



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNSD,MNDC , FF

Introduction

This Dispute Resolution hearing was convened to deal with an application by the tenant for monetary compensation of \$3,233.30 for a refund of double the \$995.00 security deposit, a refund for one-half a month rent and the cost of carpet cleaning.

The hearing was also to deal with a cross application by the landlord for \$3,200.00 claiming liquidated damages of \$1,000.00 for early termination of the fixed-term tenancy and \$2,150.00 loss of rent for the month of June 2012. The landlord was seeking to keep the tenant's \$995.00 security deposit in partial satisfaction of the claim.

Issues to be Decided

The issues to be determined based on the testimony and the evidence are:

- Is the tenant entitled to the return of double the security deposit pursuant to section 38 of the Act?
- Is the tenant entitled to monetary compensation for damages?
- Is the landlord entitled to monetary compensation for loss of rent and liquidated damages?

Background and Evidence

The tenancy originally began in December 2009 as a fixed term ending November 30, 2010, that was extended thereafter to end on July 31, 2012 with a rent increase to \$2,173.00 per month including \$23.00 a month for security system charges. A security deposit of \$995.00 was being held in trust.

The landlord testified that the tenant gave verbal notice to vacate effective May 15, 2012 but then gave a different date. The landlord testified that, in order to find a replacement tenant to mitigate potential losses during the fixed term period, it was necessary to establish a firm date for the ending of the tenancy in writing. The landlord testified that, for this reason, a Mutual Agreement to End Tenancy was emailed to the tenant on April 26, 2012 proposing that the tenancy would end on May 15, 2012. The

landlord testified that the tenant signed the agreement but did not return it until May 4, 2012, by which time the replacement renter had rescinded their application to rent. The landlord testified that the tenant's rent cheque paying rent for the entire month of May was deposited. The landlord testified that the tenant vacated on May 15, 2012. However, the landlord was not able to find a replacement tenant until July 1, 2012 and a loss of \$2,150.00 was therefore incurred for the month of June 2012. The landlord testified that the tenancy agreement contained a liquidated damages clause requiring that the tenant pay \$1,000.00 as liquidated damages if the tenant terminated the lease prior to the expiry date. The landlord is seeking compensation for the \$2,150.00 loss of rent for June 2012 and the \$1,000.00 in liquidated damages for a total claim of \$3,150.00 plus the \$50.00 cost of filing the application.

The tenant disputed the landlord's claim on the basis that there was a valid mutual agreement to terminate the tenancy as of May 15, 2012 which was sent by the landlord to the tenant, then signed and returned to the landlord. The tenant testified that he fully complied with the agreement by moving out on the date agreed upon. The tenant testified that, based on the Mutual Agreement ending the tenancy on May 15, 2012, he was asked by the landlord to submit a replacement cheque for one-half the month rent for May. According to the tenant, this was done with the understanding that the landlord would not cash his post-dated rent cheque for the full month of May 2012 and would also return his post-dated rent cheques for May, June and July 2012. The tenant testified that, while the landlord did return both the rent cheques for June and July 2012, the post-dated rent cheque for May was not returned and was cashed by the landlord instead. The tenant's position is that he had both a verbal commitment from the landlord and a signed agreement with the landlord, mutually ending the tenancy as of May 15, 2012 and therefore should not have been charged any rent beyond May 15, 2012. The tenant is seeking a refund of \$1,086.00 for the latter half of May 2012. The tenant also stated that he does not owe liquidated damages, which he believes should not apply in situations such as this when the contract is mutually ended by both parties.

The tenant is also claiming carpet-cleaning costs of \$156.80, that were incurred on the basis that he had initially paid to have the carpet cleaned at the beginning of the tenancy with the commitment from the landlord that, at the end of the tenancy he would not be required to pay to have the carpets cleaned. The tenant stated that, under the contract he should only be responsible for one of these cleanings.

The landlord argued that the tenant had unduly delayed signing the mutual agreement by not returning it until May 4, 2012. The landlord is of the opinion that the delay resulted in the loss of a potential tenant who had applied to rent the unit in May. The landlord feels that the Mutual Agreement is not an enforceable contract that would prevent the landlord from claiming loss of rent and liquidated damages.. With respect to

the carpet-cleaning the landlord pointed out that the tenant had permitted pets to be inside the unit on at least one occasion and this would, in the landlord's opinion, warrant the additional carpet –cleaning costs.

The tenant is also claiming a refund of double the security deposit on the basis that it was not returned within 15 days. The landlord argued that a written forwarding address was never provided to the landlord and that the tenant's service address was not known until the Notice of Hearing was served by the tenant.

Analysis

Landlord's Claim Loss Rent and Liquidated Damages

An Applicant's right to claim damages from another party is dealt with under section 7 of the Act which states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find it important to note that in a claim for damage or loss under the Act, the party making the claim bears the burden of proof and 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 reasonable steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the landlord to prove the existence and value of the damage/loss stemming directly from a violation of the agreement or a contravention of the Act by the respondent and to verify that a reasonable attempt was made to mitigate the damage or losses incurred.

I find it clear that the landlord incurred a loss, the amount of which is also evident. However, while this satisfies elements 1 and 3 of the test for damages, in order to meet the criteria for element 2, the landlord must prove that the tenant violated the Act or Agreement which resulted in the loss.

Unilateral termination by the tenant of a fixed term tenancy prior to the expiry date would constitute a violation of the agreement.

According to the Residential Tenancy Guidelines, where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options which are:

- To accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
- To accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy. (My emphasis)

Even if I accepted that the landlord did not mutually agree with the early ending of this tenancy on May 15, 2012, I find that the landlord failed to put the tenant on notice that they would be pursuing the loss of rent for the period of the fixed term.

In any case, I accept the evidence before me confirming that the parties had entered into a subsequent agreement that mutually ended the tenancy as of May 15, 2012. I find that the terms of the subsequent agreement naturally prevail over the original terms of the tenancy agreement. Therefore, I do not find that the tenant had violated the Act or tenancy agreement so the claim for loss of rent would not meet element 2 of the test for damages. For this reason, I find that the landlord is not entitled to loss of rent after May 15, 2012.

With respect to the landlord's claim for \$1,000.00 in liquidated damages pursuant to the original tenancy contract signed by the tenant, I find that the wording of this term is possibly noncompliant with the Act.

In this instance I find that the clause contained in the tenancy agreement addendum at paragraph one includes the line, "*The tenant(s) agrees by evidence of signatures below that these funds be deducted from the security deposit*".

Section 20(e) of the Act states that a landlord must not "*require, or include as a term in a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or pet damages deposit at the end of the tenancy agreement.*"

The Residential Tenancy Guideline # 4 suggests that a liquidated damages clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages, unless it can be shown that it is a genuine pre-estimate of loss.

In addition to the above, I find that, because of the existence of a subsequent contract, that being the Mutual Agreement to End Tenancy, the landlord cannot rely on the liquidated damages clause in the tenancy agreement.

Given the above, I find that the landlord's claims for loss of rent and liquidated damages have no merit and must be dismissed.

Tenant's Claim for Damages

The tenant is claiming reimbursement for carpet-cleaning costs based on an agreement between the parties that the tenant would only be responsible for one carpet cleaning charge during the tenancy. Based on the notation on the move-in condition inspection report indicating that, at the start of the tenancy the carpet had not been steam-cleaned, I accept that the tenant is entitled to be reimbursed the \$156.80 cost of carpet cleaning he incurred at the end of the tenancy.

With respect to the tenant's claim for a refund of rent collected by the landlord for the second half of May 2012, I find that this portion of the May rent related to a period after the tenancy had ended and during which the tenant no longer had the right of possession of the rental unit. For this reason, it follows that the landlord is not entitled to collect rent for that period under the Act or the agreement. I find that the tenant is entitled to a refund of \$1,086.50 from the landlord.

Tenant's Claim for Security Deposit

Section 38 of the Act deals with the rights and obligations of landlords and tenants in regards to the return of security deposit and pet damage deposit.

Section 38(1) states that within 15 days of the end of the tenancy and receiving the tenant's forwarding address a landlord must either:

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

OR

- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

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

I find that the tenant failed to provide this landlord with a forwarding address in writing after the tenancy ended. Although the tenant's address was on the Application for Dispute Resolution, I find that the tenant's claim for double the refund was initiated prior to him complying with the Act by giving the landlord the forwarding address in writing.

Based on the above, I find that the tenant is not entitled to a refund of double the security deposit, but must be credited with \$995.00 currently held on his behalf.

Conclusion

I find that the tenant is entitled to total monetary compensation of \$2,238.30, comprised of \$1,086.50 partial refund of rent for May 2012, \$156.80 for the cost of carpet cleaning, a \$995.00 refund of the security deposit and the \$50.00 cost of the application.

I hereby grant a monetary order in the amount of \$2,238.30 in favour of the tenant. This order must be served on the respondent and if unpaid may be enforced in Small Claims Court if necessary.

The landlord's application is dismissed in its entirety without leave to reapply.

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: September 10, 2012.

Residential Tenancy Branch