

## **Decision**

### **Dispute Codes:**

MND, MNSD, FF

### **Introduction**

This Dispute Resolution hearing was convened to deal with an Application by the landlord for a monetary order for compensation for utilities owed under the Residential Tenancy Act, (the Act) and to retain the amount from the security deposit.

Both parties appeared and gave testimony.

### **Issue(s) to be Decided**

The landlord was seeking payment of utilities accrued during the tenancy.

The issues to be determined based on the testimony and the evidence is whether the landlord is entitled to monetary compensation for utilities owed and unpaid.

### **Background and Evidence**

The tenancy began on September 1, 2008 with rent set at \$1,400.00 and a security deposit of \$700.00 was paid. The tenancy ended on April 20, 2010.

The landlord testified that the tenant had underpaid utilities and still owed \$408.00. The landlord submitted a tenancy agreement which indicated that the utilities were not included in the \$1,400.00 rent and that the tenant was to pay ½ of the utilities to the landlord each month in equal installments, the amount of which was specified to be \$112.00 per month until June 2009. The landlord stated that the utilities had increased, but the tenant refused to pay half the increased amount as required. The landlord had submitted invoices from the hydro company to verify the charges.

A copy of a Notice of Rent Increase dated May 28, 2009 was submitted into evidence that showed that the tenant's rent stated to be \$1,512.00, instead of \$1,400.00 as shown in the tenancy agreement, was being increased to \$1,569.00 effective September 1, 2009.

The tenant testified that they had paid the required utilities each month as specified in the tenancy agreement. The tenant pointed out that there were 3 units being supplied with hydro on the same account. The tenant testified that when more of the hydro was used for the period, the landlord had demanded payment of the accumulated shortfall. However, the tenant's position was that their contract required being billed for their share of utilities each month in equal monthly installments and that they were not in arrears for utilities under the agreement. The tenant stated that there was no provision to bill the tenant for a "catch-up" amount in a lump sum.

### **Analysis**

In regards to an applicant's right to claim damages from another party, Section 7 of the Act states 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 damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and order payment in such circumstances.

Section 6 of the Act states that the rights, obligations and prohibitions established under the Act are enforceable between a landlord and tenant under a tenancy agreement and that a landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58 (1) [*determining disputes*].

Section 58 of the Act states that, except as restricted under the Act, a person may make an application for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of: (a) rights, obligations and prohibitions under this Act; (b) rights and obligations under the terms of a tenancy agreement that

- (i) are required or prohibited under this Act, or
- (ii) relate to the tenant's use, occupation or maintenance of the rental unit, or common areas or services or facilities.

In this instance I find that the application by the landlord is to enforce a term in the tenancy agreement that required payment of utilities

In regards to the claim for utilities, I draw attention to section 46 (6) which states that when a tenancy agreement requires the tenant to pay utility charges to the landlord, and

if the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them, then the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

When there is a term in the agreement stating that the tenant had to pay utilities to the landlord, the landlord must prove that a written demand for the utility payment was made at least 30 days before including this debt as rent arrears. Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement.

In this instance I find that the tenancy agreement submitted into evidence indicated that electricity was not included in the \$1,400.00 rent and a notation on the agreement under "*Additional Information*" stated, "*1/2 of monthly hydro bill to be added to monthly rent cheque. Bill for June – June 2008/09 is \$224.00. 1/2 = 1123.00/mo. Total rent cheque is 1512.00/mo until June 09.*"

I find that there was a disparity between how the landlord interpreted the tenant's obligation to pay for 1/2 utilities and the tenant's interpretation. I find that the tenant's argument was that this term should be interpreted to mean that the tenant would be charged an equal monthly instalment for utilities based on average usage during the previous year and I find that this position does have some merit, particularly given the written statement from the former landlord confirming that this was so. The Notice of Rent Increase appeared to support this because the monthly rent and monthly utility costs were amalgamated. I find that the tenant complied with the agreement by making equal monthly payments of rent with the applicable portion for utilities for the duration of the tenancy.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if ; (a) the term is inconsistent with this Act or the regulations, (b) the term is unconscionable, or (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

I find that the fact that the tenant was required to pay 1/2 of the utilities for a complex that included 3 units, would function to make the term unconscionable. I also find that, given the discrepancy between the landlord's interpretation and the tenant's interpretation of

the meaning of this particular term, it does not clearly communicate the rights and obligations under it.

Moreover, the Notice of Rent increase issued by the landlord had purported to increase the rent from \$1,512.00 to \$1,569.00. In this notice, I find that the landlord had incorrectly utilized a monthly figure for rent that actually included the amount of utilities shown on the agreement, (\$1,400 rent plus \$112.00 utilities), as a basis for calculating the rent increase. I find that the rent increase issued on May 28, 2009 and effective September 1, 2009 was not fully compliant with the Act and regulations. Section 42(3) of the Act states that a Notice of Rent increase must be in the approved form, failing which it will not be effective.

Given all of the above, I find that the landlord is not entitled to any monetary compensation from the tenant for claimed utility arrears.

### **Conclusion**

Based on the testimony and evidence presented during these proceedings, I find that the landlord's application must be dismissed in its entirety without leave to reapply. Accordingly, under section 38 of the Act, the tenant's security deposit of \$700.00 plus \$3.50 interest must be refunded to the tenant forthwith.

August 2010

Date of Decision

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Dispute Resolution Officer