DECISION

Dispute Codes MND MNR MNSD MNDC FF
MNSD FF

Introduction

This hearing convened at 9:30 a.m. on September 23, 2009, for one hour, then reconvened at 3:00 p.m. the same date for an additional one hour, and dealt with cross applications for Dispute Resolution filed by both the Landlords and the Tenant.

The Landlords filed seeking a Monetary Order for damage to the unit, site or property, for unpaid rent or utilities, to keep all or part of the security deposit, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed seeking a Monetary Order for the return of her security deposit and to recover the cost of the filing fee from the Landlords for this application.

Service of the hearing documents by the Landlords to the Tenant was done in accordance with section 89 of the *Act*, served personally to the Tenant's service address at her Legal Counsel's office on September 13, 2010. Counsel confirmed receipt of the Landlord's hearing package.

Service of the hearing documents by the Tenant to the Landlords was done in accordance with section 89 of the *Act*, served via registered mail on May 12, 2010. The Landlords confirmed receipt of the Tenant's hearing package.

The parties appeared, gave affirmed testimony, confirmed receipt of evidence provided by the other party, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

Are the Landlords entitled to a Monetary Order pursuant to section 67 of the *Residential Tenancy Act*?

Is the Tenant entitled to a Monetary Order pursuant to section 67 of the *Residential Tenancy Act*?

Background and Evidence

Undisputed Testimony / Evidence

The Landlords initially filed their claim through Provincial small claims court. The Tenants application for dispute resolution was filed with the Residential Tenancy Branch in order to quash the small claims action. There are currently no outstanding actions in either Provincial or Supreme Court pertaining to the tenancy involving these parties.

The parties initially entered into a written fixed term tenancy agreement which commenced on July 1, 2007 and expired on June 30, 2008. A Strata Property Act Form K was signed on June 30, 2007 by one of the Tenants. The Tenant paid a security deposit of $1,250.00 on June 4, 2007. The parties entered into a second fixed term tenancy effective July 1, 2008 which was set to switch to a month to month tenancy after June 30, 2010. No additional security deposit was paid.

The Tenant vacated the rental unit sometime during the last week of September 2009. The Landlords found out that the Tenant had vacated when they attended the unit sometime near the end of September 2009 and the beginning of October 2009. They attended the unit to show it to a prospective renter and upon entry they found that the unit had been vacated. Keys for the rental unit were picked up from Counsel's office by the Landlords however the mail keys were not returned.

Counsel confirmed that it is the Tenant's position that she gave the Landlords permission to retain the security deposit to cover costs of ending the tenancy as confirmed in Counsel's letter to the Landlords dated September 21, 2009. (Item 16 in the Tenant's evidence)

The Tenant acknowledges responsibility for the advertising costs of $813.33 plus the $5.00 claim for failure to return the mailbox keys.

Landlord's Witness

The Witness for the Landlords attended and provided affirmed testimony. She advised her credentials include a real estate license and training as a home staging professional. She stated that she had an opportunity to show the rental unit to a prospective buyer in October or November 2009 and she found the place to be "a disaster". She said the living room wall had numerous holes like a woodpecker had been at the wall. She contacted the Landlords and advised them that this unit did not show well considering that it was a high end condo. She recommended a handyman to the Landlords who was subsequently hired to patch the walls and paint the rental unit for a cost of $550.00. The handyman was paid in cash by the Witness who was later reimbursed by the Landlords. The Witness later referred a potential renter to the Landlords who subsequently rented the unit. The Witness was paid a $500.00 finder's fee from the Landlords for this referral. She argued that the Landlords had a duty to prepare the suite prior to anymore showings.

The Witness confirmed that no invoices were issued to the Landlords for these services; there were no contracts created for these repairs; the handyman was paid through the Witness; and no fees were paid to the Witness for the handyman services.

Landlords' Submissions

It is the Landlords' position that they did what was reasonable to mitigate and made every attempt to find a new tenant or to even sell the rental unit. They stated that they would have been willing to accommodate a one or two year lease and were doing what they could to accommodate the Tenant's wishes.

The Landlords confirm they had a verbal conversation with the Tenant on June 24, 2009, as reference by their notes on page 16 of their evidence, where the Tenant stated that she would pay for the advertising costs and assured the Landlords that the owners would not go a month without rent. The parties entered into a written agreement on July 6, 2009, (page 17 of the Landlord's evidence), which provides that the Tenant would be

responsible for advertising costs, rent until a new suitable tenant is found, costs associated with finding the new tenant, and that there would be no sublet or sublease offered to the new tenant but rather a new lease in order to release the existing Tenant from any further responsibility.

The Landlords argued that they aggressively followed up every inquiry and kept the Tenant informed throughout the process as supported by their documentary evidence on pages 19 to 30; 37 to 52; and 58 to 60. They spent their weekends and evenings showing the unit and feel they went over and above their required duties as the Tenant was in fact responsible for the unit for the duration of the fixed term tenancy agreement. They stated the Tenant took the position that it was the Landlords responsibility to find a new tenant and that she only referred two people as proposed tenants, as noted in the e-mail on page 81 of the Landlord's evidence.

The Tenant communicated to the Landlords via e-mail on September 16, 2010, that she "would think that the best action at this point, is to continue the path you have taken"; "I will replace the drywall in the living room before a new tenant moves in" and "Let me know what the advertising costs are to date and I will reimburse you." A copy of this e-mail can be found on page 36 of the Landlord's evidence.

The evidence pages 33, 34, and 35 confirm the Tenant's agreement to showings of the rental unit while pages 61 and 62 confirm the communication between the parties where the Landlords were seeking the Tenant's direction on which way to proceed.

Page 63 is a copy of the letter written September 21, 2009, by the Tenant's lawyer which includes notification that the Tenant would be vacating the unit September 24, 2009, the Tenant agreed to pay for October 2009 rent, and the Tenant authorized the Landlords to keep the security deposit as per the letter which includes "(Tenant's name) has agreed for you to retain the damage deposit she and her husband paid upon entering into the Lease."

With respect to payment of repairs page 84 of the evidence is a copy of an e-mail sent by the Landlords to the Tenant's lawyer on October 20, 2009 advising the lawyer that the cost of repairs will be $500.00 plus GST. The lawyer responded on October 20, 2009 (page 81 of the evidence) with an e-mail that states "With respect to the repair and advertising costs, please be advised that these expenses are appropriate deductions from the damage deposit paid by (Tenant's name) and her late husband.

The Landlords made several attempts to pick up the keys for the rental unit and on November 4, 2009 they were only able to pick up an incomplete set as noted in pages 85, 86, and 87 of their evidence.

The rental unit was brand new which had never been occupied prior to the Tenants taking possession which is why no move-in inspection report was completed. The reason why a move-out inspection report was not completed is because the Tenant had already vacated the unit before the Landlords found out. The Landlord's evidence page 139 supports that there were over 60 holes in the living room/den wall and that the realtor would be paid a $500.00 finder's fee if the unit was rented by her client. Page 140 of the evidence provides a cheque that was issued to the realtor to cover the costs of repair and finder's fee totalling $1,050.00 ($550.00 + $500.00)

Pages 89 and 107 to 117 support the rental unit was re-rented effective December 1, 2009, and the Landlords had kept the Tenant's lawyer informed.

In response to the lawyer's argument that the unit had been occupied prior to December 1, 2009 because the utility accounts were put in the new tenant's name in November, the Landlords argued that this was the same courtesy they offered to the original Tenants, allowing them access early to move possessions in and to get their accounts set up and organized. It is the Landlords' position that they did not want the Tenant to incur utility costs for any period that the new tenant may have access to the unit to begin to move possessions in. They confirm the tenancy agreement did not become

effective until December 1, 2009, and no rent was paid by the new tenant for any period prior to December 1, 2009.

Tenant's Submission

The Tenant acknowledges responsibility for the advertising costs of $813.33 plus the $5.00 mail key fee being claimed by the Landlords.

The Tenant refuses responsibility for cleaning charges of $50.00 and argues that she paid to have the rental unit cleaned after her possessions were removed as supported by the letter issued by the cleaning lady which is located after tab 18 in her evidence. She referred to photos provided after tab 4 in the evidence to support how clean the unit was. These photos were taken during the course of the tenancy on July 23, 2009.

Counsel argued that the move out fee of $100.00 is in contravention of section 34(2) of the Act and referred to this fee as an amount charged to the tenant to sublet the unit. This fee is an "inevitable fee which would be charged at sometime" however they argue this fee is not listed in the lease and is not a fine so is not reference on the strata "Form K" and therefore cannot be recovered from the Tenant.

The Tenant strenuously objects to rent being charged for November 2009 as she told the Landlord in June 2009 of her intention to move out of the rental unit. The Tenant offered to pay the difference of a reduced rent if the Landlord would lower the rent however that was not offered. The Tenant recognizes that this is "the toughest market in Western Canada" and therefore she should not be held responsible.

They contend that the Landlords were holding out for a two year term, as supported by the e-mail after Tab 17. The Tenant suggests that the unit could have been rented earlier if the Landlords would have accepted a one year term. This supports a negative inference of the Landlords' attempt to mitigate as they would only take a two year term. They argue that it is not a coincidence that the Landlords were able to secure a new tenant within days of the Tenant stopping to pay rent.

With regards to claims for damages the Tenant's evidence of photos behind tab 4 support that there is minimal damage in the unit. Counsel noted that there were no photos or evidence provided by the Landlords which prove the condition of the rental unit. The Landlord failed to inform the Tenant of a required move-out inspection report and is therefore has forfeited their right to claim against the security deposit for damages. There are no photos to disprove the realtor's statement or to prove that payment was made to the handyman.

It is the Tenant's position that the document dated July 6, 2009, and found after tab 3 in the evidence, is not a contract as there is no consideration for this contract. Counsel asks that this evidence be given weight accordingly.

Counsel refutes the Landlord's statement that she was not informed that the Tenant had vacated the rental unit as supported by page 65 of the Landlord's evidence which is a copy of an e-mail dated September 23, 2009, and confirms the Landlords received the lawyer's letter of September 21, 2009, advising them that the Tenant would vacate on September 24, 2009. This is a direct contradiction of the Landlord's testimony.

Landlords' Closing Statement

The Landlords confirmed the contradiction in their testimony and argued that they are not as familiar with these processes as the Tenant's lawyer is. They argued that both parties signed the agreements in good faith.

The financial burden of breaking the lease lies with the Tenant and they did what they could to assist the Tenant in moving on.

They argued that the photos show no details of the damage as they do not show the walls after the paintings were removed and the dirt was not visible as the Tenant and her furniture still occupied the unit at the time these photos were taken.

The move out fee is the strata charge for booking the elevator for the move out and is

not a sublease charge. The Tenant was clear that she did not want a sublease. The Tenant paid the $100.00 fee when she moved in and would have had to pay this fee at anytime she moved out.

In response to Counsel's argument and evidence pertaining to whether the Landlords would accept a one or two year lease. They submit that the e-mail evidence is missing information, is disjointed, does not meet the proper time line and has obviously been altered. They did not insist a two year lease. It came down to these people not wanting to rent a place and have their money go to someone else's mortgage.

The Landlords suggest that they were not required to even request the repairs as they had already been given permission to complete them and deduct them from the security deposit. They informed the lawyers out of a courtesy to the Tenant.

The male Landlord stated the new tenant was not found overnight as suggest by the Tenant's Counsel. This was a process that took time. He also confirms the unit was left dirty and if the cleaning lady was paid six hours to clean she did not finish the job as it was left dirty.

Tenant's Closing Statement

Counsel for the Tenant argued the Landlords' closing statements were based on hearsay and not supported by their documents. He argued the Landlords had no wholesale rights to repairs of the unit.

The Tenant confirmed her photos were taken July 23, 2009 during the time she occupied the rental unit.

Analysis

Landlords' application

Each participant submitted a voluminous amount of documentary evidence to the *Residential Tenancy Branch,* all of which has been carefully considered, along with the testimony, in making my decision.

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 evidence supports the parties entered into a written fixed term tenancy agreement effective July 1, 2008 which was not set to expire and switch to a month to month tenancy until after June 30, 2010. Section 45 (2) of the *Residential Tenancy Act* (Act) provides that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than the date specified in the tenancy agreement as the end of the tenancy, is not earlier than one month after the date the landlord receives the notice, and is the day before the day in the month that rent is payable under the tenancy.

A tenant may not use the one month notice provision of the Act to end the fixed term tenancy prior to the end of the fixed term. Any written notice provided by the Tenant will take effect not sooner than the end of the fixed term.

Based on the above, I find the Tenant to be responsible for the all terms of the fixed term tenancy agreement until the effective date of a new tenancy agreement entered into by the Landlords or until the end of the fixed term of June 30, 2010, which ever was earlier.

I do not accept the Tenant's argument that the Landlords did not take the proper action to find a new tenant as the Tenant is responsible for the tenancy for the duration of the

fixed term. I accept that the Landlords mitigated their losses in this case as the Landlord's did not suffer a loss of rent until November 2009 when rent was not paid and they were able to secure a new tenancy effective December 1, 2009.

Section 26 (1) of the Act provides 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, unless the tenant has a right under this Act to deduct all or a portion of the rent. As per the aforementioned I find in favour of the Landlords' claim for unpaid rent for November 2009 in the amount of $2,500.00.

The Tenant has acknowledged responsibility for advertising costs of $813.33 and the mailbox key of $5.00. Therefore I approve the Landlords' claims for these items.

I do not accept the Tenant's argument that the agreement the Landlord and Tenant entered into on July 6, 2009, is an invalid contract due to a lack of consideration. In this case I find the July 6, 2009 to be an addendum to the tenancy agreement; therefore the agreement is valid. The Tenant has signed the document agreeing to be responsible for "the costs associated with finding a new tenant". I note that this agreement restates what the Tenant's obligations are under the Act.

I accept the Witness's testimony which confirms she was paid a $500.00 finder's fee and she was paid $550.00 for repairs to the living room wall in the rental unit.

The Landlords are seeking reimbursement of the $500.00 finder's fee paid to the realtor for contact with the new tenant. The Landlords suffered the loss of $500.00, due to the Tenant's breach of section 45 (2) of the Act, so the Landlords could secure the new tenant. The Landlords paid the fee to mitigate any further losses. Had they not paid this fee and were not able to secure a new tenant the loss may have included additional losses for rent at a cost of $2,500.00 per month. Based on the aforementioned I find the Landlords suffered a loss of $500.00 due to the Tenant's breach; therefore I approve their claim of $500.00.

The evidence clearly shows there was damage caused to the wall in the living room. The Tenant testified she left numerous hooks and wires attached to the wall at the end of the tenancy and the Landlords' Witness confirmed there were numerous holes in the wall. In the Tenant's e-mail to the Landlords dated September 16, 2009 the Tenant states "I will replace the drywall in the living room before a new tenant moves in". The letter written by the Tenant's lawyer dated September 21, 2009 also confirms there was damage to the living room wall which required repair. Section 32(3) of the Act provides a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property. Based on the above I find the Landlords' have provided sufficient evidence to support their claim of $550.00 for repairs to the unit.

The Landlord is seeking $50.00 for cleaning costs. There neither is evidence to support the date the alleged cleaning took place nor is their evidence to support how or when the cleaning person was paid. The Tenant provided opposing evidence in the form of a letter from the cleaning person who assisted the Tenant in cleaning the unit after the furniture was removed. Therefore I find the Landlords' have failed to provide sufficient evidence to support their claim for cleaning costs.

The evidence supports the Tenant signed the Strata Form K on June 30, 2007, which stipulates the Tenant must comply with the "bylaws and rules of the strata corporation" and that the current bylaws and rules were attached to the form K. The Tenants admittedly paid the $100.00 move-in or elevator booking fee at the onset of their first tenancy. I do not accept the Tenant's argument that this $100.00 move-out fee represents a fee charged to the Tenant by the Landlords to sublet this unit. There is no evidence to support this unit was sublet, rather there is evidence the unit was re-rented under a new separate tenancy agreement.

There is evidence that the Landlords suffered a loss of $100.00 pertaining to the Tenant's move-out fees charged by the Strata. As the Tenant has signed the Form K

acknowledging receipt of the bylaws and rules she is responsible for the move-out fee. I approve the Landlords' claim of $100.00.

I do not accept the Tenant's argument that the Landlord is not entitled to claim for damages because of a failure to request or complete a move-out inspection. While I agree that Section 36(2) stipulates the right of the landlord to claim against a security deposit for damage to residential property is extinguished if the landlord does not comply with the requirements for a move-out inspection. It does not prevent the landlord for claiming damages under sections 32 and 67 of the Act, nor does it prevent the *Residential Tenancy Branch* from offsets damages to the security deposit under section 72 (2)(b) of the Act. Furthermore I must add that the Tenant signed over her security deposit, in full, to the Landlord, prior to the end of this tenancy, to cover costs to repair the unit and to find a new tenant.

The Landlords have primarily been successful with their application; therefore I award recovery of the $50.00 filing fee.

Monetary Order – I find that the Landlords are entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenant's security deposit as follows:

Unpaid Rent for November 2009	$2,500.00
Advertising costs	813.33
Mailbox Key	5.00
Reimbursement of finder's fee	500.00
Repairs, patch, sand, and paint rental unit	550.00
Move Out Fees	100.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the landlord)	**$4518.33**
Less Security Deposit of $1,250.00 plus interest of $9.43	-1259.43
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	**$ 3,258.90**

Tenant's application

Having found earlier that the Tenant signed over or forfeited her security deposit to the Landlords in full, prior to the end of the fixed term, I hereby dismiss the Tenant's application, without leave to reapply.

The Tenant has not been successful with her application; therefore I decline to award recovery of the filing fee.

Conclusion

A copy of the Landlord's decision will be accompanied by a Monetary Order for **$3,258.90**. The order must be served on the respondent Tenant 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: September 27, 2010.

Dispute Resolution Officer