

## **DECISION**

### **Dispute Codes:**

MNSD, MND, MNR, MNDC, FF

### **Introduction**

This hearing was convened in response to an amended application by the landlord ( at time of hearing) and a cross application by the tenant.

**The landlord's** relevant application for dispute resolution is as follows:

- A Monetary Order to recover unpaid rent in the total of \$2250,
- unpaid utilities in the amount of \$527
- loss of revenue in the amount of \$2700,
- late fees totalling \$250
- Recovery of the filing fee associated with this application in the amount of \$50.

**The tenant** applied for dispute resolution on August 12, 2010 for:

- Return of the security deposit in the amount of \$2700.
- Money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the aggregate of \$22300.

Both parties attended the conference call hearing and participated with their submissions, testimony and documentary evidence, and were permitted to ask questions and attempt to settle all matters.

### **Preliminary matters**

The landlord submitted that he was not aware that the tenant(s) had filed an application for dispute resolution. The landlord acknowledged having received the tenant's evidence (a binder) by ordinary mail and accepted it as the tenant's counter evidence to his application. One of the tenants acknowledges having sent the binder to the landlord

by ordinary mail. Another tenant testified that they sent the notice of dispute resolution by registered mail to the address of the landlord and provided a receipt for the registered mail cost. The tenant was not certain if they had addressed the mail naming the landlord. The landlord testified that there are several suites in the residential property and that he had been personally apprised by the postal outlet of a registered letter to the address – but could not release the mail without a name and in due course the registered mail would be returned to the sender. The landlord testified that had he known of a cross application he would have advanced his own evidence. As a result of the ambiguity in respect to proper service of the tenant's application for dispute resolution, the tenant's application is preliminarily **dismissed - with leave to reapply**.

The hearing proceeded on the merits of the landlord's application.

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

Is the landlord entitled to the monetary amounts claimed ?

### **Background and Evidence**

This tenancy began September 01, 2009 as a fixed term tenancy ending August 31, 2010. The tenant vacated on April 30, 2010. The tenancy agreement reflects that rent in the amount of \$2700 is payable in advance on the day before the first of each month and that all utilities are the responsibility of the tenant. At the outset of the tenancy, the parties agree the landlord collected a security deposit from the tenant in the amount of \$2700, although not reflected in the tenancy agreement, which the landlord retains. There is some dispute as to the calculation of rent in respect to the number of tenants in the rental unit. However, there is no dispute between the parties that the tenants did not pay full rent – failing to pay \$200 for the months of December 2009 through to March 2010 (total of \$800). The tenant agrees that they also failed to pay \$1450 for the month of April 2010 – paying only \$1250. The landlord claims late fees of \$250 – the tenancy agreement reflects: 6. *Late payments of rent are subject to a charge of \$50 per day, subject to a minimum of \$50.*

On April 02, 2010 the parties agreed in writing that the outstanding utilities to date totalled \$1627. They further agreed in writing that the landlord would accept only \$1100 for utilities as full payment for utilities to April 30, 2010 provided that the tenant paid \$2500 *toward rent* payment by 6 p.m. on that date. The parties agreed that the tenant paid the landlord only the aforementioned \$1250. Therefore, the landlord now seeks the balance of the utilities, mutually calculated, in the amount of \$527.

The landlord claims rent for the month of May 2010 in the amount of \$2700. The tenant testified that they verbally notified the landlord they would be vacating on April 30, 2010 – which they thought was also in compliance with an order by the City for the landlord to cease using the rental unit as such by the same date. The tenant testified that the city inspector had told them they would need to vacate. The landlord acknowledges the verbal notice of the tenant and claims that, despite the letter from the City, he did not agree to terminate the tenancy as he disputed the City's instructions. The landlord testified that he permitted the tenant to find replacement tenants to the end of the fixed term of the tenancy and, both, he and the tenant showed the suite during the month of April. The tenants submitted that the landlord repeatedly showed the suite. The landlord was able to secure new tenants for June 2010. The quantum of the landlord's monetary claim is **\$5727**.

### **Analysis**

I have considered all evidence and all submissions and have considered all testimony given in the hearing.

On preponderance of the evidence, I find that the tenant did not pay full rent for the period of December 2009 through to March 2010 in the amount of **\$800**.

I find that the tenant did not pay full rent for the month of April 2010 in the amount of **\$1450**, as agreed by the parties.

Also as agreed by the parties, I find the landlord's claim for the full amount of the mutually calculated and agreed utilities, to April 30, 2010 – in the balance of **\$527** - is justified – given the tenants did not meet the terms of the agreement which would have required them to only pay a portion of it.

I find that the landlord's claim for late fees does not meet the statutory parameters established in the Residential Tenancy Act Regulations for the collection of late fees. A landlord is only permitted to charge a late fee of \$25 per month provided it is so stipulated in the tenancy agreement. I find the landlord's terms are *unconscionable* and therefore I **dismiss** this portion of the landlord's claim without leave to reapply.

I find that there was no mutual agreement to end the fixed term tenancy on April 30, 2010. I further find the landlord has met the burden of proving they attempted to mitigate their revenue losses for the month of May 2010 and followed section 7(2) of the *Act* by taking reasonable steps to mitigate or minimize the loss or damage. Therefore, I

will allow the landlord loss of rent / revenue for the month of May in the amount of **\$2700**.

Based on all the above, I find that the landlord has established a monetary claim for **\$5477** in unpaid rent and utilities. The landlord is also entitled to recovery of their filing fee – of which I grant a portion in the amount of \$50 for a total entitlement of **\$5527**.

The **security deposit** will be off-set from the award made herein.

### **Conclusion**

**I order** that the landlord retain the deposit of \$2700 in partial satisfaction of their claim and **I grant** the landlord an order under Section 67 of the Act for the balance due of **\$2827**. If necessary, this order may be filed in the Small Claims Court and enforced 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*.

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