



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNR MNSD MNDC FF
 MNSD FF

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 or utilities, to keep the security deposit in partial satisfaction of their claim, 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 double his/her security deposit and to recover the cost of the filing fee from the Landlord.

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 20, 2011. The Canada Post tracking number was provided in the Landlord's testimony. The Tenant is deemed to be served the hearing documents on January 25, 2011, the fifth day after they were mailed as per section 90(a) of the *Act*. Based on the aforementioned I find the Tenant was sufficiently served notice of today's hearing.

The Landlord and Agent 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 did not appear despite being served with notice of today's hearing in accordance with the Act and despite having his/her own application for dispute resolution scheduled for the same hearing date and time.

Issue(s) to be Decided

1. Has the Tenant breached the *Residential Tenancy Act*, regulation or tenancy agreement?
2. If so, has the Landlord met the burden of proof to obtain a Monetary Order as a result of that breach?
3. Has the Landlord breached the *Residential Tenancy Act*, regulation or tenancy agreement?
4. If so, has the Tenant met the burden of proof to obtain a Monetary Order as a result of that breach?

Background and Evidence

The parties entered into a fixed term tenancy agreement effective November 1, 2009 which was set to switch to a month to month tenancy after April 30, 2010. Rent was payable on the first of each month in the amount of \$1,080.00 and on November 1, 2009, the Tenant paid \$540.00 as the security deposit. A move-in inspection report was completed in the presence of the Tenant on October 26, 2009 and a move-out inspection report was completed in the presence of the Tenant on March 31, 2010. The Tenant provided his/her forwarding address, in writing, on the move-out form on March 31, 2010. The Tenant signed the inspection report form agreeing to a deduction of \$194.25 from the security deposit which included \$99.75 to clean carpets and \$94.50 to clean the draperies.

The Landlord and Agent testified that on February 28, 2010, the Tenant provided notice to end the tenancy effective March 31, 2010; which was prior to the end of the fixed term lease of April 30, 2010. They are seeking liquidated damages to compensate for the loss of rent of \$1,080.00 for the month of April 2010. They were not able to re-rent the unit until July 17, 2010. The liquidated damage clause is provided for in # 2.10 (b) of their tenancy agreement. They began to advertise this unit immediately after receiving the Tenant's notice to end in two local newspapers and on the internet.

The Landlord confirmed they did not make a previous application to retain the security deposit.

Analysis

Landlord's application

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the Landlord, bears the burden of proof and the evidence furnished by the Applicant Landlord must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement
3. Verification of the Actual amount required to compensate for loss or to rectify the damage
4. Proof that the claimant followed section 7(2) of the *Act* by doing whatever is reasonable to minimize the damage or loss

Section 45 (2) 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. Therefore, in this case the Tenant could not end the tenancy prior to the end of the fixed term of April 30, 2010.

Based on the testimony and documentary evidence before me I find that the Tenant has failed to comply with section 45(2) of the *Act*, which caused the Landlord to suffer a loss of rent for the month of April 2010. Based on the aforementioned, I find that the Landlord has proven the test for damage or loss as listed above and I hereby approve their claim of \$1,080.00.

The Landlord has succeeded with their application therefore I award recovery of the \$50.00 filing fee.

The evidence supports the Tenant ended the tenancy March 31, 2010, in breach of Section 45(2) of the *Act* and provided his forwarding address to the Landlord, in writing on March 31, 2010. The Tenant agreed, in writing, at the end of the tenancy, to allow

the Landlord to retain \$194.25 for cleaning costs which left a balance of the security deposit of \$345.75 to be disbursed.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit. In this case the Landlords were required to return the Tenant's security deposit of \$345.75 or file for dispute resolution no later than April 15, 2010. The Landlord did not make their application for dispute resolution until January 18, 2011.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposit and the landlord must pay the tenant double the security deposit. This does not preclude section 72(2)(b) of the *Act* to offset a claim if Ordered by a Dispute Resolution officer.

Monetary Order – I find that the Landlord is 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:

Loss of Rent / Liquidated Damages for April 2010	\$1,080.00
Filing fee	50.00
Subtotal (Monetary Order in favor of the Landlord)	\$1,130.00
Less Double Security Deposit owed (2 x \$345.75) plus interest of \$0.00	-691.50
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$438.50

Tenant's Application

Section 61 of the *Residential Tenancy Act* states that upon accepting an application for dispute resolution, the director must set the matter down for a hearing and that the Director must determine if the hearing is to be oral or in writing. In this case, the hearing was scheduled for an oral teleconference hearing.

In the absence of the Applicant Tenant, the telephone line remained open while the phone system was monitored for ten minutes and no one on behalf of the Applicant Tenant called into the hearing during this time. Based on the aforementioned I find that

the Tenant has failed to present the merits of his/her application and the application is dismissed, without leave to reapply.

Conclusion

Landlord's Application

A copy of the Landlord's decision will be accompanied by a Monetary Order for **\$438.50**. The order must be served on the Tenant and is enforceable through the Provincial Court as an order of that Court.

Tenant's Application

The Tenant's application is HEREBY DISMISSED, without leave to reapply.

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: March 09, 2011.

Residential Tenancy Branch