



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, MNSD, FF

Introduction

This hearing was convened by way of conference call in response to the landlord's application for an Order of Possession for unpaid rent or utilities; for a monetary order for unpaid rent or utilities; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenants for the cost of this application.

The hearing commenced on October 26, 2011, but did not finish and was adjourned to October 27, 2011 for a continuation of the testimony. The landlord and both tenants attended the conference call hearings, provided evidence in advance of the hearing, gave affirmed testimony and were given the opportunity to cross examine each other on their evidence. All evidence and testimony provided have been reviewed and are considered in this Decision.

During the course of the hearing, the parties advised that the tenants have moved from the rental unit, and therefore the landlord's application for an Order of Possession is withdrawn.

Issue(s) to be Decided

- Is the landlord entitled to a monetary order for unpaid rent or utilities?
- Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?
- Is the landlord entitled to keep all or part of the pet damage deposit or security deposit in full or partial satisfaction of the claim?

Background and Evidence

The parties agree that this tenancy began as a fixed term tenancy on April 1, 2010. Rent in the amount of \$1,695.00 was payable in advance on the 1st day of each month and was increased to \$1,733.99 effective September 1, 2011. At the outset of the tenancy the landlord collected a security deposit from the tenants in the amount of

\$847.50 and no pet damage deposit was collected. A move-in condition inspection report had been completed at the outset of the tenancy, and a move-out condition inspection report was completed at the end of the tenancy.

The parties do not agree on the date that the tenancy ended; the landlord testified that it ended on September 30, 2011, and the tenants have testified that they moved from the rental unit a week before the end of September, 2011 and had all belongings removed from the rental unit on September 28, 2011.

The landlord testified that a term of the tenancy agreement provides for successive 6 month fixed terms unless the tenants have provided sufficient notice to end the tenancy prior to the end of any fixed term. The first term expired on September 30, 2010, the second on March 31, 2011, and the third on September 30, 2011.

The landlord also provided a document entitled "Landlord's Application for Dispute Resolution, Revised Schedule A, Details of the dispute continued." The landlord testified to each of the claims therein:

- a) "Monthly rents payable April 1, 2011 to August 31, 2011; 5 months X \$1,695.00 per month, less \$3,086.00 payments made to the landlord, for a subtotal of \$5,389.00."

The landlord testified that the tenants are in arrears of rent the sum of \$3,390.00 for 2 months due to N.S.F. cheques for rental payments for April and May, 2011. Also provided in evidence are copies of N.S.F. cheques dated April 1, 2011, May 1, 2011, June, 2011 and July, 2011. The landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, a copy of which was provided in advance of the hearing. The notice is dated August 24, 2011 and states that the tenants failed to pay rent in the amount of \$1,695.00 that was due on May 1, 2011, and contains an expected date of vacancy of September 10, 2011. The notice was accompanied by a letter dated August 24, 2011 from the landlord's counsel to the tenants stating that the tenants had defaulted under the agreement having failed to pay the May, 2011 rent in full and the rents for June, July and August, 2011. The tenants made payments toward arrears in the amount of \$1,700.00 on May 28 and \$1,386.00 on May 30, 2011, covering 2 months of unpaid rent, which is acknowledged in the counsel's letter; and the letter advises that the amount due for rent, among other claims, is \$5,389.00 from April 1 to August 31, 2011. A ledger of payments due and made was not provided for the hearing.

- b) "Rent for September 1 to September 10, 2011 @ \$57.80 per day (September 2011 rent \$1,733.96 divided by 30 days), for \$578.00;" and

- c) "Over-holding rent payable under paragraph 23 of the Agreement after deemed receipt of Notice to estimated date to vacate the premises – September 11, 2011 to September 29, 2011 ($\$1,733.96 \times 200\% = \115.60 per day for 19 days), for \$2,196.40."

The landlord testified that the tenants did not vacate the rental unit on September 10, 2011 in accordance with the notice to end the tenancy, and the landlord therefore claims over-holding in the amount of \$2,196.40. Further, clause 23 in the addendum to the tenancy agreement states as follows: "23. In the event of over-holding by the Tenants, the Landlord shall have the right to summarily evict the Tenants, and no new tenancy shall be created by the over-holding Provided that they shall continue to be obligated to pay rent to the Landlord for the unexpired part of the current fixed length of time equal to 200% of the preceding Rent and Further Provided that no new tenancy shall be created by such over-holding or payment."

- d) "Administration fees (paragraph 24 of the Agreement) for 7 defaults \times \$50.00 fee, for \$350.00."

Paragraph 24 of the Addendum to the tenancy agreement states: "Interest shall accrue on any late payment by the Tenants at the rate of 2% per month or part thereof plus a handling fee of \$50.00."

- e) "Interest on late payments to the hearing date (paragraph 24 of the Agreement), for \$435.32;"
- f) "Landlord's legal fees to June 11, 2011 (paragraph 22 of the Agreement), for \$495.60;"

Paragraph 22 of the addendum states: "The Tenants shall pay the Landlord's reasonable legal and other professional fees and expenses, including his own fees on a time basis for his legal time as a lawyer acting for himself in making formal legal demand, and other costs and expenses incurred in and about enforcing any of the terms off this Tenancy Agreement, in collecting Rent and any amounts payable by the Tenants to the Landlord, and in and about recovering possession from the Tenants."

The landlord testified that the landlord is a lawyer and stated that the amount claimed is an inexpensive and reasonable cost for the landlord's professional services required for this tenancy.

- g) "Estimated Legal fees to September 15, 2011 (paragraph 22 of the Agreement), for \$612.00."

The landlord also testified that a law firm was retained to assist with the legal aspects of the tenancy including issuing the notice to end tenancy and attempting to collect the outstanding rent and other fees from the tenants. The landlord also argued that there is nothing in the *Residential Tenancy Act* that prohibits the claim of legal fees.

h) "Residential Tenancy Office filing fee for \$100.00;" and

"Less August and September, 2011 rent payments (2 X \$1,695.00), for a \$3,390.00 deduction from the above claims; and the total amount claimed is \$6,766.32."

On May 31, 2011 the landlord served the tenants with a notice of rent increase, a copy of which was provided by the landlord. The notice is dated May 31, 2011 and increases the rent by \$38.99 per month effective September 1, 2011 for a new monthly rent of \$1,733.99. The landlord claims the increased monthly rent for that month.

The landlord also claims damages from the tenants for:

- A safety chain for a door at a cost of \$3.03 including HST;
- A hole in a wall which is estimated to cost \$50.00 to repair;
- A cigarette hole in drapes which is estimated to cost \$200.00;
- A plunger, or plug for a bathroom sink, for which the landlord replaced at a cost of \$10.00;
- A stain on a carpet which is estimated to cost \$250.00 to repair;
- Broken drape pullers which are estimated to cost \$150.00 for both of them;
- 10 burned out light bulbs at a cost of \$16.91;
- A missing shower curtain which is estimated to cost \$20.00 to replace; and
- Stains on the walls, which were painted 2 years ago, for which the landlord claims \$300.00 as an estimate for the repair.

The landlord also claims that because the tenants have not provided a forwarding address, I should not deduct the security deposit from any claim the landlord has against the tenants. The landlord stated that under the *Residential Tenancy Act*, the tenants must provide a forwarding address within a year or the landlord is entitled to keep it.

The tenants agree that the landlord is entitled to a monetary order for 2 month's rent.

The tenants testified that the move-out condition inspection took place on October 3, 2011.

After the landlord issued the notice to end tenancy, the parties were still discussing the possibility of maintaining the tenancy. The tenants also testified that the parties were still in communications beyond the effective date of the landlord's notice to end the tenancy, and the landlord told the tenants that the landlord would call off the lawyers. The tenants testified that the landlord preferred the tenants to stay, but the tenants gave the landlord a one month notice to end the tenancy because they felt they could not continue to pay that amount of rent. The contract ended on September 29, 2011 and if the tenants stayed beyond that date, they would be obligated to stay another 6 months. The tenants further testified that during discussions with the landlord, the landlord was going back and forth, and the tenants therefore do not agree that the landlord is entitled to all of the landlord's claims.

The tenants further testified that the landlord had introduced them to the perspective tenants for the purpose of handing over keys, and then the landlord changed his mind and told the tenants not to give the keys to them. The tenant called the landlord who then told the tenant who to give them to. The landlord then disabled the entry card to the complex on September 28, 2011.

With respect to damages, the tenants testified that upon moving into the rental unit, the following defects were noticed:

- A patch in the wall in the child's bedroom;
- Cigarette hole in drapes;
- Stained living room carpet;
- Curtains were very old;
- The curtains in the master bedroom were stained.

Analysis

With respect to the tenancy agreement, the *Act* specifically states as follows:

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

6 (3) A term of a tenancy agreement is not enforceable if

- (a) the term is inconsistent with this Act or the regulations,
- (b) the term is unconscionable, or

- (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Further, the regulations specifically state:

- 1 (1) The terms of this tenancy agreement and any changes or additions to the terms may not contradict or change any right or obligation under the Residential Tenancy Act or a regulation made under that Act, or any standard term. If a term of this tenancy agreement does contradict or change such a right, obligation or standard term, the term of the tenancy agreement is void.

With respect to the landlord's claims, I find as follows:

- a) "Monthly rents payable April 1, 2011 to August 31, 2011; 5 months X \$1,695.00 per month, less \$3,086.00 payments made to the landlord, for a subtotal of \$5,389.00."

I find that there is no dispute that the landlord is entitled to a monetary order for 2 months of unpaid rent due to the returned cheques for April and May, 2011 and I find the landlord is entitled to a monetary order for 2 months of unpaid rent and late payment fees. However, regardless of what the tenancy agreement provides for, the regulations specifically limit the amount of late fees or N.S.F. fees the landlord may collect from the tenants:

- 7 (1) A landlord may charge any of the following non-refundable fees:
- c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
 - d) subject to subsection (2), an administration fee of not more than \$25.00 for the return of a tenant's cheque by a financial institution or for late payment of rent;

- (2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

The addendum to the tenancy agreement provides for late fees and N.S.F. fees, however, they are not consistent with the regulations. Further, I find that the landlord has failed to provide any evidence of the amount charged by the financial institution for the 4 returned cheques. The landlord is entitled to an administration fee of \$25.00 per returned cheque. Therefore, I find that the landlord has established a claim for unpaid rent and late fees totalling \$3,490.00.

- b) "Rent for September 1 to September 10, 2011 @ \$57.80 per day (September 2011 rent \$1,733.96 divided by 30 days), for \$578.00;"

In the circumstances, I find that the term of the tenancy was fixed until the end of September, 2011, and the landlord is entitled to the full amount of rent for the month of September, 2011. I further find that the rental increase effective September 1, 2011 complies with the *Act* and the landlord is entitled to rent at \$1,733.96 for that month.

- c) "Over-holding rent payable under paragraph 23 of the Agreement after deemed receipt of Notice to estimated date to vacate the premises – September 11, 2011 to September 29, 2011 ($\$1,733.96 \times 200\% = \115.60 per day for 19 days), for \$2,196.40."

I accept the testimony of the tenants that the parties were still in discussions about salvaging the tenancy even after the effective date of the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. I further find that clause 23 in the addendum to the tenancy agreement is a term that is unconscionable, which is prohibited by the *Act* and the regulations. The *Act* prohibits terms that are unconscionable, and the regulations describe "unconscionable" as "oppressive or grossly unfair to one party." Firstly, I am not clear on what the term "summarily evict the tenant" means, being that the landlord claims that the tenants had already been served with the notice to end tenancy. Secondly, requiring a tenant to pay rent to the end of the fixed term of a tenancy in the amount of 200% I find is grossly unfair to one party and is unconscionable. The landlord's application for over-holding is hereby dismissed.

- d) "Administration fees (paragraph 24 of the Agreement) for 7 defaults \times \$50.00 fee, for \$350.00."

I find that the administrative fees the landlord is entitled to are set out above, and the landlord is not entitled to any further fees.

- e) "Interest on late payments to the hearing date (paragraph 24 of the Agreement), for \$435.32;"

There is nothing in the *Act* that permits the landlord to claim interest. The landlord may be entitled to interest under the *Court Order Enforcement Act*, but I find that pre-judgment interest is not payable under the *Residential Tenancy Act*.

- f) "Landlord's legal fees to June 11, 2011 (paragraph 22 of the Agreement), for \$495.60;"

and;

- g) "Estimated Legal fees to September 15, 2011 (paragraph 22 of the Agreement), for \$612.00."

Section 72 of the *Act* permits the director to order repayment of a fee for starting proceedings or for review of a director's decision. I find that if the legislators had intended to provide for legal fees the section would not be limited to repayment of fees for starting proceedings or review of a director's decision. I further find that regardless of what the landlord's other professions are, they are not related to this tenancy. The landlord's applications for legal fees are hereby dismissed.

With respect to the landlord's claims damages, the onus is on the landlord to satisfy the 4-part test for damages:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the tenants' failure to comply with the *Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. The efforts the landlord made to mitigate, or reduce such damage or loss.

The parties agree that move-in and a move-out condition inspection reports were completed. I find that the landlord has established a claim against the tenants for a safety chain for a door at a cost of \$3.03 including HST, for which a receipt was provided; and 10 burned out light bulbs at a cost of \$16.91 for which a receipt was provided. With respect to the balance of the damages claimed by the landlord, I have no evidence before me of how the landlord estimated the costs, and therefore, I find that the landlord has failed to establish element 3 of the test for damages, and the landlord's claim for those items is hereby dismissed.

With respect to the security deposit, the landlord holds that money in trust on behalf of the tenants. The landlord is correct with respect to the section of the *Act* that states that if a tenant does not provide the landlord with a forwarding address in writing for one year, the landlord does not have to return that deposit. However, I do not agree that the landlord is entitled to keep it after these proceedings for the tenants' failure to provide a forwarding address. The landlord has an address for service upon the tenants as evidenced by the landlord's ability to serve the tenants with notice of this hearing. Also, the landlord made an application to keep all or part of the security deposit and I must find whether or not the landlord is entitled to. I specifically refer to Section 72 (2) of the *Act* which states that:

72 (2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other, including an amount under subsection (1), the amount may be deducted

- (a) in the case of payment from a landlord to a tenant, from any rent due to the landlord, and
- (b) in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit due to the tenant.

Having found that the tenants are indebted to the landlord, I further find that the landlord is entitled to keep the security deposit, and the amount of that deposit shall be deducted from the monetary orders awarded to the landlord.

The landlord is also entitled to recovery of the \$100.00 filing fee for the cost of filing this application.

In summary, I find that the landlord has established the following claims:

- unpaid rent and late fees totalling \$3,490.00;
- rent for the month of September, 2011 in the amount of \$1,733.96;
- damages totalling \$19.94; and
- recovery of the filing fee in the amount of \$100.00;

for a total of \$5,343.90.

Conclusion

For the reasons set out above, I hereby order the landlord to keep the security deposit in the amount of \$847.50 and I grant the landlord a monetary order for the balance due of \$4,496.40. This order is final and binding on the parties and may be enforced.

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: November 18, 2011.

Residential Tenancy Branch