



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MND, MNR, MNSD, MNDC , FF

Introduction

This Dispute Resolution hearing was convened to deal with an application by the landlord for a monetary claim for \$1,520.00 for \$600 in unpaid rent allegedly owed for the month of April 2010, \$600.00 loss of rent for the month of May 2010 and \$320.00 for damage to the floor and reimbursement of the \$50.00 filing fee. The hearing was also convened to deal with an application by the tenant for the return of the \$300.00 security deposit under the Act in addition to the \$50.00 fee paid by the tenant for this application.

Both the landlord and tenant were present and each gave testimony in turn.

Issues to be Decided for the Tenant's Application

The issues to be determined based on the testimony and the evidence is whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act.

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for damages, payment of arrears in rent for the month of December 2008 and compensation for one month's rent loss due to inadequate notice by the tenant.

The issues to be determined based on the testimony and the evidence is whether the landlord is entitled to monetary compensation under section 67 of the *Act* for rent, loss of rent and damages.

The tenant has the burden of proof to establish that the deposit existed and that 15 days had expired from the time that the tenancy ended without the landlord either refunding the deposit or making application to keep it. The landlord has the burden of proof to show that compensation for rent and damages was warranted.

Background and Evidence

The landlord testified that the tenancy began on March 25, 2010 with rent set at \$600.00 per month and that a security deposit was paid in the amount of \$300.00, for which a receipt was issued. The landlord testified that after moving in, the tenant refused to sign the written tenancy agreement and also failed to pay rent for April 2010. The landlord testified that a formal Ten Day Notice to End Tenancy for Unpaid Rent on the applicable form was never issued but a letter was posted on the tenant's door demanding payment. The landlord testified that the tenant then vacated the unit at the end of April 2010 without paying. However, despite efforts to re-rent, the landlord was not able to find a tenant to take the suite for May 2010 and the landlord incurred a loss of \$600.00 for rent for the month of May 2010. In addition to the above, according to the landlord, the tenant left damage to the floors which cost the landlord \$320.00. The landlord acknowledged that the parties did not complete and sign any formal Move-In and Move-Out Condition Inspection Reports, but submitted photographic evidence of the damage to the floors and copies of the invoices for repairs. The landlord was seeking \$1,520.00 in total compensation for rent, loss of rent and the cost of repairs.

While the tenant acknowledged having moved out at the end of April, he denied that he gave short notice to the landlord under the Act. The tenant stated that he was given a choice by the landlord to either pay extra money to use the laundry facilities or move out and the tenant chose to move. According to the tenant, the rent for April was paid up full by the tenant in cash but no receipt was ever issued by the landlord. The tenant stated that his forwarding address was sent to the landlord by registered mail and the landlord confirmed receipt of this on May 11, 2010. The tenant was seeking the return of his security deposit in the amount of \$300.00.

Analysis: Landlord's Application

In regards to rent claimed by the landlord for the month of April, I note that section 26 (1) of the Act states 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.

However, there is disputed verbal testimony in regards to whether or not the rent payment was made.

In regards to the landlord's assertion that the tenant did not pay the rent for April, I find that even if I accept this testimony as fact, it is clear that the landlord did not take the proper action under the Act to demand payment and/or end the tenancy. Section 46 of

the Act permits a landlord to terminate a tenancy by issuing a Ten Day Notice to End Tenancy for Unpaid Rent. Under the Act, once the Notice is served the tenant then has 5 days to pay which will cancel the notice or the tenant can dispute the notice by making application within 5 days. This information is on the Notice. Unfortunately, by giving the tenant a letter composed by the landlord instead of the legal Ten Day Notice to End Tenancy for Unpaid Rent on the approved form, the landlord did not afford the tenant an appropriate opportunity to take action in accordance with the Act.

In regards to the form and content of notice to end tenancy I find that section 52 of the Act states that in order to be effective, a notice to end a tenancy must be in writing and must (a) be signed and dated by the landlord or tenant giving the notice, (b) give the address of the rental unit, (c) state the effective date of the notice, (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and, (e) when given by a landlord, be in the approved form.

In this instance, I find that the Notice to End Tenancy showing the rental arrears owed was not served on a valid form relating to a Notice to End Tenancy for Unpaid Rent under section 46 of the Act. The existence of this form including the information on the rights and obligations is critical in establishing the claim for rent owed.

It is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. The reason that this is true is because one party must carry the added burden of proof. In other words, the applicant, in this case the landlord, has the onus of proving during these proceedings, that the compensation being claimed is justified under the Act.

When the evidence consists of conflicting and disputed verbal testimony in the absence of independent evidence, then the party who bears the burden of proof is not likely to prevail. In the absence of a Ten Day Notice to End Tenancy for Unpaid Rent I find there is not sufficient proof to support the landlord's claim for rent owed for the month of April.

In any case, while the tenant did not pay, the tenant vacated the unit ending the tenancy despite the fact that a valid 10-Day Notice was never issued.

In regards to the tenant's claimed reason for vacating, I find that, even if I accepted the tenant's testimony that the tenant had paid rent for April but left without notice only because the landlord had imposed extra charges for laundry, this would raise the question of why the tenant would not have stayed and merely refused to pay these extra charges. The tenant would be at liberty under such circumstances to make an

application for dispute resolution to deal with the additional charges, rather than merely vacating the unit without proper notice under the Act.

The landlord had also claimed a loss of rent for the month of May due to the tenant leaving without proper notice. 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 to order payment under these circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being 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 respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant took reasonable measures to address the situation and to mitigate the damage or losses that were incurred.

Section 45 of the Act states that a tenant may end a periodic tenancy by giving the landlord written 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, and (b) 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. I find that this tenant violated the Act by ending the tenancy without proper notice. Therefore I find that elements 1, 2 and 3 of the test

for damages have been met. However, to meet element 4 the landlord must prove that reasonable steps were taken to mitigate the loss. The landlord testified that the unit was advertised but did not provide evidence to verify when and where the advertisements were placed. Given the absence of supportive evidence on mitigation, I find that the landlord's claim for \$600.00 compensation cannot be granted and the landlord's entitlement to compensation is reduced to \$300.00.

.In regards to the claim for damage to the floors, I find that the tenant's role in causing damage can best be established with a comparison of the unit 's condition before the tenancy began with the condition of the unit after the tenancy ended. In other words, through the submission of copies of the move-in and move-out condition inspection reports containing both party's signatures.

Both section 23(3) of the Act covering move-in inspections and section 35 of the Act for the move-out inspections state that the landlord must jointly do these inspections and both parties must complete and sign the forms.

In this instance, the landlord admitted that neither a move-in condition inspection report nor move-out condition inspection report was completed. I find the failure to comply with sections 23 and 35 of the Act has hindered the landlord's ability to establish what damages were caused by the tenant and did not preexist.

Given the above, even if I accepted the existence of the damage as confirmed in the photos and all of the associated costs to rectify the damage, I find that the landlord did not offer sufficient evidentiary proof that the tenant was responsible for causing it in violation of the Act. Therefore I find that element 2 of the test for damages has not been satisfied and the claim for repairs to the floor must be dismissed.

Analysis: Tenant's Application

Return of Security Deposit

The landlord has made application to retain the deposit for claimed damages and rent owed while the tenant has made application for the return of the security deposit.

Section 38 of the Act deals with the rights and obligations of landlords and tenants in regards to the return of security deposit and pet damage deposit. Section 38(1) states that within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either:

- repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest; OR

- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The landlord was in possession of the tenant's security deposit held in trust on behalf of the tenant at the time that the tenancy ended. The evidence submitted verified that the tenancy ended on April 30, 2010 and I find that the landlord made application to retain the deposit within the 15 days.

In regards to a tenant's right to the return of the deposit, regardless of any other factors, the deposit is always considered to be funds held in trust for the tenant. And in this case the tenant is credited with \$300.00 for the deposit. However, given that I have found the landlord is entitled to compensation of \$300.00 I order that the landlord retain the \$300.00 deposit in satisfaction of the claim.

Conclusion

Based on the testimony and evidence presented during these proceedings, I find that the landlord is entitled to retain the tenant's \$300.00 security deposit. The remainder of the landlord's application is dismissed and the tenant's application is dismissed in its entirety without leave.

Each party is responsible for paying his own cost of the application.

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*.

September 2010

Date of Decision

Dispute Resolution Officer