

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

There are applications filed by both parties. The Landlord has made an application for a monetary order for unpaid rent or utilities, to keep all or part of the security deposit, for money owed and the recovery of the filing fee. The Tenant has made an application for the return of double the security deposit and recovery of the filing fee.

Both parties attended the hearing by conference call and gave testimony. As both parties have attended and have confirmed receipt of the notice of hearing and evidence package submitted by the other party, I am satisfied that both parties have been properly served.

It was clarified with the Landlord that there is no unpaid rent, but that they seek the recovery of lost rental income for August 2012, to keep all or part of the security deposit, compensation for loss (agent service fees) and recovery of the filing fee.

It was also clarified with both parties that the Landlord seeks recovery of agent fees. Section 72 of the Act addresses **Director's orders: fees and monetary order**. With the exception of the filing fee for an application for dispute resolution, the Act does not provide for the award of costs associated with litigation to either party to a dispute. Accordingly, the Landlord's claim for recovery of litigation costs are dismissed.

Issue(s) to be Decided

Is the Landlord entitled to a monetary order for lost rental income?

Is the Landlord entitled to retain the security deposit?

Is the Tenant entitled to a monetary order for the return of double the security deposit?

Background and Evidence

This Tenancy began on September 1, 2011 on a fixed term tenancy ending on August 31, 2012 as shown by the submitted copy of the signed tenancy agreement. Both parties agreed that the Tenancy ended on July 31, 2012. The monthly rent was \$1,530.00 payable on the 1st of each month and a security deposit of \$750.00 was paid

on August 10, 2010. Both parties agreed that the Tenant gave the forwarding address in writing to the Landlord on June 28, 2012 to vacate the rental unit on July 31, 2012.

The Landlord seeks recovery of loss rental income of \$1,530.00 for August 2012 for breach of the fixed term tenancy and to offset that amount from the \$750.00 security deposit held. The Landlord states that the Tenant breached the fixed term tenancy by ending it early by 1 month. The Tenant confirms this, but states that it is the duty of the Landlord to mitigate any losses by trying to re-rent the unit. The Tenant states that no showings were made. The Landlord dispute this and states that this was done by trying to re-rent the unit for the month of August 2012 for the 1 month duration as the Landlord wished to stop renting and sell the unit. The Landlord stated in their direct testimony that no agents would attempt to rent the unit for a 1 month duration. The Landlord states that the rental unit remains unoccupied and that she has not listed it for sale.

The Tenants seek the return of double the security deposit of \$1,500.00. The Tenant states that one clear month of notice was given on June 28, 2012 to end the tenancy on July 31, 2012. The Landlord did not return the deposit within 15 days of the end of the tenancy.

Analysis

Both parties have confirmed that the Tenants breached the fixed term tenancy by ending it 1 month early by vacating the rental unit on July 31, 2012 and that the Tenant gave the Landlord their forwarding address in writing on June 28, 2012.

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.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

- (a) the director has previously ordered the tenant to pay to the landlord, and
- (b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

- (a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
- (b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(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.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must use a service method described in section 88 (c), (d) or (f) *[service of documents]* or give the deposit personally to the tenant.

I find that it is clear that the Landlord did not comply with section 38 (1) by returning the security deposit within 15 days after the end of the tenancy or when the forwarding address in writing was given to the Landlord. The Landlord filed for dispute resolution on September 4, 2012 well after the end of tenancy on July 31, 2012 and beyond the 15 day period. By not complying the section 38 (1) of the Act, section 38 (6) (b) applies.

The Tenants have established a monetary claim for the return of double the security deposit of \$1,500.00. The Tenant is also entitled to recovery of the \$50.00 filing fee. The Tenant is granted a monetary order under section 67 for the balance due of \$1,550.00.

As for the Landlord's claim for the loss of rental income. Residential Tenancy Branch Policy Guideline #3 states,

"In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent."

I find based upon the evidence submitted by both parties that the Landlord's attempt to re-rent the unit for a 1 month duration (August 2012) to be unreasonable and a failure to reasonably mitigate any losses. The Landlord stated that she wished to sell the unit in September being the reason that she only requested the unit to be listed for rental for one month only. The Landlord has failed to establish a claim for loss of rental income. The Landlord's application is dismissed without leave to reapply.

Conclusion

The Landlord's application is dismissed.
The Tenant is granted a monetary order for \$1,550.00.

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 16, 2012.

Residential Tenancy Branch