

DECISION

Dispute Codes MNSD MND FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order to keep the security deposit, for damage to the unit site or property, and to recover the cost of the filing fee from the Tenants for this application.

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

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

Preliminary Issues

All of the participants, including myself, experienced some form of difficulty when signing into the hearing so the hearing did not commence until approximately twenty minutes after the scheduled time.

Upon reviewing the service of evidence the female Tenant stated that she did not receive copies of the Landlord's evidence and confirmed they received a copy of the Landlord's application for dispute resolution and a copy of the Notice of Hearing. The female Tenant stated that under those grounds she could request an adjournment. The Landlord argued that all of the documents were sent to the Tenants prior to their filing for dispute resolution which is why the Landlord felt they did not need to resend those documents. The Landlord confirmed receipt of the Tenants' evidence and requested that this hearing proceed today. The Tenants initially requested an adjournment on June 23, 2010, claiming the male Tenant could not appear today and I confirmed that it was indeed the male Tenant who appeared as one of the participants today. In considering the female respondent's request for adjournment I note the following: that the applicant Landlord has requested to proceed with today's hearing on the merits of her application; and that all participants were present; and I found the continuation of today's hearing would not prejudice either party; therefore I denied the female Tenant's request to adjourn, in accordance with section 6.6 of the *Residential Tenancy Branch Rules of Procedure* and the hearing proceeded.

Issues(s) to be Decided

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

Background and Evidence

The undisputed testimony was the fixed term tenancy agreement was effective July 1, 2009 and was set to expire on June 30, 2010. Rent was payable on the first of each month in the amount of \$1,379.00 and the Tenants paid a security deposit of \$689.50. Section 5 of the tenancy agreement provides for liquidated damages in the amount of \$450.00. Both Tenants attended and signed the move-in inspection report on June 15, 2009. Both Tenants attended the move out inspection on December 31, 2009.

Landlord's Testimony

The Landlord confirmed that prior to December 1, 2009 the Tenants provided one month's written notice to end the tenancy effective December 31, 2009. A neighbour of the rental unit contacted the Landlord near the end of November 2009 to advise that he saw the Tenants moving their possessions out of the unit. The Landlord then issued a written notice to the Tenants that the rental unit would need to be inspected and available for showing to prospective tenants. The Landlord argued that upon inspecting the unit during the first week of December 2009 she was concerned that the Tenants had abandoned the unit as all of their bigger possessions and main items needed to live comfortably were moved out of the unit and there was waste and other items strewn throughout the unit. The Landlord called the Tenants and told the male Tenant that they would need to keep the heat on in the rental unit and that the unit needed to be cleaned up before the Landlord could show it to prospective tenants. It was during this conversation that the male Tenant advised the Landlord that they were going out of the Country for a 2 to 2 ½ week vacation and that they would not be able to clean the unit so the Landlord would have to clean and prepare the unit for showing. It was during the first two weeks of December 2009, over several days, that the unit was cleaned, painted, the Tenants' possessions tidied up and packed away, the oil tank filled and the heat turned on. The Unit was advertised on the internet and in the local newspaper. The unit was first shown around December 15, 2009 and was re-rented effective January 1, 2010.

The Landlord testified they are seeking liquidated damages, reimbursement for the cost of fuel, cleaning costs, and to keep the security deposit as noted on their application for dispute resolution.

Male Tenant's Testimony

The male Tenant confirmed the conversation he had with the Landlord about the unit requiring cleaning, that the oil tank required filling, and he confirmed that they went out of the Country on vacation from December 10, 2009 to December 18th or 19th, 2009. The male Tenant argued that while the Landlord and he discussed the Landlord cleaning and preparing the unit to be shown and filling the oil tank they were not given the opportunity to do the "normal cleaning that a tenant does at the end of a tenancy". The male Tenant stated that when they returned from their vacation the female Tenant went off to work while he attended the rental unit which is when he found their remaining possessions had been packed up by the Landlord, stored in the basement, and that the entire rental unit had been cleaned.

Female Tenant's Testimony

The female Tenant testified they took possession of their new rental unit December 1, 2009 but that they did not move the majority of their possessions and did not vacate the rental unit until December 31, 2009. Upon further questioning the female Tenant stated that while they moved some of their possessions into the unit they left all of their large items in the rental unit in question and that they slept at the old rental unit until the last week of December 2009.

The female Tenant argued that there was no oil in the tank at the onset of their tenancy and that she refused to turn the furnace on until the Landlord had the furnace serviced. The Tenant went on to say that she is aware that it is the Landlord's responsibility to service the furnace. When asked how they heated the rental unit the female Tenant responded that they used space heaters and confirmed that they did not have the Landlord's written permission to install plastic over the interior of all the windows or to use a different source of heat other than the furnace. The Tenant then argued that they had the oil tank filled, that she did not have proof of this other than her testimony, and that they began to use the furnace near October 29th or 31, 2009 after the Landlord had the furnace serviced.

The female Tenant referred to her documentary evidence which included among other items as copy of their fixed term tenancy agreement, a copy of the move-in inspection report, a copy of the move-out inspection report, a copy of a letter dated November 4, 2009 which they sent to the Landlord, a copy of a letter issued by the Landlord on January 19, 2010, and a copy of the November 29, 2009 notice to end tenancy issued to the Landlord. The Tenant then argued that the Landlord had altered the move-out inspection report after the inspection was completed where the Landlord added "***house abandoned during Dec/09-landlord cleaned and repaired prior to the inspection" as well the Landlord added throughout the document "landlord cleaned".

The female Tenant confirmed that they did not provide evidence which supports they put oil in the oil tank and did not provide evidence which would support the date that they moved most of their possessions out of the rental unit, such as a receipt for the moving vehicle or trailer rental.

In closing the Landlord wanted to clarify that the Tenants refused to sign the move-out inspection form until all of the cleaning costs were known so they left the inspection on December 31, 2009 with the agreement that they would meet again in January 2010 to finalize the document. The Landlord was not able to reach either Tenant as they would not return her calls so the letter was sent to the Tenants with a copy of the move-out inspection report and the application for dispute resolution was filed.

Analysis

The Landlord confirmed that they did not provide the Tenants with copies of their evidence in contravention of section 3.1 of the *Residential Tenancy Branch Rules of Procedure*. Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the respondent Tenants have not received copies of the Landlord's evidence I find that the Landlord's evidence cannot be considered in my decision. I did however consider the Landlord's testimony, the information provided in the application for dispute resolution, the Tenants' testimony, and the Tenants' documentary evidence.

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

The evidence supports the tenancy agreement was for a fixed term set to expire on June 30, 2010, and the Tenants ended the tenancy as of December 31, 2009, six months prior to the expiration of the fixed term. Ending a fixed term tenancy prior to the date specified in the tenancy agreement as the end of the tenancy is a contravention of section 45(2)(b) of the Act. As a result the Tenants became liable for section 5 of the tenancy agreement which provides that if the tenant ends the fixed term tenancy before the end of the original term the landlord may treat the agreement as being at an end and the sum of \$450.00 will be paid by the tenant to the landlord as liquidated damages. Liquidated damages are a predetermined amount that the parties agree to at the onset of the tenancy agreement and are an amount designed to cover the landlord's costs of re-renting the unit. Liquidated damages are in addition to any other amounts owed by the tenant such as unpaid rent or damages. Based on the aforementioned I find the Landlord has proven the test for damage or loss and I approve their claim for \$450.00.

The Landlord is seeking \$326.57 for the cost of approximately 300 litres for the oil tank which was filled at the beginning of December 2009. The Tenants' documentary evidence supports that it was their responsibility to keep the minimum amount of oil in the tank, (300 litres) at all times during the tenancy. I accept the Landlord's testimony and information on her application for dispute resolution that the Landlord had to have the oil tank replenished at the beginning of December 2009. I do not accept the female Tenant's testimony that they had the oil tank filled at the very end of October 2009 and that this would have fulfilled their responsibilities. As per their tenancy agreement the Tenants were to keep a minimum of 300 litres of oil in the tank "at all times" which means up to December 31, 2009, the end of their tenancy. Based on the aforementioned I find the Landlord has proven the test for damage or loss and I approve their claim for \$325.57.

There is supporting testimony that the Landlord and male Tenant had a verbal agreement that the rental unit required some cleaning before the Landlord could show the unit and that the Landlord would have the work performed during the Tenants' absence from the Country. The testimony does not provide exactly what work was performed, by whom, the amount of time and dates the work was performed, or the exact cost incurred by the Landlord to have the work completed. I note that while there is a move-out inspection report it was not completed until weeks after the unit was allegedly cleaned by the Landlord. In consideration of the Landlord's claim of 1,404.16 I find the Landlord has failed to prove the test for damage or loss and I hereby dismiss this portion of their claim.

The Landlord has been partially successful with their claim therefore I award 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 Tenants' security deposit as follows:

Liquidated damages	\$450.00
Cost of Oil	326.57
Filing fee	50.00
Subtotal (Monetary Order in favor of the landlord)	\$ 826.57
Less Security Deposit of \$689.50 plus interest of \$0.00	-689.50
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$137.07

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 **\$137.07**. The order must be served on the respondent 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 30, 2010.

Dispute Resolution Officer