



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order 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 the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenant's agent (the tenant) confirmed that the tenant received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on December 17, 2010. The tenant also received the landlord's evidence package. I am satisfied that the landlord served these documents in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for damage and loss arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The parties presented written evidence of their Residential Tenancy Agreement (the Agreement) that commenced this tenancy on September 15, 2010. Although that Agreement identified this as a fixed term tenancy that was to end on August 31, 2011, the parties agreed that the landlord inserted a note beside this part of the Agreement that "Tenant may move out early." The female landlord (the landlord) said that she included this note on the Agreement because the tenant asked her to do so. Monthly rent was set at \$1,150.00, payable in advance on the first of the month. The landlord continues to hold the tenant's \$575.00 security deposit, paid on September 19, 2010.

The landlord testified that a joint move-in condition inspection was conducted at the commencement of the tenancy. Although she said that a report of that inspection was prepared and provided to the tenant, the landlord entered no copy of that report into evidence. The landlord testified that a joint move-out condition inspection was conducted and a report prepared by the landlord. However, she said that no copy of that report was sent to the landlord, nor was one entered into written evidence by the landlord.

The tenant's agent had no knowledge of either of the inspections the landlord claimed to have conducted. The tenant's agent testified that she witnessed the condition of the premises at the commencement and end of this tenancy. She testified that the rental unit required considerable cleaning before the tenant could move in and that it was in far better condition when the tenant vacated the rental unit than when he commenced the tenancy. The tenant entered written evidence from a witness who assisted the tenant with cleaning at the beginning of this tenancy and who confirmed the information provided by the tenant's agent.

The landlord applied for a monetary award of \$625.00 which included recovery of the \$50.00 filing fee for this application. The landlord claimed that the tenant violated the terms of his fixed term tenancy agreement when he sent an October 28, 2010 written notice to end this tenancy by November 30, 2010. The parties agree that the tenant vacated the rental unit by November 30, 2010. The landlord testified that she advertised in local newspapers and on internet rental sites to try to rent the premises to another tenant for December 1, 2010. She said that she was not able to re-rent the premises until February 1, 2011, at a monthly rental of \$1,250.00 per month for a one-year fixed term tenancy.

The landlord's application to retain the tenant's security deposit plus the filing fee was for damage caused requiring cleaning when the tenant vacated the rental unit and for loss of rental income until February 1, 2011.

Analysis - Landlord's Claim for Damage

Section 36(2)(c) of the *Act* reads in part as follows:

36 (2) *Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit...for damage to residential property is extinguished if the landlord*

(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

Although the landlord said that reports of the joint move-in and move-out condition inspection were prepared, she did not enter copies of these into written evidence. The landlord provided no photographs of the condition of the rental unit either before or after this tenancy. The tenant provided a written statement from one individual and oral testimony from the tenant's agent in support of the tenant's assertion that the tenant left the rental unit in better condition than when he commenced this tenancy.

Based on the balance of probabilities, I find that the landlord is not entitled to a monetary award for damage as the landlord has not provided sufficient evidence to demonstrate entitlement to such an award. I also find that the landlord's right to claim for damage against the security deposit was extinguished through the landlord's failure to give the tenant a copy of the move-out condition inspection report.

Analysis – Landlord's Claim for Losses Arising out of this Tenancy

I have carefully reviewed the Agreement entered into by both the landlord and the tenant. The landlord agreed to modify the terms of the Agreement she prepared for this tenancy by adding the statement that "Tenant may move out early" to the section of the Agreement establishing this as a fixed term tenancy to end on August 31, 2011. I accept that a tenant may always be able to move out early if the tenant is willing to pay for losses incurred by the landlord by ending a fixed term tenancy before the end of the fixed term. However, the inclusion of this somewhat ambiguous wording in this part of the Agreement casts doubt on the meaning that the parties had in mind when they signed the Agreement. Although the landlord testified that she did not expect that her addition of this statement to the Agreement at the tenant's request would allow the tenant to vacate the rental unit six weeks after commencing this tenancy, she provided no explanation as to what she thought the statement added to the Agreement if she believed that this remained a fixed term tenancy to end on August 31, 2011. The tenant's agent testified that the tenant understood that the landlord's willingness to add this statement to the Agreement allowed the tenant to vacate the premises before the end of the fixed term tenancy without exposure to responsibility for the landlord's losses in rent.

At the hearing and through their written evidence, I find that the parties did not have a shared understanding of the statement added to their Agreement. Under circumstances where the meaning of a written contract is unclear, the party responsible for drafting the contract bears responsibility for any lack of clarity or ambiguity in the terms included in that contract.

In this case, I find that the statement added to the Agreement by the landlord was sufficiently unclear that it modified what would otherwise have been a fixed term tenancy into a periodic tenancy. For that reason, I find that the tenant did comply with the terms of the Agreement by providing written notice on October 28, 2010 of his intention to end this tenancy by November 30, 2010. I dismiss the landlord's application for loss of rent arising out of this tenancy on that basis.

In addition, I find that the landlord has not provided sufficient evidence to demonstrate the efforts taken to mitigate the tenant's losses by advertising in community newspapers and internet rental websites. Other than her oral testimony at the hearing, she offered no written evidence of any efforts taken to re-rent the premises once the tenant gave his written notice to end this tenancy.

Since I dismiss the landlord's application for a monetary award, I order the landlord to return the tenant's security deposit plus interest forthwith. No interest is payable over this period.

As the landlord has been unsuccessful in this application, I make no order regarding the recovery of the landlord's filing fee for this application.

Conclusion

I dismiss the landlord's application for a monetary award and for recovery of her filing fee. I issue a monetary Order in the tenant's favour in the amount of \$575.00 requiring the landlord to return the tenant's security deposit.

The tenant is provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord 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*.