

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

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

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

Both parties attended both hearings and were given a full opportunity to be heard, to present evidence and to make submissions. The tenant confirmed that the landlord provided her a copy of his dispute resolution hearing package on April 13, 2011. I am satisfied that the landlord served this package in accordance with the *Act*.

At the July 26, 2011 hearing, the landlord testified that he did not receive the tenant's extensive written evidence package sent by the tenant to his former address. The tenant testified that she only received the last two pages of the landlord's written evidence package the night before the July 26th hearing and had not had a proper chance to review this portion of the landlord's evidence. As I was not satisfied that either of the parties were in a position to respond to one another's written evidence packages, I granted an adjournment of the July 26, 2011 hearing to enable the parties to obtain and review the evidence packages of the other party. In granting this adjournment, I advised the parties to refrain from submitting any further written evidence as the purpose of the adjournment was to ensure that both of them had a proper opportunity to respond to the written evidence submitted prior to the July 26, 2011 hearing. Both parties are to be commended for complying with this direction.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid utilities? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This month-to-month tenancy commenced by way of a written Residential Tenancy Agreement (the Agreement) for a rental unit that was first occupied on July 1, 2010. According to the Agreement, monthly rent was set at \$1,000.00, payable in advance on the first of each month. The landlord retains the tenant's \$500.00 security deposit paid

on July 17, 2010. The tenant vacated the rental unit on March 30, 2011, in response to a 2 Month Notice to End Tenancy for Landlord's Use of the Property (the 2 Month Notice) issued to the tenant on February 1, 2011.

Although the Agreement stated that the tenancy did not include water, electricity or heat, the addendum to that Agreement included the following provisions:

- 1) *Tenant is responsible to pay half of the electrical bills.*
- 2) *Tenant is responsible to pay half of the utility bills.*
- 3) *Tenant is responsible to pay half of the cable bills or an agreed upon amount - \$30.00/ Month...*

The tenant noted that the only portion of the addendum that was initialled by the parties was the provision regarding cable bills. It would appear that this was initialled because it was the only pre-arranged amount the parties agreed upon at the time the addendum was signed.

Both parties agreed that shortly after the tenancy started, the tenant approached the landlord and asked that a regular monthly amount be charged her for utilities. The parties agreed that the amount they selected was \$100.00 for utilities. The tenant understood that this was to be an all inclusive payment of \$100.00 for utilities each month that was to be added to her monthly rent. The parties confirmed that she paid a total of \$1,100.00 each month. The landlord said that the oral agreement was to allow the tenant to pay \$100.00 each month towards her half of the total cost of the utilities. When he received a high hydro bill of \$627.05 in January 2011, the landlord advised the tenant that her \$100.00 utility payments each month were insufficient to look after the increased hydro bills he was receiving.

The landlord applied for a monetary award of \$616.91 for that portion of his utility bills that were not paid as a result of the tenant's \$100.00 payments towards those bills over the course of her tenancy. Both parties submitted copies of utility bills complete with their own calculations on how the landlord's claim should be considered.

Analysis

The fundamental issue in dispute in this application arises from the oral agreement that the parties entered into after they signed the Agreement. Both parties agreed that they entered into an oral agreement because the tenant was on a fixed income and was finding irregular utility payments would cause her budgeting difficulties. Under many circumstances, the written provisions of the Agreement (and any attached addendum) are relied on when there is a dispute as to the terms agreed to by the parties. However, in this case, I find that the wording of the Agreement and the addendum do not produce

sufficient clarity, as both parties agreed that they entered into an oral agreement that was not part of the Agreement.

In considering which of the two versions of the oral agreement between the parties represented the correct terms of their agreement, I rely on both the testimony of the parties and the behaviour of the parties during times that are relevant to this application.

The tenant said that her clear purpose for asking to make a monthly payment of \$100.00 for utilities was to ensure that she would not have large variations in her monthly expenses that she could not meet. I find that the parties shared this understanding of the purpose for the tenant's request to make monthly utility payments. The tenant said that the landlord never provided any indication that he was tallying her \$100.00 monthly payments and comparing them to his actual utility bills. She testified that for many months of this arrangement the landlord provided nothing that would indicate that he was applying her \$100.00 monthly payments towards the original terms of the Agreement that required her to pay half of the utility bills for the rental property. The landlord did not dispute her claim that he provided no copies of utility bills over this period and that he provided no indication to her as to whether she was overpaying or underpaying her portion of the utility bills.

The parties agreed that the first time that the landlord asked the tenant to make additional utility payments was in mid-January 2011, when he received the first of the higher seasonal utility bills when colder weather occurred. The landlord testified that he did not speak with the tenant about her underpayment of her half of the utility bills until he received the \$627.05 hydro bill covering the period from October 21, 2010 to December 20, 2010. After that point, the tenant was clearly advised that the landlord had a different understanding of their oral agreement and was expecting her to make up the difference between her \$100.00 monthly payments and his utility bills.

I should first state that I have no doubt that both parties genuinely believe that they have the correct understanding of the oral agreement they entered into with respect to the tenant's monthly utility payments. However, in making a decision in this matter, I need to consider not just their oral testimony, but also their actions and the timing of their actions.

In this case, I find on a balance of probabilities that the tenant's account of the terms of the oral agreement between the parties regarding the payment of utilities aligns more closely with the sequence of events that occurred. I should first note that both parties agreed that the very purpose that the tenant sought out this method of paying her monthly utility bills was to ensure that she had clarity on what she owed each month so

as to prevent the very scenario that unfolded when the utility bills escalated in the winter months. If the landlord were applying the tenant's \$100.00 monthly utility payments towards her half of the utilities as set out in the Agreement, I would expect that on an ongoing basis the landlord would be providing receipts for his utility bills to the tenant and a ledger on the current status of her payments. If her payments were more than his utility bills for those months and he was applying these payments to his ongoing bills, he would have been expected to rebate some of her monthly payments to her. None of this occurred until the landlord received the \$627.05 hydro bill. At that point, it would seem that the landlord realized that the tenant's monthly payments that he had been receiving for months would not pay half of his utility bills over the winter months. He then advised the tenant that her payments were no longer accounting for one half of his utility bills and asked for her to pay the difference between her accrued credit and his actual bills.

Based on the landlord's failure to provide any indication that he was keeping track of the tenant's monthly utility payments and applying them towards his utility bills until his utility bills increased significantly, I find little in the landlord's actions that would support his assertion that their oral agreement enables him to recover utility payments over and above the tenant's \$100.00 monthly payments. Rather, it would seem that the landlord made an ill-advised oral agreement that underestimated the amount of utility bills that would be owing over an annual cycle. For these reasons, I find that the landlord has not demonstrated that he is entitled to a monetary award for unpaid utilities during the course of this tenancy.

I dismiss the landlords' application for a monetary award without leave to reapply. I dismiss the landlord's application to retain the tenant's security deposit and I order the landlord to return the tenant's \$500.00 security deposit plus applicable interest forthwith. No interest is payable over this period.

Since the landlord has not been successful in this application, I find that he bears the cost of filing his application.

Conclusion

I dismiss the landlord's application for a monetary award without leave to reapply. I dismiss the landlord's application to retain the tenant's security deposit without leave to reapply. I order the landlord to return the tenant's \$500.00 security deposit and issue a monetary Order in the tenant's favour in that regard.

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.

I dismiss the landlord's application to recover his filing fee for this application from the tenant.

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*.