

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants pursuant to the *Residential Tenancy Act* (the *Act*). The landlord's application was for:

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

The tenants applied for a return of their security deposit from the landlord.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenant who participated in the telephone conference hearing (the tenant) submitted written evidence that she sent copies of the tenants' application for dispute resolution to the landlord on July 2, 2010 by registered mail. She provided copies of Canada Post Tracking Numbers to confirm her mailing of these documents. The landlord's representative (the landlord) testified that he received the tenants' application for dispute resolution. The landlord said that one of his staff sent the tenants a copy of the landlord's application for dispute resolution on or about September 10, 2010. The tenant confirmed receiving the landlord's application on September 20, 2010. I am satisfied that the parties served one another with their applications for dispute resolution in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and for loss resulting from this tenancy? Is the landlord entitled to a monetary award for damage resulting from

this tenancy? Which of the parties is entitled to the tenants' security deposit? Is the landlord entitled to recover his filing fees for this application from the tenants?

Background and Evidence

This one-year fixed term tenancy commenced on August 1, 2009. The tenancy was scheduled to end on July 31, 2010. Monthly rent was set at \$1,700.00, payable on the first of each month. The tenants paid a security deposit of \$850.00 on August 1, 2009, which the landlord continues to hold.

On April 12, 2010, the tenants sent the landlord's representative an email advising that they wished to end the tenancy by May 11, 2010. The landlord's representative notified the tenants that they would remain responsible for the rent owing according to the fixed tenancy agreement if the landlord were unsuccessful in renting to another tenant. The tenants vacated the rental premises by April 30, 2010, and did not pay rent for May 2010 or any subsequent months.

The tenant testified that the tenants did not provide a forwarding address to the landlord in writing. The tenant requested the return of the \$850.00 security deposit. The landlord applied for the following:

Item	Amount
Loss of Rent - May 2010	\$1,700.00
Loss of Rent – June 2010	1,700.00
Loss of Rent – July 2010	1,700.00
Liquidated Damages	950.00
Cleaning Rental Premises Post Tenancy	120.00
Recovery of Filing Fee for this application	100.00
Total Monetary Award Requested	\$6,270.00

The landlord asked for permission to retain the tenants' security deposit in partial satisfaction of the monetary award requested.

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.

Loss of Rent May – July 2010

The tenant did not dispute the landlord's claim that she signed a fixed term residential tenancy agreement that did not end until July 31, 2010. As such, the tenants could not unilaterally end their responsibilities under that fixed term tenancy agreement by notifying the landlord of their intention to vacate the rental premises in 30 days. I find that the tenants vacated the rental premises by April 30, 2010, in contravention of their fixed term tenancy agreement.

Section 7(2) of the *Act* requires the landlord claiming damage or loss resulting from the tenant's non-compliance with a tenancy agreement to "do whatever is reasonable to minimize the damage or loss." I am satisfied by the landlord's undisputed oral testimony that the landlord did attempt to rent the rental premises to another tenant for the remaining portion of the tenants' fixed term tenancy agreement. The landlord testified that advertisements were placed in a number of locations (e.g., the rental agent's website, a community newspaper, on Craigslist.) The landlord said that they were unsuccessful in renting the unit to another tenant for this period, even at a reduced proposed rental rate of \$1,600.00 per month. The landlord testified that the rental unit was not rented again until early August 2010.

As the landlord discharged his duty to mitigate the tenants' losses to the extent necessary, I find that the tenants are responsible for the landlord's loss of income for the remaining three months of their fixed term tenancy agreement. I issue a monetary award in the landlord's favour of \$1,700.00 for each of May, June and July 2010.

Liquidated Damages

Residential Tenancy Policy Guideline #4 establishes how clauses for Liquidated Damages in residential tenancy agreements are to be interpreted by DROs.

...A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into...

The landlord cited Section 16 of the signed Addendum to the residential tenancy agreement as the reason for requesting \$950.00 in liquidated damages arising out of this tenancy. This section reads in part that these damages cover “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.” The landlord said that these costs were designed to cover the extra costs that the landlord would need to incur to re-rent the rental premises before the expiration of the fixed term tenancy agreement.

While I have given the landlord’s request careful consideration, I am not satisfied that the landlord has established to the extent necessary that this charge provided a genuine pre-estimate of the cost for this item. Other than the landlord’s oral testimony that his real estate company tried to re-rent the rental unit, he provided little evidence regarding the costs incurred in advertising and in re-renting premises in this community. He provided no evidence to support his assertion that the \$950.00 fee identified in the liquidated damages clause in the Addendum represented a genuine pre-estimate of the cost of ending this tenancy early. I also note that both parties agreed at the time this tenancy was signed that the tenants would vacate the rental unit by July 31, 2010. The landlord provided insufficient evidence to demonstrate that the costs incurred by the landlord to try to mitigate the tenants’ losses exceeded those that would have been

incurred had the landlord re-rented the premises at the end of this fixed term tenancy. I dismiss the landlord's claim for liquidated damages arising from this tenancy.

Cleaning Costs

The landlord did not present any copies of a move-in or move-out condition inspection report. The landlord produced no photographic evidence, bills or invoices to support his claim for cleaning costs. I dismiss the landlord's claim for cleaning costs.

Security Deposit

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit.

With respect to the return of this security deposit, the triggering event is the provision by the tenant of the forwarding address. In this case, the evidence is that the tenant did not provide a forwarding address in writing where the landlord could return the security deposit. Therefore the landlord's obligations to return it had not yet been triggered when the landlord applied for dispute resolution to retain the tenants' security deposit on August 14, 2010.

I allow the landlord's application to recover all of the tenants' security deposit in partial satisfaction of the landlord's monetary award plus interest. No interest is payable over this period.

Filing Fee

As the landlord has been partially successful in his application, I allow the landlord to recover his \$100.00 filing fee for his application from the tenants.

Conclusion

I issue a monetary Order in the landlord's favour in the following terms:

Item	Amount
Loss of Rent - May 2010 – July 2010	\$5,100.00
Less Security Deposit	-850.00
Recovery of Filing Fee for this application	100.00
Total Monetary Order	\$4,350.00

This monetary Order allows the landlord to retain the tenants' security deposit and to recover the landlord's filing fee from the tenants. I dismiss the tenants' application.

The landlord is provided with these Orders in the above terms and the tenant must be served with a copy of these Orders as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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*.