

## **DECISION**

**Dispute Codes:** MNR, MNSD MNDC FF

### **Introduction**

The hearing was convened to deal with an application by the tenant for the return of the double the tenant's security deposit and to obtain a monetary order for compensation for damage or loss under the Act or a retro-active rent abatement. The hearing was also convened to hear a cross- application by the landlord for a monetary order to retain the security deposit for damages and loss. Both parties appeared.

### **Issues to be Decided for the Tenant's Application**

- Whether the tenant is entitled to the return of double the security deposit paid.
- Whether or not the tenant was entitled to a reduction in rent based on the landlord's failure to provide services and facilities or do repairs that were required by the Act or included in rent as part of the agreement.

### **Issues to be Decided for the Landlord's Application.**

- Whether the landlord is entitled to compensation under section 67 of the *Act* for rent, loss of rent and damages.

### **Background and Evidence**

The tenancy began on May 6, 2009 and ended September 30, 2010. The monthly rent was \$1,500.00 and a security deposit of \$750.00 was paid.

The tenant testified that the landlord failed to make repairs that were promised and the tenant was forced to endure conditions that breached the agreement between the parties. The tenant stated that there was a roof leak and, over a period of time, the landlord made several unsuccessful attempts to patch it before finally replacing the roof. The tenant testified that during this period, the quiet enjoyment of the rental unit was compromised. The tenant stated that the leaking had caused mould and dampness in the unit and affected the carpet. Other problems included neglected repairs to the unit. This included the balcony, which the tenant stated was hazardous. The tenant submitted photos into evidence showing the condition of the unit.

The tenant testified that in September 2010 the drains backed up causing sewage and human waste to flood over the fixtures and floors, contaminating the premises. The tenant stated that, after numerous unsuccessful attempts to contact the landlord, they were forced to clean up the mess and locate a plumber for emergency service. After this incident, the tenant felt the family could no longer cope with the situation for health reasons and they moved out two days later. The tenant is seeking a 20% rent reduction over the tenancy for the loss of quiet enjoyment and having to relocate due to the landlord's failure to do the promised repairs or maintain the health and safety of the unit.

The tenant testified that they gave the landlord a written forwarding address on October 29, 2010. However the security deposit was never returned. The tenant is seeking compensation of double the deposit in the amount of \$1,500.00..

The landlord testified that the tenants vacated without notice sometime in early October 2010 and had been in arrears for \$100.00 for September. The landlord is also claiming \$1,500.00 loss of October rent.

The landlord acknowledged that he did not return the tenant's security deposit. The landlord stated that the tenant requested the return of the security deposit in a letter dated October 29, 2010, which was in evidence. The letter made a clear reference to a "*forwarding address*" and asked that all the tenant's mail and deposit refund be sent to "*this address*". According to the landlord, despite references made to the forwarding address, no return address was given in the letter, nor on the envelope. The tenant refuted this and testified that a page was removed from the correspondence in question.

The landlord disputed the tenant's claim that the house was not adequately maintained by the landlord, and stated that no promises were made to improve the balcony or other enhancements at the start of the tenancy as alleged by the tenant. With regard to the sewage problem, the landlord testified that while he was away, he provided the number of another resident who was available to respond to emergencies. With respect to the roof leaks, the landlord testified that the problem was attended to immediately and the roof was replaced. The landlord denied that the leaking roof had caused a mould problem and stated that he investigated the tenant's complaint and found that only a small area around the window air conditioner was affected. The landlord stated that he told the tenant that the mould spots could be eradicated using bleach. The landlord testified that, if any hazardous conditions did exist, they were all caused by the tenant. The landlord's position was that the tenants had left the unit in a filthy, damaged condition. The damages included destroyed carpeting, broken cabinetry, dirty appliances, grimy fixtures and furniture and garbage left for disposal. The landlord testified that the tenant's damage cost \$16,209.56 to repair and the landlord is seeking compensation. The landlord testified that , after repairs and renovations, the home was

put on the market and sold. The landlord supplied photos of the way the unit looked after the tenant left and photographs of the unit after the landlord's renovations were done. Written and verbal witness testimony given on behalf of the landlord, supported the landlord's position regarding the state of the rental unit when the tenant's departed.

The tenants disputed the landlord's claim for damages and pointed out that the condition of the rental unit was poor when they first moved in and when the landlord did not respond to requests for repairs, the condition deteriorated further. The tenant acknowledged that they left in a hurry at the end of September for health reasons. The tenant testified that once they moved out, the landlord apparently decided to do renovations for the purpose of selling the building, after neglecting the property for such a long period of time. The tenant pointed out that many of the invoices submitted by the landlord were dated for several months after they had left and some were for invoices dated January 2011. The tenant also pointed out that the landlord submitted numerous receipts and invoices from his own company and the descriptions of the work being done were not sufficiently detailed, which prevented the tenant from forming any defense. The tenant's position was that the landlord's monetary claim had no merit.

#### **Analysis – Tenant's Claim for Return of Security Deposit**

In regard to the return of the security deposit, I find that section 38 of the Act is clear on this issue. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant or make an application for dispute resolution to claim against the security deposit. The Act also states that the landlord can retain a deposit if the tenant agrees in writing or if, after the end of the tenancy, there is an order that the landlord retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposit. It appears that the landlord had the tenant's forwarding address on October 29, 2010. In any case, even if I accept the landlord's allegation that the tenant's October 29, 2010 letter neglected to provide the forwarding address, I would still have to find that the landlord had the tenant's forwarding address upon being served with the hearing package for dispute resolution on November 22, 2010. I find that the landlord did not make a claim against the deposit until March 7, 2011, well beyond the mandatory 15 days.

Section 38(6) provides that if a landlord does not comply with the Act by refunding the deposit or making application to retain it within 15 days, the landlord may not make a claim against the deposit, and must pay back double the amount of the security deposit.

I find that the tenant's security deposit was \$750.00 and the landlord failed to comply with the Act in retaining the funds being held in trust for the tenant. I find that the tenant is therefore entitled to compensation of double the deposit, amounting to \$1,500.00.

**Analysis: Tenant's Monetary Claim**

With respect to a monetary claim for damages or rent abatement, it is important that the evidence furnished by the applicant 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 the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

Section 32 of the Act imposes responsibility on both the landlord and tenant in terms of caring for the property. The Act states that a landlord must provide and maintain residential property in a state of decoration and repair that would comply with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, making it suitable for occupation by a tenant.

Opinions may differ as to what constitutes a "necessary" repair. Some deficiencies in a unit may not significantly affect the function or usefulness of a feature or facility, particularly if the deficiency was present at the time that the tenant agreed to rent the unit. Generally speaking, if there is a health or safety issue, the matter must be addressed without delay, regardless of fault, and an application to obtain an order towards that end is likely to be successful. On the other hand, I find that where the party is seeking an improvement or aesthetic enhancement, that would clearly not qualify as "damage", then it is likely an application for the enhancement would not succeed.

With respect to the tenant's allegation that compensation was warranted due to the fact that the tenant felt forced to relocate, I reject this argument. While it is understandable that the tenants felt they had reached their limit of tolerance, the Act provides a remedy and the tenant could have made an application for dispute resolution seeking an order to force the landlord to comply with the Act in relation to maintenance and repairs.

However, in regard to the tenant's claim for the 20% rent abatement, I find that during the tenancy there were issues that did significantly interrupt the tenant's quiet enjoyment and devalued the tenancy for periods of time.

Section 33 (2) of the Act states that the landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs. In this situation, I find that the landlord did not comply with this requirement and the tenant was left in a bad situation as a result. I find that the leak in the roof and the attempts to repair it, eventually leading to replacement functioned to inconvenience the tenant and left residual condition issues in the unit that were never addressed afterwards. I accept the tenant's testimony regarding the loss of use of the balcony due to a hazardous state of disrepair. Accordingly, I find that the tenant is entitled to a 10% retro-active rent abatement for the 17 months of the tenancy, for a total of \$2,550.00.

#### **Analysis – Landlord's Application**

The landlord has requested monetary compensation in the amount of \$16,209.56 which includes \$100.00 for rental arrears for September 2010, \$1,500.00 for loss of rent for October 2010 and the remainder for cleaning and repairs.

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act, Regulations or tenancy agreement. I find that the tenant owed the landlord \$100.00 rent for September.

With respect to the \$1,500.00 claim for loss of rent for October 2010 being claimed in damages due to the tenant's failure to give proper notice to end the tenancy under the Act, I find that this claim must meet the test for damages. Section 45 of the Act states that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that: (a) is not earlier than one month after the date the landlord receives the notice, and; (b) is the day before the day in the month, that rent is payable under the tenancy agreement. I find that the tenant did not comply with the Act

I find that the landlord has met the test for damages for the loss of rent for October 2010, and find that the landlord is entitled to be paid rent owed reduced by the 10% abatement for an amount of \$1,350.00.

With regard to the landlord's claim for repairs to the unit, I find that in order to meet elements 1 and 2 in the test for damages the landlord must prove that the damage existed and was caused through a violation of the Act by this tenant.

I find that section 32 of the Act states that a tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit. While a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant, a tenant is not required to make repairs for reasonable wear and tear.

Section 37(2) of the Act states that, when a tenant vacates a rental unit, unit must be left reasonably clean, and undamaged except for reasonable wear and tear.

In determining whether or not the tenant had complied with sections 32 and 37 of the Act, I find that this can best be established with a comparison of the unit's condition when the tenancy began, with the final condition of the unit after the tenancy ended. In other words, through the submission of move-in and move-out condition inspection reports containing both party's signatures. The Act places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and both the landlord and tenant must sign the condition inspection report after which the landlord must give the tenant a copy of that report in accordance with the regulations.

In this instance, the landlord admitted that neither a move-in condition inspection report nor move-out condition inspection report were ever completed. I find the failure to comply with sections 23 and 35 of the Act hindered the landlord's ability to establish the end-of-tenancy condition in relation to damage allegedly caused by the tenant.

I also find the evidence submitted in support of the landlord's expenditures does not sufficiently meet element 3 of the test for damages. I find that the invoices lack sufficient detail to determine what was done to the unit nor why. I find it evident that the unit had various maintenance and repair issues prior to, and during, the tenancy.

Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. Where an item has a limited useful life, it is necessary to take into account the age of the damaged item and reduce the replacement cost to reflect the depreciation of the original value. In order to estimate depreciation of the replaced item, reference can be made to *Residential Tenancy Policy Guideline 37* in order to accurately assess what the normal useful life of a particular item or finish in the home would be. For example, flooring is expected to reach the end of its useful life in 10 years. It was clear from the photographs that some of the features and finishes in this home were of a vintage that would warrant replacement, rather than repairs, due to normal wear and tear. Under the Act, a tenant is not responsible for normal wear and tear.

Given the above I find that the landlord's claims for compensation for the repairs and restorations were not sufficiently supported by the evidence and the landlord has not met the burden of proof.

With respect to the cleaning and disposal, based on the evidence and testimony, I find that the tenant did not leave the unit in a reasonably clean state. However, according to the landlord, the rental home was subject to a major renovation and therefore, the failure to complete the move-out cleaning would not be relevant as the home would require a thorough post-construction cleanup, after the renovation work was completed.

It is clear, however, that the landlord was forced to remove items left on site by the tenants, including furniture and garbage. I accept the landlord's claim that the items were taken to the landfill on October 25, 2011 at a cost of \$20.00. I also award the landlord the cost of labour for the removal of these items in the amount of \$100.00 representing 4 hours at the rate of \$25.00 per hour for total compensation of \$120.00.

The total compensation owed to the tenant is \$4,050.00 comprised of \$1,500.00 double the security deposit and \$2,550.00 rent abatement.

The total compensation owed by the tenant to the landlord is \$1,570.00 comprised of: \$100.00 rent owed for September 2010, \$1,350.00 rent loss owed for October 2010, \$20.00 dumping fees and \$100.00 labour for garbage removal.

### **Conclusion**

Based on the testimony and evidence presented during these proceedings, I find the landlord is entitled to damages of \$1,570.00 and the tenant is entitled to monetary compensation of \$4,050.00. Setting off these two amounts leaves \$2,480.00 remaining in favour of the tenant. I hereby grant the tenant a monetary order in the amount of \$2,480.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The remainder of the landlord's and the tenant's applications are dismissed without leave. Neither party is entitled to be reimbursed the filing costs.

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: April 2011.

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Residential Tenancy Branch