Landlord is claiming $600.00 for rental arrears; however the Landlord could not provide testimony of when the arrears occurred. The Landlord relied upon evidence which was recreated, such as duplicate receipts issued after the fact, and did not provide an exact accounting of when rent was paid and what the balance owing was at any given time. The Landlord simply claimed the arrears accumulated over a period between December 2008 and December 2009. If no action had previously been taken for rental arrears which occurred in months prior then the Landlord has failed to mitigate her losses. Based on the aforementioned I find the Landlord has failed to prove the test for damage or loss, as listed above, and therefore I hereby dismiss her claim for $600.00 of rental arrears.

There is no evidence before me to prove the rental unit had been painted a neutral color in 2008 and there is no evidence which verifies the actual amount required to purchase the paint and pay for the painting labour. There is the presence of opposing testimony pertaining to what was discussed and agreed upon with painting the daughter's bedroom and the Landlord has confirmed the entire rental unit has been gutted to repair the wiring and the painting will not be completed until the repairs are finished. Based on the aforementioned I find the Landlord has failed to prove the test for damage or loss and I hereby dismiss her claim of $424.60 for painting.

The Landlord has been partially successful with her claim therefore I award recovery of the $50.00 filing fee.

Landlord's Monetary Claim – I find that the Landlord is entitled to a monetary claim from the Tenant as follows:

Unpaid Rent for December 2009	$775.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the Landlord)	**$825.00**

Tenant's Application

The Tenant has relied upon the evidence which was recreated in the form of duplicate receipts, issued after the fact, for her claim of $300.00 of overpaid rent. The Tenant acknowledged that she had no knowledge of such an overpayment in rent until after she received the recreated evidence provided by the Landlord. One could argue that the recreated evidence was incorrect and therefore does not meet the test of proving an overpayment existed. I also note that the Tenant could not provide me with dates on when the alleged overpayment occurred and instead the Tenant relied on an overall total of rent owed vs. rent paid as shown in the recreated evidence. Based on the aforementioned I find the Tenant has failed to prove the test for damage or loss, as listed above, and therefore I hereby dismiss her claim for $300.00 in overpayment of rent.

In relation to costs incurred to compile her application, I find that the Tenant has chosen to incur costs that cannot be assumed by the Landlord. The dispute resolution process allows an Applicant to claim for compensation or loss as the result of the Respondent's breach of the Act, not for costs incurred by a personal choice to have someone else compile the Applicant's evidence. Therefore, I find the Tenant may not claim costs to prepare her application and evidence, as they are costs which are not denominated, or named, by the *Residential Tenancy Act.*

The Tenant stated that she was aware that she could not claim for her prescription receipts which were prescribed to her after an injury she incurred during her move as she understood the Landlord did not cause her injury, therefore I dismiss her claim for $41.74 for prescription medications.

In determining the Tenants' claim of $483.60 to reimburse vacation time taken to move and deal with the stress of dealing with electrical problems and having to move plus the moving costs of $388.50, I must consider if both parties upheld their requirements under the tenancy agreement. The Tenant is required to pay rent while the Landlord is required to provide the Tenant the opportunity to use the premises fully. If the Tenant is deprived of the use of all or part of the premises through no fault of their own, the Tenant may be entitled to damages, even when there has been no negligence on the part of the Landlord. The parties are also required under section 7 of the Act to ensure they do whatever is reasonable to minimize the damage or loss.

I am required to consider the evidence not on the basis of whether the testimony "carried the conviction of the truth", but rather to assess the evidence against its consistency with the probabilities that surround the preponderance of the conditions before me. As per the aforementioned I find, on a balance of probabilities, that although the Landlord was informed of the electrical problem on November 27 2009, prior to her leaving the country for a vacation, the Landlord failed to make arrangements to delegate an agent to ensure the electrical problem was being dealt with in a timely and safe

manner, and this failure contributed to the delay of the repairs until the Landlord returned from her vacation.

Simply leaving keys with an electrician to attend to a problem “when they had time” does not meet the test of mitigating a loss or providing a rental unit that is maintained in a state of decoration and repair that complies with the health and safety requirements as required under section 32 of the Act. The Landlord has since confirmed that all four rental units are uninhabitable until the electrical problems have been repaired.

The Tenant and her minor child were left uninformed for several days with intermittent electricity and heat, having to call the Landlord, the electrical company, and finally the city, only to be provided with a temporary fix which involved limited use of the rental unit at different times of the day. I do not accept the Landlord’s argument that she was attending to the issue when she offered the Tenant to move into the Landlord’s residence, amongst the Landlord’s possessions, for the duration of the Landlord’s vacation. The Tenant and her daughter then suffered unannounced interruptions to their quiet enjoyment of the rental unit when the Landlord and contractors entered the rental unit without proper written notice, in contravention of section 29 of the Act.

Based on the aforementioned I find the Tenant has proven the test for damage and loss and I hereby approve her claim in the amount of $483.60 as aggravated damages for the costs incurred by the Tenant to be away from work to deal with the stress and suffering; plus the claim of $388.50 for costs incurred by the Tenant to move; plus $517.00 (approximately 2/3 of one month’s rent of $775.00) for loss of quiet enjoyment of the rental unit from November 27, 2009 to December 29, 2009.

The evidence supports that the Tenant vacated the rental unit and provided the Landlord with a forwarding address in writing on approximately December 29, 2009. The Landlord has not returned the security and pet deposits to the Tenant, the Landlord does not possess an Order allowing the Landlord to retain the pet and security deposits, the Landlord does not have the Tenant’s written permission to keep the pet and security deposits, and the Landlord did not file her application for dispute resolution requesting to keep the pet and security deposits until March 3, 2010.

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. In this case the Landlord was required to return the Tenant’s pet and security deposits or file for dispute resolution no later than January 13, 2010. The Landlord did not file her application for dispute resolution until March 3, 2010.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is 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 pet and security deposits. Based on the aforementioned I find the Tenant has proven the test for damage or loss, and I hereby approve her claim for the return of double the pet and security deposits in the amount of $1,210.00.

As the Tenant has been partially successful with her application I hereby award recovery of the $50.00 filing fee.

Tenant's Monetary Claim – I find that the Tenant is entitled to a monetary claim from the Landlords as follows:

Aggravated damages	$483.60
Moving costs	388.50
Loss of quiet enjoyment	517.00
Return double the pet and security deposits (2 x $480.00 plus 2 x $125.00)	$1,210.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the Tenant)	**$2,649.10**

Off-Set Monetary Claims – Cross Applications – These claims meet the criteria under section 72(1) of the *Act* to be offset against each other's claims as follows:

Monetary Order in favor of the Tenant	$2,649.10
Less Monetary Order in favor of the Landlord	-825.00
TOTAL OFF-SET AMOUNT DUE TO THE TENANT	**$1,824.10**

Conclusion

A copy of the Tenant's decision will be accompanied by a Monetary Order for **$1,824.10**. The Order must be served on the respondent Landlord 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: June 08, 2010.

Dispute Resolution Officer