

DECISION

Dispute Codes MND, MNR, MNDC, MNSD, FF, OLC

Introduction

There are applications filed by both parties. The Tenant has made an application for a monetary order for money owed or compensation for loss under the Act, regulation or tenancy agreement, for the return of double the security deposit, to have the Landlord comply with the Act, regulation or tenancy agreement and recovery of the filing fee. The Landlord has made an application for a monetary order for damage to the property, for unpaid rent, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, to keep all or part of the security deposit and recovery of the filing fee.

Both parties attended the hearing by conference call and gave testimony.

At the beginning of the hearing, the Tenant's claim was clarified that the Tenant was seeking the return of double the security deposit and the return of the May rent. The Landlord has clarified her amended claim to costs of repairs to damage to the unit and for loss of rental income for May, June and July of 2011 due to damages and to keep all or part of the security deposit to offset these costs.

Issue(s) to be Decided

Is the Tenant entitled to a monetary order?
Is the Landlord entitled to a monetary order?

Background and Evidence

Both parties agree that the Tenancy began on May 1, 2011 as shown in the Landlord's submitted evidence of a copy of the signed tenancy agreement and that through mutual consent that the Tenancy ended on May 7, 2011. The monthly rent was \$1,965.00 payable on the 1st of each month and a security deposit of \$982.50 was paid. No condition inspection report for the move-out was completed.

The Landlord has submitted evidence that the Tenant has acknowledged receiving and the Tenant had no evidence to submit. Both parties agree that the Landlord received by email a forwarding address a few days before May 16, 2011 by email from the Tenant's Lawyer, J.S.

The Tenant is making a claim for the return of double the security deposit of \$1,965.00 (\$982.50 X 2) and the return of May 2011 rent of \$1,965.00. The Tenant states that no condition inspection report for the move-out was made at the end of tenancy. The Tenant states that the Landlord did not return the security deposit within 15 days of the end of the tenancy. The Landlord states that she tried to resolve the dispute, but with no success. The Landlord filed for dispute resolution on September 16, 2011.

The Landlord is making an amended claim of \$12,415.92 consisting of a quotation for damage caused by the Tenant of \$3,825.92 for the balcony and railing repairs during the move-in/ move-out period. The Landlord has provided a quotation from Grantson Construction Group Inc., but stated during the hearing that no repairs have been made as the Landlord is awaiting the outcome of this dispute. The Tenant disputes this quotation that no actual work was done. The Landlord has provided an email exchange where the Tenant has acknowledged responsibility for the damage to the balcony and railings. The Landlord is also seeking the loss of 3 months of rent of \$5,895.00 because the rental unit was un-rentable due to repairs needed and a breach of the tenancy agreement. The Tenant disputes that since no repairs have been made that the Landlord is not entitled to loss of rental income. The Landlord states that the Tenant breached the tenancy agreement by ending it prematurely without notice. The Landlord has provided a copy of a condition from the tenancy agreement which states, "If tenants terminate this lease before it expires, a two month rent penalty apply" and "Tenant must notify in writing 30 days in advance for intent to move out." The Tenants dispute this stating that the Tenancy was mutually ended on May 7, 2011 and that the first condition mentioned is a penalty and not liquidated damages which is contrary to the Act. The Landlord is also seeking bank charges of \$25.00, courier charges of \$100.00 and a property management charges totalling, \$2,500.00.

Analysis

As both parties have attended the hearing and have made detailed reference to the Landlord's evidence, I am satisfied that both have been properly served. The Tenant has not submitted any evidence.

I find based upon the copy of the signed tenancy agreement that a fixed term tenancy existed for 1 year, starting on May 1, 2011 and ending on April 30, 2012. This tenancy was mutually ended by both parties on May 7, 2011.

Both parties agreed that the Tenancy ended on May 7, 2011 and that the Landlord has confirmed receiving the Tenant's forwarding address in writing by email on May 16m 2011. Section 38 of the Residential Tenancy Act states,

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), **within 15 days after the later of**

(a) **the date the tenancy ends, and**

(b) **the date the landlord receives the tenant's forwarding address in writing,**

the landlord must do one of the following:

(c) **repay**, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) **make an application for dispute resolution claiming against the security deposit** or pet damage deposit.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) **If a landlord does not comply with subsection (1),** the landlord

(a) **may not make a claim against the security deposit or any pet damage deposit, and**

(b) **must pay the tenant double the amount of the security deposit,** pet damage deposit, or both, as applicable.

I find based upon the direct evidence of both parties that the Landlord has failed to return the security deposit or file an application for dispute within 15 days of receiving the forwarding address in writing. The Landlord has extinguished her right to claim against the security deposit. The Tenant has established a claim for the return of double the security deposit totalling, \$1,965.00.

The Tenant's claim for the return of May 2011 rent of \$1,965.00 is dismissed. The Tenants failed to provide adequate notice to end the tenancy. Section 45 of the Residential Tenancy Act states,

Tenant's notice

45 (2) A tenant may end a fixed term 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,

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

The Landlords claim of damage to the rental unit is dismissed with leave to re-apply. I find that the Landlord's claim is premature as she has not yet suffered a loss and no work to repair the damage has yet been made.

The Landlord's claim to keep May 2011 rent of \$1,965.00 has been established above in the Tenant's claim for the return of May 2011 rent. The Landlord may retain May rent for lack of proper notice.

The Landlord's claim for loss of rental income for two months totalling \$3,900.00 is dismissed. The Landlord has not made any attempts to repair the property damage nor has she provided any evidence of mitigation to re-rent the unit. I note as well that the condition specified is noted as a "penalty". I find that this condition is unconscionable and is therefore unenforceable.

The Landlord's claim for Property Management Fees of \$2,500.00, bank charges of \$25.00 and \$100.00 for courier charges and has failed to provide any invoices or receipts. These are costs normally associated in the litigation of disputes during a tenancy and are not recoverable. This portion of the Landlord's claim is dismissed.

I find that both parties have been successful in their applications and decline to order the recovery of the filing fee for each.

The Tenant is entitled to the return of double the security deposit (\$982.50) totalling, \$1,965.00. The Landlord is entitled to retain the May rent of \$1,965.00. The Landlord currently holds \$2,947.50 consisting of the May rent and security deposit. Offsetting these awards for each party results in the Landlord returning \$982.50 to the Tenant.

The Tenant is entitled to a monetary order for \$982.50. I grant the Tenant a monetary order under section 67 for the balance due of \$982.50. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The Landlord's claim for damage of \$3,825.92 is dismissed with leave to reapply.
The Tenant is granted a monetary order for \$982.50.

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: October 25, 2011.

Residential Tenancy Branch