

DECISION

Dispute Codes MNR, FF

Introduction

This hearing dealt with the landlord's application pursuant to section 67 of the *Residential Tenancy Act* (the *Act*) for a monetary order for unpaid rent and for the recovery of the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord testified that she sent the application for dispute resolution package to the tenant by registered mail on June 3, 2010. The tenant confirmed that she received this application on June 8, 2010. I am satisfied that the landlord served the application for dispute resolution to the tenant in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary order? Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

The landlord testified that this one-year fixed term tenancy commenced on June 1, 2008. Rent was set at \$725.00 per month. The tenant paid a \$362.50 security deposit on May 27, 2008. The landlord testified that she retained that security deposit plus interest as part of the \$400.00 liquidated damages charge that she applied to the tenant when the tenant vacated the rental premises on March 1, 2009.

The parties agreed that the tenant first notified the landlord of a mould problem outside the tenant's bathroom on January 29, 2009. The tenant submitted into evidence photographs of this mould. The following day the landlord inspected the premises and removed the mould. The tenant testified that she sent the landlord her written notice to end this tenancy on January 30, 2009 because she remained concerned that the cause

of the mould problem she identified in the rental premises had not been remedied. She said that she was encountering problems with allergies at that time and was worried that the ventilation in the rental premises were causing these health problems.

The landlord said that she told the tenant at the time of the condition inspection report on March 1, 2009 that she would be responsible for a liquidated damages fee of \$400.00. The landlord testified that she also told the tenant that she would be responsible for the landlord's rental losses for March, April and May 2009 if the landlord were unable to rent the premises to another tenant during those months.

The tenant entered into evidence a copy of the Security Deposit Statement signed on March 1, 2009 which permitted the landlord to retain her security deposit in partial satisfaction of the liquidated damages fee. In this statement, she accepted the landlord's charge of \$400.00 for liquidated damages. The balance shown as due in the statement is "0."

The parties agreed that the tenant did not accept that she was responsible for both the liquidated damages fee and rent until the expiration of the fixed term tenancy agreement. The landlord testified that she told the tenant that she could register her objection by including a tenant statement in Part V of the Move-Out Inspection. The parties agreed that the tenant provided the following tenant statement:

...(I) was not aware of these circumstances. I do not agree with these terms. I was unaware that I am required to cover rent costs until suite rented...

The landlord submitted into evidence another version of the signed Security Deposit Statement. This statement showed specific figures for the security deposit, unpaid rent fees of \$725.00 for March 2009 and \$362.50 for April 2009, a utility charge of \$172.48, and a total balance owing of \$1,294.13. The landlord said that this information was placed on the tenant's signed March 1, 2009 statement by the landlord's accounting department after final calculations on the tenant's account were available.

The landlord provided undisputed testimony that she advertised the rental premises as soon as the tenant provided her notice to end tenancy. She testified that a new tenant could not be located until April 15, 2010 at a monthly rental of \$700.00. The landlord requested a monetary award of \$725.00 for March 2009 and \$362.50 for the first two weeks of April 2009. She also asked for recovery of her filing fee for this application.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must 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 other party.

Section 5 of this Residential Tenancy Agreement reads as follows:

5. LIQUIDATED DAMAGES: *If the tenant ends the fixed term tenancy before the end of the original term as set out in (B) above, the landlord may treat this Agreement as being at an end. In such event, the sum of \$400.00 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty. Liquidated damages covers the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property...*

I do not accept the tenant's assertion that the landlord's failure to deal with the cause of the mould outside her bathroom enabled her to end her fixed term tenancy prior to the scheduled May 31, 2009 termination date of her tenancy agreement. Until January 29, 2009, the tenant had provided no notice of this issue to the landlord. The landlord inspected and cleaned this mould the following day.

The landlord presented evidence to demonstrate that she attempted to mitigate the tenant's losses by advertising the rental premises and leasing it for April 15, 2009.

The liquidated damages portion of the tenancy agreement specifies that "the landlord may treat this Agreement as being at an end " in which case the tenant will pay \$400.00 as liquidated damages. The tenant submits that the landlord's acceptance of the payment of \$400.00 ended her responsibility for the landlord's rental losses in March and April 2009. This position seems consistent with the tenant's March 1, 2009 statement and the balance owing shown on the Security Deposit Statement she signed that day. I do not accept that the notes regarding ongoing responsibility for March, April or May 2009 rental losses change the basic provisions of the Liquidated Damages portion of the tenancy agreement. In considering this evidence, I attach little weight to changes made by the landlord's accounting department after the tenant signed the March 1, 2009 Security Deposit Statement.

Based on the tenancy agreement entered into evidence before me, I find that the landlord has two options when the tenant wishes to end the tenancy before the end of the fixed term. The landlord may choose to accept \$400.00 from the tenant for liquidated damages in which case the tenancy agreement ends, or the landlord may opt not to accept that sum and thereby continue the agreement between the parties. In this case, the landlord chose to accept the sum of \$400.00. The agreement between the parties ended on the date that sum was accepted. As there was no longer an agreement between the parties after March 1, 2009, no more rent is payable by the tenant. I am not satisfied that the landlord is entitled to a monetary order for unpaid rent for March 2009 and part of April 2009.

Conclusion

I dismiss the landlord's application for a monetary order for loss of rental income and recovery of the filing fee for this 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*.