

## **DECISION**

Dispute Codes      MNSD MNR MNDC MND FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord seeking a Monetary Order for unpaid rent or utilities, for damage to the unit, site or property, to keep all or part of the security and or pet 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 Tenant.

Service of the hearing documents was done in accordance with section 89 of the *Act*, served personally by the Landlord to the Tenant on January 5, 2010, and via registered mail to the Tenant on January 5, 2010. The Tenant confirmed receipt of the hearing package.

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

### Issue(s) to be Decided

Is the Landlord entitled to a Monetary Order under sections 38, 67, and 72 of the *Residential Tenancy Act*?

### Background and Evidence

The Tenant confirmed receipt of the Landlord's evidence on May 25, 2010, which was left for him at his place of residence.

The Landlord acknowledged receipt of the Tenant's evidence and argued that it was not left in the Landlord's mailbox until yesterday, June 7, 2010. When asked why the Tenant did not provide the Landlord with copies of his evidence back on May 25, 2010, when it was provided to the Residential Tenancy Branch, the Tenant's advocate confirmed the Tenant's evidence was not served to the Landlord until yesterday and argued that she was told that the evidence could be left at any time for the Landlord as long as it was prior to the hearing.

The undisputed testimony confirmed the fixed term tenancy began on August 15, 2009 and was set to expire on August 31, 2010. The rent was payable on the first of each

month in the amount of \$870.00 and the Tenant paid a security deposit of \$435.00 on August 7, 2009. The Tenant entered into the written tenancy agreement and signed accepting the terms of the agreement on August 11, 2009. A move in inspection report was completed and signed by both parties on August 15, 2009 and a move out inspection was conducted in the presence of the Landlord, the Tenant, and the Tenant's advocate with the report being completed and signed on December 31, 2009, in the immediate vicinity of the Tenant and the Landlord with the Tenant's advocate standing at a distance.

The Landlord testified that on November 29, 2009, the Tenant provided him with written notice to end the tenancy effective December 31, 2009. The Landlord stated that on December 1, 2009, he discussed with the Tenant, the Tenant's obligations under the fixed term lease and for the liquidated damages of \$750.00, as noted on the tenancy agreement, and requested that the Tenant sign the early end of tenancy form but the Tenant refused to sign the document. The Landlord confirmed the Tenant paid the full rent for December, 2009; the Tenant vacated the rental unit by December 30, 2009; and the move out inspection was completed on December 31, 2009.

The Landlord referred to his documentary evidence in support of his monetary claim which included, among other things, a copy of an invoice for the \$70.00 cost of cleaning the rental unit, a carpet cleaning receipt for \$84.00 which notes there was a tomato stain left on the carpet, copies of several advertisements where the Landlord had advertised the rental unit at various amounts to attempt to rent the unit as quickly as possible, a copy of the Tenant's tenancy agreement, a copy of the tenancy agreement entered into effective February 15, 2010 in support that the Landlord re-rented the unit at a lower amount, and a copy of the signed and completed move-in and move-out inspection report.

The Landlord is seeking reimbursement of the \$70.00 cleaning costs plus the \$84.00 for carpet cleaning. The Landlord argued that the evidence he received from the Tenant only included pictures of the kitchen and bedroom and did not include any pictures of the living room, which is where the carpet was stained; did not include photos of the bathroom and hallways of the rental unit which were left very dirty; and did not include the exterior of the rental unit; which were all areas noted on the move-out inspection report as being dirty and requiring cleaning.

The Landlord testified that he began to advertise the rental unit as early as December 2, 2009 on local internet sites and in local newspapers. The Landlord pointed out that his documentary evidence confirms he advertised the rental unit for \$870.00, \$795.00, and

as low as \$725.00 and was finally able to re-rent the unit for a monthly rent of \$770.00 which included parking, garbage pickup, and the cost of power.

The Landlord referred to the move-in and move-out inspection report whereby the Tenant signed in agreement for the Landlord to keep the security deposit of \$435.00 as partial payment towards the \$750.00 liquidated damages and the copy of the Tenant's cheque #44 dated December 30, 2009 in the amount of \$315.00 which notes the payment is for liquidated damages, which when added to the security deposit amount of \$435.00 totals the liquidated damages amount of \$750.00. The Landlord is requesting to keep the \$435.00 security deposit as agreed to by the Tenant, in writing on the move-out inspection report, to satisfy the full \$750.00 liquidated damages as agreed to by the Tenant at the onset of the tenancy. The Landlord argued the liquidated damages is a true estimate of his costs to re-rent the unit as he had to pay to advertise the unit in several locations, he had to interview several potential renters and pay for credit checks on the applicants only to find out they did not meet the Landlord's screening requirements. The Landlord argued this took his time, money, and effort which is why the liquidated damages were provided for in the tenancy agreement.

The Landlord is seeking loss of rent for all of January 2010 in the amount of \$870.00 and one half of a month's rent in the amount of \$435.00 for the month of February 2010 as the unit was not re-rented until February 15, 2010. The Landlord testified he is also seeking an additional \$600.00 which is comprised of six months (March 2010 through to the end of the Tenant's fixed term at the end of August 2010) at \$100.00 per month for the loss of rent the Landlord is suffering for having to re-rent the unit for only \$770.00 per month for the remainder of the fixed term period.

The Landlord testified that when he requested the Tenant's forwarding address during the move-out inspection the Tenant told the Landlord he did not have a forwarding address because the Tenant was relocating back to Germany, and the Tenant did not provide the Landlord with a forwarding address. The Tenant's advocate argued that an address was provided to the Landlord as listed on the tenancy agreement and addendum at the onset of the tenancy.

The Tenant provided testimony, in English, and confirmed that he arrived in Canada in May 2007; and prior to being laid off in December 2009, he was gainfully employed as a framing carpenter; and is currently 35 years of age and is single. The Tenant confirmed that he had rented a place in 2007, prior to knowing his advocate and prior to renting this unit. The Tenant confirmed that he did not meet his friend, who is attending the hearing today as his advocate, until sometime in 2008.

The Tenant testified that he made a personal choice to seek out different accommodations, that he searched on the local internet advertising website and made arrangements on his own to call the Landlord to view the rental unit. The Tenant confirmed that he saw the rental unit, discussed with the Landlord the availability, the requirement to pay a deposit, and the cost to rent the unit. The Tenant confirmed that he made the decision on his own to go ahead with renting the unit and made arrangements to meet with the Landlord a second time at which point he paid the Landlord the security deposit. The Tenant stated that his advocate was not present when he moved into the rental unit but that she did attend during the move out inspection.

The Tenant's advocate testified that the Tenant looks to other people to explain things to him and in this case the advocate argued the Landlord misrepresented the terms of the tenancy agreement, the addendum, and the liquidated damages. I asked the advocate what her proof was that the Landlord misrepresented the aforementioned and she stated the Landlord explained to the Tenant that there are other damages. The advocate then began to argue that the Landlord forced the Tenant to sign the move-out inspection report without explaining the items to the Tenant.

The Tenant confirmed that he attended the Residential Tenancy Branch on two occasions, on his own accord, to discuss his obligations under the tenancy agreement. The Tenant confirmed later in his testimony that he went to the Residential Tenancy Branch twice, on his own, before a third visit when his advocate accompanied him.

I asked the Tenant if he requested assistance from anyone prior to entering into the tenancy agreement and he replied "I didn't ask anyone for help. It's a regular agreement; it's nothing I have to be scared of."

The advocate confirmed the photos provided in the Tenant's evidence were taken by her on December 30, 2009. The advocate continued her argument that she feels the Tenant was misrepresented and that the Tenant feels manipulated after he lost his job. The Tenant then began to argue that the comments on the move-out inspection report were added after he initialed and signed the document.

The Landlord provided opposing testimony arguing the form was completed prior to the Tenant signing the form, that the Tenant acknowledged that he understood what the Landlord explained to him at the onset and at the end of the tenancy, and that the Landlord did everything according to the Act by completing all of the forms, in writing, and by having the Tenant sign them and then later providing the Tenant with copies of all of the forms.

## Analysis

The Tenant and his advocate confirmed that they did not provide the Landlord with copies of their evidence until the day before the hearing which is in contravention of section 4.1 of the *Residential Tenancy Branch Rules of Procedure*. Considering evidence that has not been served properly on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the applicant Landlord did not receive copies of the Tenant's evidence until yesterday, I find that the Tenant's evidence cannot be considered in my decision. I did however consider the testimony of the Tenant and his advocate.

The Tenant was able to answer all of my questions, in English, and displayed a clear understanding of what I was asking him. I note the Tenant displayed a high level of intelligence when speaking about his decision to seek a new rental unit and how he went about finding a new place to live. The Tenant also confirmed that he had knowledge of tenancy agreements and that he sought guidance, on his own accord, from the Residential Tenancy Branch on more than one occasion. I do not accept the advocate's argument that the Tenant looks to other people to explain things and therefore the Tenant was misrepresented by the Landlord when the tenancy agreement was entered into; as the Tenant confirmed he made the personal choice to relocate and sought new accommodations on his own. Based on the aforementioned I find the Tenant had the capacity to enter into the tenancy agreement, that there was consensus between the Tenant and the Landlord of the terms contained in the tenancy agreement, and the Tenant provided the Landlord consideration in the form of \$435.00 security deposit to secure and finalize the tenancy agreement. Therefore I find the written tenancy agreement to be valid.

I find that in order to justify payment of damages or losses under section 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant Landlord pursuant to section 7.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the Tenant.

In regards to the Landlord's right to claim damages from the Tenant, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section

67 of the *Act* grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

Section 45 (2) of the *Act* provides that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that (a) is not earlier than one month after the date the landlord receives the notice, (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this case the evidence supports the Tenant ended the fixed term tenancy, prior to the end of the fixed term, in contravention of section 45 (2) of the *Act*. The evidence supports the Landlord suffered a loss of rent for January 2010 in the amount of \$870.00, plus half of February 2010 rent in the amount of \$435.00, plus continues to suffer a loss of \$100.00 for the remaining six months of the fixed term for a total loss of rent of \$1,905.00. Based on the aforementioned I find the Landlord has proven the test for damage or loss, as listed above, and I approve his claim of \$1,905.00 for loss of rent.

Having found the tenancy agreement to be valid and the Tenant in contravention of section 45(2) of the *Act* for ending the tenancy agreement prior to the end of the fixed term, I further find the Tenant is required to pay the Landlord the \$750.00 in liquidated damages as stipulated in the tenancy agreement.

In determining the validity of the move-out inspection report a significant factor in my considerations is the credibility of the testimony provided by the Tenant and his advocate. 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. Given the level of capacity displayed by the Tenant during this hearing, in addition to the volumes of documentary evidence submitted by the Landlord which is in compliance with the *Act* and which all contains both the Landlord's signature and initials, and the Tenant's signature and initials, I find the move-out inspection report to be valid.

Section 37 of the *Act* provides that at the end of the tenancy a tenant must leave the rental unit reasonably clean and undamaged. I find the evidence supports there were sections of the rental unit that required additional cleaning, in addition to the carpet needing cleaning, and that the Landlord suffered a loss of \$154.00 (\$70.00 cleaning plus \$84.00 carpet cleaning) to have the entire unit reasonably cleaned. Based on the aforementioned I find the Landlord has proven the test for damage or loss and I approve his claim for \$154.00.

The Landlord has succeeded with his application; therefore I award the Landlord recovery of the filing fee.

**Monetary Order** – 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 Tenant's security deposit as follows:

|   |                   |
|---|-------------------|
| Loss of Rent  | \$1,905.00        |
| Liquidated Damages  | 750.00            |
| Cleaning costs (\$70.00 + \$84.00)                          | 154.00            |
| Filing fee  | <u>50.00</u>      |
| Subtotal (Monetary Order in favor of the Landlord)          | <b>\$2,859.00</b> |
| Less payment made on Tenant's Cheque # 44 December 30, 2009 | -315.00           |
| Less Security Deposit of \$435.00 plus interest of \$0.00   | -435.00           |
| <b>TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD</b>             | <b>\$2,109.00</b> |

Conclusion

I HEREBY FIND in favor of the Landlord's monetary claim. A copy of the Landlord's decision will be accompanied by a Monetary Order for **\$2,109.00**. The order must be served on the respondent Tenant 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 10, 2010.

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Dispute Resolution Officer