



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application for a Monetary Order for loss of rent and liquidated damages; as well as, authority to retain the security deposit. Both parties appeared at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Issue(s) to be Decided

1. Has the landlord established an entitlement to unpaid or loss of rent for July 2010?
2. Has the landlord established an entitlement to liquidated damages?
3. Is the landlord authorized to retain the security deposit?

Background and Evidence

I was provided the following undisputed evidence by the parties. On June 7, 2010 the tenant viewed the rental unit and signed a tenancy application. In taking the tenant's application the landlord requested the tenant provide a cheque in the amount of \$520.00 which represented the security deposit if the tenancy application were approved. The tenancy agreement indicates that until it is signed by the landlord the document is considered a tenancy application. On June 8, 2010 the landlord approved the tenancy application and deposited the security deposit cheque.

The tenancy agreement indicates the tenancy was set to commence July 1, 2010 for a one year fixed term and the monthly rent was \$1,040.00, plus parking, payable on the 1st day of every month.

It was also undisputed that on June 30, 2010 the tenant and the property manager inspected the rental unit, an inspection report was prepared and given to the tenant, and the tenant was given the keys to the unit. After the inspection the tenant deposited a letter in the landlord's mailbox along with the keys to the rental unit. In the tenant's

letter of June 30, 2010 she informs the landlord she will not be moving in and states the reason for not proceeding with the tenancy is due to the stained carpets and the stain on the bathroom floor. The tenant provided a mailing address in the letter and authorized the landlord to retain her security deposit.

The landlord's agent testified that attempts to reach the tenant by telephone were unsuccessful and on July 26, 2010 the landlord issued an arrears letter to the tenant and sent it to the mailing address she provided. The tenant claims she responded to the landlord's arrears letter July 26, 2010 via telephone calls to the landlord's office but despite her objections to the debt, the landlord sent the amount to a collection agency. The landlord was of the position that the tenant owed the landlord in accordance with the terms of their tenancy agreement and acknowledged that they sent the debt to a collections agency without first obtaining a Monetary Order.

The landlord indicated that efforts to re-rent the unit were made shortly after receiving the tenant's June 30, 2010 letter and new tenants were secured effective August 1, 2010. The landlord is seeking to recover the loss of rent for July 2010 in the amount of \$1,040.00 as well as liquidated damages of \$400.00, as provided in the tenancy agreement.

The tenant did not agree with having to pay for the July rent for the following reasons. The rental unit was not suitable for occupation for her and her child due to its condition; the parking situation had changed; and, the landlord deposited the security deposit without informing her that her application was accepted which caused the tenant to incur an NSF fee and required the tenant to obtain overdraft protection with her bank. The landlord acknowledged that security deposit cheques are taken at the time a prospective tenant signs a tenancy application but submitted that cheques are only deposited after the landlord accepts the application and a tenancy forms.

The property manager was called as a witness by the landlord. The property manager testified that she received the tenant's letter in the evening of June 30, 2010. She tried calling the tenant to discuss the situation but there was no answer on the tenant's telephone and no voicemail. The property manager then forwarded the letter to the landlord's office. The tenant acknowledged that she did not have voicemail on her phone and that it was possible the landlord tried to call her.

During the hearing the tenant stated that in addition to stains on the carpeting and a yellow stain on the bathroom floor, the rental unit carpets also smelled badly. The property manager acknowledged some stains on the carpet and a yellow stain on the bathroom floor, likely caused by a rubber mat, but explained that the smell of the

carpets was due to them being cleaned right before the inspection. The property manager submitted that the rental unit was in very liveable condition and that the rental unit has since been rented twice with no complaints by the subsequent tenants.

Provided as evidence for this hearing were copies of: the tenancy agreement; the tenant's letter of June 30, 2010; the landlord's arrears notice of July 26, 2010; bank statements for the tenant's bank account; and, a written submission prepared for the tenant.

Analysis

Section 16 of the Act provides that the rights and obligations of a landlord and tenant take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit. I find the tenancy agreement was entered into June 8, 2010 when the tenancy agreement was signed by both parties. Therefore, the tenant was obligated to fulfill the terms of the agreement by paying rent on July 1, 2010 pursuant to section 26 of the Act.

Section 26 of the Act requires that a tenant pay rent in accordance with the terms of their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has the legal right to withhold rent.

While the tenant raised the issue of the landlord requiring a security deposit before the parties entered into the tenancy agreement, which is a violation of section 20 of the Act, this violation did not give the tenant the right to withhold rent as provided by section 26 of the Act.

Section 45 of the Act provides that a tenant may not end their fixed term tenancy before the expiry date of the fixed term unless the landlord has violated a material term of the tenancy agreement that the landlord did not correct within a reasonable amount of time after written notice to do so. I find the tenant did not give the landlord written notice of a breach of a material term with a reasonable amount of time for the landlord to correct any such breach. Therefore, I do not find the tenant was entitled to end the tenancy as of June 30, 2010.

I am satisfied the landlord made reasonable efforts to contact the tenant to discuss the situation yet she did not make any effort to discuss the situation with the landlord after leaving the note of June 30, 2010. I find the landlord acted reasonably in concluding the tenant would not be fulfilling the tenancy agreement after unsuccessful attempts to contact her and proceeding to take measures to re-rent the unit in a timely manner.

For all of the reasons above, I grant the landlord's request to recover loss of rent in the amount of \$1,040.00 for the month of July 2010.

Residential Tenancy Policy Guideline 4 provides for liquidated damages. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the fixed term by the tenant. If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum unless the sum is found to be a penalty. I find the amount payable under the clause to be a reasonable pre-estimate and is not a penalty. Therefore, I grant the landlord's request to recover liquidated damages of \$400.00 from the tenant.

While the tenant raised a serious issue with respect to the landlord sending a debt to a collection agency without first establishing an entitlement to recover that amount by way of obtaining a Monetary Order, such conduct does not negate the tenant's obligation to pay the landlord as ordered above. I find the landlord's actions, with respect to sending the debt to a collection agency is not a violation of the Residential Tenancy Act, Residential Tenancy Regulations or tenancy agreement; therefore, any claims related to such conduct fall outside the jurisdiction of the Residential Tenancy Act and my authority to resolve such a dispute. Accordingly, if a tenant suffers damages as a result of a landlord sending a debt to a collection agency before the amount of the debt is established by way of a Monetary Order the tenant's remedy is through the appropriate court.

I award the filing fee paid for this application to the landlord. I am satisfied the landlord obtained the tenant's written consent to retain the security deposit in partial satisfaction of rent owed by the tenant. Therefore, I provide the landlord with a Monetary Order calculated as follows:

Rent – July 2011	\$ 1,040.00
Liquidated damages	400.00
Filing fee	50.00
Less: security deposit	<u>(520.00)</u>
Monetary Order	\$ 970.00

The landlord must serve the Monetary Order upon the tenant and may enforce it in Provincial Court (Small Claims) as necessary.

Conclusion

The landlord is entitled to retain the tenant's security deposit and has been provided a Monetary Order for the balance of \$970.00 to serve upon 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*.

Dated: October 14, 2011.

Residential Tenancy Branch