



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNR MNSD MNDC FF
 MNDC RPP LRE O

Introduction

This hearing dealt with cross applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed seeking a Monetary Order for unpaid rent, 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.

The Tenant filed seeking a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, return the tenant's personal property, suspend or set conditions on the landlord's right to enter the rental unit and other reasons.

Service of the hearing documents by the Landlord to the Tenant was done in accordance with section 89 of the *Act*, sent via registered mail on January 12, 2011. Canada post receipts were provided in the Landlord's evidence. The Tenant testified he has not received or picked up the registered mail. Based on the evidence before me I find the Tenant has been sufficiently served notice of the Landlord's application and is deemed served as of January 17, 2011, five days after it was mailed, in accordance with section 90 of the *Act*.

Service of the hearing documents by the Tenant to the Landlord was done in accordance with section 89 of the *Act*, served personally to the Landlord January 6, 2011 at 1:00 p.m. The Landlord confirmed receipt of the Tenant's hearing documents and evidence.

The parties appeared at the teleconference hearing, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

The Tenant testified he did not receive the registered mail package of evidence sent by the Landlord January 14, 2010. The Canada Post receipts were provided in the Landlord's evidence; therefore I find the Tenant has been sufficiently served with the Landlord's evidence as of January 19, 2010, five days after they were mailed in accordance with section 90 of the Act, despite him not picking up the registered mail.

Issue(s) to be Decided

1. Did the Tenant breach the *Residential Tenancy Act*, regulation or tenancy agreement?
2. If so, has the Landlord met the burden of proof for monetary compensation as a result of that breach?
3. Did the Landlord breach the *Residential Tenancy Act*, regulation or tenancy agreement?
4. If so, has the Tenant met the burden of proof for monetary compensation as a result of that breach?
5. Is the Landlord in the possession of the Tenant's property?
6. Is the Tenant seeking possession of the unit?
7. If so, has the Tenant met the burden of proof to have Orders issued to suspend or set conditions on the Landlord's right to enter the rental unit?

Background and Evidence

I heard undisputed testimony that the parties entered into a fixed term tenancy agreement effective September 15, 2010 which was set to switch to a month to month tenancy agreement after March 31, 2011. Rent was payable on the first of each month in the amount of \$650.00. The Tenant paid a security deposit of \$325.00 on September 9, 2010.

The Landlord testified that it is their policy to have payments issued directly to them for all tenants who are on income assistance. This is a process where the Ministry issues the rent payments in the Landlord's name and has them either directly deposited into the Landlord's bank account or cheques mailed directly to the Landlord. The Landlord receives their Canada Post mail through a mail slot on the office door which is separate from the locked mail box which is located on the side of the office where tenants place their rent payments.

The Landlord was not aware the Tenant was on income assistance. She had received mail with her Canada Post mail that was addressed to the Tenant in September, October, November and she hand delivered these envelopes directly to the Tenant. When she emptied the locked payment box and wrote up the deposit for December's rent there were several income assistance cheques which tenant's had placed in the box to pay their rent which included an income assistance cheque made payable to the Tenant. She emptied the box on November 27, 2010, placed the cheques in her deposit book and returned the payment stubs to each tenant. When she knocked on the Tenant's door on November 27, 2010 a woman answered and she gave her the stub and requested that she give it to the Tenant. The cheques were held in the office until rent day on December 1, 2010. She had left the Tenant four messages informing him that they needed to complete the income assistance paperwork to have his rent paid directly to the Landlord now that she knew he was on income assistance. The Tenant never returned her calls. She states she was not aware the Tenant was ending his tenancy until she was served with his application for dispute resolution and a copy of his hand written letter provided in evidence on January 5, 2011.

The Tenant testified that on October 11, 2010 a ring was taken out of his suite. He spent two days around November 24 and 25th looking for his income assistance cheque. November 27, 2010 the Landlord gave his cheque stub to his female guest and violated his privacy. On November 29th he called the police for advice. December 3rd he moved his small valuables out of the suite and requested a print out of the cashed cheque. He did not have a print out as he was told this could take up to three months to get. December 9, 2010 he wrote the letter to the Landlord and placed it in her mail box which stated that he would notify her of any changes. December 30, 2010 he requested to file charges for two counts of fraud. January 1, 2011 the Landlord entered his suite illegally. He knows this because he placed paper in the door jamb which had fallen out when he returned to the suite. January 7, 2011 he came back to the suite to remove the rest of his possession and found the locks had been changed. He states he left an exercise bike, his kid's chairs, a microwave, clothes, and other small kid's belongings. He claims all of his big items were moved out in early December when he spoke with the security guard and told him of the situation.

The Tenant confirmed the address on his income assistance file was incorrect from the onset of his claim. He was aware of this and knew that his mail was being directed to the Landlord's office in September, October, November and the Landlord delivered his cheques unopened to him. He did not contact the Ministry to request a change of address until November 29, 2010. He is of the opinion that the Landlord chose to open his November cheque without his permission.

The Tenant stated that he had guessed it was the Landlord who had entered his suite unless someone else has a key to his unit. He explained that the woman who was at his suite and was given his cheque stub is the mother of two of his four children. He confirmed that this woman was staying at his suite attending to his four children while he was away at his family's home recovering from an illness. He stated that this is not the first time this woman has been a guest at his suite during his absences and that he gives her the rental unit keys while he is away. He states the mother of his other two children is not left alone in his suite.

The Tenant is seeking \$3200.00 as compensation for the cost of the stolen ring that he values at \$350.00; this was a women's ring that was his Aunts; plus \$500.00 for moving costs; plus three months rent returned for October, November and December; plus the return of his security deposit of \$325.00. He confirmed that he is not seeking possession of the rental unit but he is seeking to have his remaining possessions returned to him.

The Landlord stated she did not hear a word from the Tenant, written or verbal, until she was served on January 5, 2011 which is the first time she saw the Tenant's letter. She confirmed she changed the locks on January 6, 2011 because the Tenant made it clear in his letter that he was out of the unit and he did not return the mailbox keys or the keys to the unit. On January 13, 2011 she sent her cleaning lady to clean the unit so they could list it to rent. She attended and found the unit had been broken into and the lock was lying on the floor. Prior to this date there were several kitchen items left on the counter, pots, pans, etc. and these items were removed from the counter when the suite had been broken into. A police report was filed immediately to report the break in. The Landlord had taken photos and there were no other items taken. The Tenant's possessions are currently being held in storage by the Landlord.

The Landlord clarified that they do not have a security guard. They have a senior who volunteers to assist on garbage day for the garbage company to gain access to the bins and on scheduled move out days to assist tenants moving in and out with access to the building. The Landlord confirmed there was no communication between her and the Tenant from the time she handed the woman his cheque stub and when she was served notice of his application for dispute resolution on January 5, 2011, despite her leaving him four messages during this time. The rent cheques were not deposited until December 1, 2010 therefore had the Tenant contacted her she could have returned his cheque to him if it was an issue. She believes the Tenant refused to return her calls because she had informed him that he would be required to have his income assistance paid directly to the Landlord for his rent. She confirms she was contacted by police and provided them with all her evidence to support her statements. She is of the opinion

that the Tenant's December cheque may have been delivered to the address written on the cheque and they may have opened the cheque and placed it in the rent deposit box, if it was not the Tenant himself who did that.

With respect to her claim the Landlord states they have been advertising the unit for February 1, 2011 and to date it has not been re-rented. They are seeking \$650.00 for January rent, \$5.00 for December rent, \$50.00 for November rent, \$100.00 for cleaning the unit (5 hours of cleaning @ \$20.00 per hours) plus \$90.00 carpet cleaning. She pointed out that their tenancy agreement provides for an automatic deduction from the security deposit of \$90.00 for carpet cleaning because they use their own company. Upon clarification the Landlord confirmed that they have a contract with a professional carpet cleaning company to clean the suites and tenants are not "allowed" to hire their own company to clean the carpets. She stated again that there was absolutely no communication from the Tenant between November 27, 2010 and January 5, 2011 and there was no letter received from the Tenant in December 2010.

In closing the Tenant confirmed that everything the Landlord said was true except that there was no outstanding balance for November 2010 that is why the Landlord wrote \$5.00 owing for December on the stub. He claims there was no 10 Day Notice issued for January so he should have been granted access. I asked the Tenant why he did not contact the Landlord when he determined the locks had been changed. He stated he wanted to wait until the arbitration. He states he did not break into the unit and remove his possessions. He claims he does not feel he violated his tenancy agreement because the Landlord is the one who forged his cheque. She is the one who breached his privacy when she handed his stub to the guest so he refused to contact her until he was able to seek legal advice.

The Landlord stated that she handled the situation to the best of her ability. She states the lack of communication is the biggest barrier. He failed to inform them of his change in work status and she believes he avoided calling her back because she told him he had to change his status.

Analysis

I have carefully considered all of the testimony and evidence before me which included, among other things, a copy of the tenancy agreement, a hand written letter issued by the Tenant which is not dated, a copy of the 10 Day Notice issued January 2, 2011, the Landlord's written submission, tenant ledgers, and a copy of the Tenant's December income assistance payment.

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 party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

Landlord's application

The evidence supports the parties entered into a fixed term tenancy agreement ending March 31, 2011. Section 45 of the 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.

Section 44 of the Act provides that a tenancy ends when (a)(i) notice is provided by the tenant to end the tenancy in accordance with section 45 of the Act; or 44(a)(ii) the tenancy ends on the effective date of a notice to end tenancy for unpaid rent in accordance with section 45 of the Act "or" 44(d) when the tenant vacates or abandons the rental unit.

After careful consideration of the testimony and evidence I find that on a balance of probabilities the Tenant moved the majority of his possessions out of the unit sometime in December or early January 2011 and that he continued to have possession of the unit as he returned to the unit to remove the smaller less critical items. The Tenant did not provide the Landlord with written notice to end the tenancy and did not pay rent that was due January 1, 2011. Therefore I find this tenancy ended due to the issuance of the 10 Day Notice to End Tenancy on January 2, 2011.

A 10 Day Notice to End Tenancy was posted to the Tenant's door on January 2, 2011 for unpaid rent of \$5.00 for December 2010 and \$650.00 for January 2011. There is no indication that a balance remains unpaid from November 2010. The notice is deemed to have been received by the Tenant on January 5, 2011, three days after it was posted to the door, and the effective date of the notice is January 15, 2011, pursuant to section 90 of the *Act*. I accept the evidence before me that the Tenant failed to pay the rent owed in full or make application to dispute the Notice within the 5 days granted under section 46 (4) of the *Act*. Based on the foregoing, I find that the Tenant is conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the effective date of the Notice, January 15, 2011. Therefore I approve the Landlord's claim for unpaid rent of \$655.00.

The tenancy agreement #5 provided for liquidated damages of \$325.00. 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. I accept the Landlords testimony that this amount is reasonable to accommodate administration costs incurred to re-rent the unit. Having found the tenancy ended as a result of the Tenant's breach of failing to pay January 2011 rent, I find there to be sufficient evidence to support the test for damage or loss as listed above and I approve the Landlord's claim of \$325.00.

Section 20 (e) of the *Act* provides that a landlord must not require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement. Therefore I find # 3 of the "Addendum to the Standard Residential Tenancy Agreement" which states "All carpets must be steam-cleaned and will be steam-cleaned by (the landlord's name). The cost of Steam-cleaning the suite will be deducted from tenants security deposit" to be contracting out of the *Act* and is therefore not enforceable.

Section 24 of the *Act* provides the right of a landlord to claim against the security deposit for damage to the property is extinguished if the landlord fails to comply with section 23 of the *Act* and complete a move-in inspection report. In the absence of a move-in and move-out inspection report I find there to be insufficient evidence to support the condition of the unit at the end of the tenancy and there is no evidence to support the Landlord actually incurred a cost to have the carpets and suite cleaned. As per the aforementioned I find the Landlord provided insufficient evidence to support their claim of \$190.00 (\$90.00 + 100.00) and the claim is hereby dismissed without leave to reapply.

The Landlord changed the locks to the rental unit and mailbox on January 6, 2011, prior to the effective date of the Notice to end tenancy and without an Order from the *Residential Tenancy Act* granting the Landlord authority to change the locks. Based on the aforementioned I find the Landlord acted outside their authority and therefore must suffer the cost of their actions. Therefore I dismiss their claim for \$50.00 to change the locks, without leave to reapply.

The Landlord has been partially successful with their application, therefore I award recovery of the \$50.00 filing fee.

Monetary Order – I find that the Landlord is entitled to a monetary claim and 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 December 2010 and January 2011	\$655.00
Liquidated damages	325.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the landlord)	\$1,030.00
Less Security Deposit of \$325.00 plus interest of \$0.00	- 325.00
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$705.00

Tenant's application

The Tenant has sought compensation of \$3,200.00 for breach of his privacy and for fraud. Neither action falls under the *Residential Tenancy Act*, therefore I decline jurisdiction on these matters and direct the Tenant to seek action in the applicable Court.

The Landlord changed the locks to the rental unit and mailbox on January 6, 2011, prior to the effective date of the Notice to end tenancy and without an Order from the *Residential Tenancy Act*. Therefore I find the Landlord breached section 28 of the Act as her actions precluded the Tenant from having exclusive possession of the unit and the Tenant is not responsible for rent for the period of January 6 – 31, 2011. I hereby award the Tenant monetary compensation in the amount of **\$555.62** (650.00 x 12 months divided by 365 days x 26 days).

The Tenant confirmed that he "assumes" the Landlord entered his suite, in breach of the Act and he has no evidence to support it was actually the Landlord that took his ring or missing gift card. Based on the aforementioned I find there is insufficient evidence to

support that the Landlord stole the Tenant's possessions or that she entered the unit prior to January 6, 2011. Therefore I dismiss the Tenant's claim for monetary compensation without leave to reapply.

The evidence supports the Landlord has moved the Tenant's possessions that were left in the unit into storage. Therefore I hereby Order the Landlord to allow the Tenant access to his possessions once the Tenant has contacted the Landlord and set an agreeable time to pick up his possessions. The Landlord is instructed to comply with part 5 of the regulations pertaining to the abandonment of personal property.

Offset of Monetary Orders

Monetary award in favor of the Landlord	\$705.00
Less Monetary award in favor of the Tenant	-555.62
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$149.38

Conclusion

A copy of the Landlord's decision will be accompanied by a Monetary Order for **\$149.38**. The order must be served on the 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: January 24, 2011.

Residential Tenancy Branch