



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MND, MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties.

The Landlord requested an order for monetary compensation under the Act or tenancy agreement, for damage to the rental unit, to keep all or part of the security deposit, and to recover the filing fee for the Application.

The Tenants requested monetary orders for compensation under the Act or tenancy agreement, for return of the security deposit, and to recover the filing fee for the Application.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Preliminary Issue:

The Landlord claimed that she did not receive the Tenants' Notice of Hearing, which was mailed September 2, 2010, as the address listed was incorrect. I note that the Tenants provided evidence that the envelope was sent by registered mail to the address the Landlord used on the tenancy agreement and Notice to End Tenancy. I note that the Landlord apparently received notice of the Tenants' Application by references throughout the hearing, and I find the Landlord deemed served for purposes of the hearing.

Issue(s) to be Decided

Is the Landlord entitled to the monetary compensation sought?

Are the Tenants entitled to the monetary compensation sought?

Background

I heard testimony that this tenancy started on August 28, 2009, for a fixed term of one year, and ended in August 2010. Tenant FA testified that the Tenants moved out on August 25, 2010. Monthly rent was \$2,200.00, payable on the 1st day of the month and a security deposit of \$2,200.00 was paid prior to the tenancy. The first page of the tenancy agreement was submitted by the Tenants, which indicated the parties had agreed to renew the lease for another fixed term of 1 year, for a monthly rent of \$2,300.00.

The Landlord's Claim and Evidence

The Landlord is claiming that the Tenants moved out without notice and caused damage to the rental unit. In support of her claim, the Landlord submitted evidence in the form of documents and photographs, which included a statement of her claim, a receipt for a microwave oven in the amount of \$646.39, page 1 of a 2 page 2 Month Notice to End Tenancy for Landlord's Use, and copies of 12 post dated cheques for the next year's lease.

In her testimony the Landlord explained after the renewal of the lease was signed, she called for an inspection of the rental unit. The Landlord testified that she became alarmed when she noticed a closet was lined with foil, the smoke detector was disabled and observed damage to the rental unit.

I heard testimony from the Landlord that upon seeing this, she talked to her real estate agent, which led to her issue the Tenants a 2 Month Notice to End Tenancy for Landlord's Use (the "Notice"), dated August 13, 2010, with a move out date of October 30, 2010. The Landlord was not clear how the Notice was delivered, but the Tenants acknowledged receiving it on August 13, 2010, from the Landlord's husband.

I heard testimony and saw evidence from the Landlord that the Tenants moved out without notice and that there was no move out inspection. The Landlord later testified that there was a move out inspection, but that she did not remember the date. I note the date of the Landlord's Application for Dispute Resolution is August 27, 2010, which lists the Tenants' forwarding, current address and which states that "the move out was fine for wall damages."

The Landlord's monetary claim is \$6,300.00, which includes rent for the months of September and October, compensation for damage to the microwave oven and door and the filing fee.

The Tenants' Claim and Evidence

Tenant FA supplied the testimony for the Tenants.

In support of their claim, the Tenants submitted relevant evidence in the form of documents, which included the first 2 Month Notice to End Tenancy, the second 2 Month Notice to End Tenancy, an email to the Landlord's representative confirming the move out date and inspection date, a copy of the move in inspection report, which the Tenants said showed there were marks and cracks in the rental unit at the start of the tenancy, and copies of 12 post dated cheques for the next year's lease.

I heard testimony from the Tenant confirming that the parties agreed to enter into a new, one year lease, beginning September 1, 2010. I heard testimony from the Tenant that the day after the new lease was signed, the Landlord, on August 11, 2010, called and said she didn't trust them and that they had to move out. The Tenant testified that he then went to the RTB office to inquire about the Tenants' rights, and was told that the Landlord could not require them to move without a proper written notice. The Tenant then asked the Landlord for a notice, which came in the form of the first page of a 2 page 2 Month Notice to End Tenancy for Landlord's Use.

I heard testimony from the Tenant that he further requested a complete Notice, which then came as the first page of a 2 Month Notice to End Tenancy for Landlord's Use and the second page of a 1 Month Notice to End Tenancy.

I heard testimony and saw evidence that the Tenant sent an email, dated August 18, 2010, to the Landlord's Agent, who had been the Landlord's contact person throughout the tenancy, stating that the Tenants would be moving at the end of August in accordance with the Landlord's wishes and requesting a time on August 25 or 26 for a move out inspection. I note the Landlord's Agent replied, confirming an inspection at 6:00 p.m. on August 25.

The Tenant denied causing any damage to the microwave oven and did not know why it would need replacing.

I note the Tenants' Application indicated that the Tenants agreed the Landlord could retain some portion of the security deposit for cleaning, but no receipts or evidence was submitted in support of the amount.

The Tenants' monetary claim is \$4,500.00, which includes a request for the return of their security deposit, compensation for one month rent allowed for a 2 Month Notice to End Tenancy, an elevator fee charged by the strata and the filing fee.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the

damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

In regard to the Landlord's claims, I dismiss her Application. The Landlord's claim against the security deposit has been extinguished by operation of section 35 of the Act, as there is no evidence before me the Landlord completed an inspection report in accordance with the Act and regulation. The only evidence submitted shows a move in inspection.

I find that the Landlord had insufficient evidence to meet the burden of proving the Tenants caused any of the alleged damages to occur. Without a move out condition inspection report it is up to the Landlord to establish the condition of the rental unit at the time the Tenants moved out. This led me to examine if the Landlord's evidence regarding the condition of the rental unit has credibility, and having done so, I find the Landlord's evidence is questionable and exaggerated.

There were instances where the Landlord's evidence and testimony lacked consistency. In one example, she submitted a written statement that the Tenants moved out without notice, and then testified that she was present at the move out inspection in August. The Landlord's date of Application suggests that her statement that she did not remember the date of the move out inspection suggests the inspection had been completed by August 27, 2010.

It is not clear why the Landlord is seeking rent for the months of September and October when she sought to end the tenancy early, received notice the Tenants were leaving in August and attended a move out inspection. However, due to insufficient evidence, I find the Landlord is not entitled to receive compensation for the September and October rent.

The Landlord did not have a clear explanation as to why she contravened Section 19 of the Act by charging double the allowable security deposit or attempted to contravene Section 43 of the Act by increasing the monthly rent in the new lease more than is allowable.

Therefore, I **dismiss** the entire claim of the Landlord.

I have included a guidebook to the Act for the Landlord to use as a reference.

In regard to the Tenants' claims, I allow their Application and grant a monetary order against the Landlord.

As described above, the Landlord is precluded from claiming against the security deposit of the Tenants by section 35 of the Act. I order the Landlord to return the security deposit to the Tenants.

Section 49 allows a landlord to issue a notice to end tenancy, which I find the Landlord issued to the Tenants on August 13, 2010.

Section 88 provides for ways documents must be served. The requirement to serve a document in a certain way is not discretionary. Section 88 does not permit service of a document by email transmission. Accordingly, emailed service of the Tenants' notice of early end of tenancy, by the end of August 2010, did not occur in a manner that complies with the Act. However, section 71 of the Act permits that I may make an order that a document not served in accordance with section 88 was sufficiently served. The provision of section 71 is discretionary and in this case I find the evidence supports that the Tenants communicated to the Landlord's real estate representative, through email, in the parties' usual and customary way, and that the representative confirmed the date. Therefore, I order the email notice of August 18, 2010, advising the Landlord of the early move out date sufficiently served and therefore, under section 51(1.2) of the Act I order the Landlord to pay the Tenants the equivalent of one month's rent.

I find the Tenants' submitted insufficient evidence of their claim for an elevator fee.

Having made the above determinations, I find that the Tenants have established a total monetary claim of **\$4,450.00**, comprised of \$2,200.00 for one month's rent, \$2,200.00 for the return of the security deposit, and the \$50.00 fee paid by the Tenants for this application.

I grant the Tenants an order under section 67 for the amount of **\$4,450.00**. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The Landlord's claim is dismissed as there was insufficient evidence regarding the alleged damages caused by the Tenants and claim for September and October rent.

The Tenants' claim is allowed and they are granted a monetary order for \$4,450.00.

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: December 20, 2010.

Dispute Resolution Officer