

DECISION

Dispute Codes

For the landlord: MND MNR MNDC FF

For the tenant: FF O

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the *Residential Tenancy Act* (the “Act”).

The tenant applied for “other” and provided details that she is seeking compensation for one month’s rent due to a 2 Month Notice To End Tenancy For Landlord’s Use being served upon her, and to recover the filing fee.

The landlord applied for a monetary order for damage to the unit, site or property, for money owed for damage or loss under the *Act*, regulation or tenancy agreement, for unpaid rent or utilities, and to recover the filing fee.

The tenant, a witness for the tenant, and an agent for the landlord (the “agent”) attended the hearing. The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their relevant evidence orally and in documentary form prior to the hearing, and make submissions to me.

The parties confirmed receiving the evidence package from the other party and that they had the opportunity to review the evidence prior to the hearing. I find the parties were served in accordance with the *Act*.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

At the outset of the hearing, the tenant clarified that she was reducing her monetary claim from \$1,250.00 in her application to \$850.00 which is comprised of the equivalent of one month's rent in the amount of \$800.00 plus the \$50.00 filing fee.

Issue to be Decided

- Is either party entitled to a monetary order under the *Act*, and if so, in what amount?

Background and Evidence

A month to month tenancy began on March 1, 2011. Monthly rent in the amount of \$800.00 was due on the first day of each month. The tenant paid a security deposit of \$400.00 at the start of the tenancy which has since been returned in full by the landlord.

On September 25, 2012 the landlord or agent for the landlord served M.E. with a 2 Month Notice to End a Tenancy for Landlord's Use (the "2 Month Notice"). M.E. was listed on the tenancy agreement as a co-tenant. The tenant stated that M.E. advised her of the 2 Month Notice and she acted on the Notice and vacated the rental unit as soon as possible on October 2, 2012.

The parties agreed that the tenant provided a written 10 Day Notice to End Tenancy on October 3, 2012, one day after vacating the rental unit. The tenant stated that the notice was posted to the landlord's door on October 3, 2012. The agent testified that he was unsure of what day the landlord received the tenant's 10 Day Notice. The agent stated that the deemed service date would be three days later making the deemed service date October 6, 2012 which would make the effective date of the tenant's 10 Day Notice October 16, 2012.

The agent's position is that by serving M.E., who in his opinion was no longer a tenant, the landlord did not serve the 2 Month Notice correctly, and are not obliged to pay the tenant the required one month equivalent of rent as a result. The agent was asked if it was the landlord's intention to serve the female tenant with the 2 Month Notice and the agent confirmed that it was the intention of the landlord to serve the female tenant with the 2 Month Notice on September 25, 2012.

The parties agreed that co-tenant M.E. vacated the rental unit; however, the original tenancy agreement was not amended to reflect this change to the tenancy. The landlord

submitted a letter from M.E. in evidence stating that he would be vacating by April 1, 2012 at the latest. The tenant stated that M.E. was still living in the rental unit after that date due to the tenant suffering from an injury and requiring care from M.E. The tenant stated that she didn't want to move, but was trying to move as soon as possible after receiving the 2 Month Notice. The agent did not submit evidence that M.E. was removed from the tenancy agreement by written agreement and that a new tenancy agreement was signed by the female tenant. The agent stated that he had a verbal agreement releasing tenant M.E. from the tenancy as the female tenant was continuing to reside there and was paying rent.

The tenant is seeking the equivalent of one month's rent as compensation and in accordance with the *Act* as a result of being served with the 2 Month Notice.

The landlord is claiming \$2,408.77 comprised of the following:

Unpaid October 2012 rent	\$800.00
Unpaid November 2012 rent	\$800.00
Damage to the rental unit	\$808.77
Total	\$2,408.77

The agent stated that the tenant did not pay rent \$800.00 for October 2012 or \$800.00 for November 2012 and therefore owes rent in the amount of \$1,600.00. The tenant stated that she didn't pay October 2012 rent as she was owed the equivalent of one month's rent and did not live in the rental unit in November 2012. The tenant stated that she vacated as early as possible after being served with the 2 Month Notice.

The agent stated that the landlord's claim for \$808.77 for damages to the rental unit is comprised of the following:

Repairs to screw damage in walls	\$740.24
Cost of paint	\$68.53
Total	\$808.77

The agent submitted an invoice in the amount of \$740.24 from a contractor which states:

“DRYWALL REPAIRS – 9 WALLS PATCHED + PAINTED 3 WALLS REPAIRED
AND SPOT PAINTED REPLACE DAMAGED TOWEL HOLDER”

The agent testified that due to the tenant hanging pictures with screws, there were repairs required to nine walls. The tenant disputed the agent's testimony by stating that screws were only used in three walls and not nine, and that she was given permission by the landlord to hang heavy pictures. The agent agreed that the tenant was given permission to hang heavy pictures but did not give permission to use screws. The agent was asked if the tenant was advised not to use screws. The agent stated that he had not advised the tenant not to use screws to hang the heavy pictures.

The agent submitted a receipt for \$68.53 for paint which was required in addition to the \$740.24 paid to the contractor for drywall repairs. The agent submitted photos in evidence which appear to show three different walls. The first photo shows 5 holes, the second photo shows one hole, and the third photo shows one hole above a thermostat.

The agent also submitted photos of a towel holder and two holes in the wall where the agent described the towel holder had been broken away from the wall. The tenant stated that the towel holder was loose and not correctly installed when they moved into the rental unit. The tenant disputed the agent's testimony regarding the condition of the walls and the towel holder at the start of the tenancy.

Both parties agreed that a move-in condition inspection report was not completed by the landlord at the start of the tenancy. The agent testified that the home was new in 2010, however, he did not have any documentary evidence to support his testimony. The witness for the tenant, M.E. testified that the towel holder was "loose" when they moved in.

Analysis

Based on the documentary evidence and the affirmed testimony provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;

3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Tenant's claim for compensation equivalent to one month rent – The tenant testified that she vacated the rental unit even though she did not want to after receiving the landlord's 2 Month Notice. The agent stated that due to the tenant not being served correctly, the landlord should not have to pay the tenant the equivalent of one month's rent. The agent confirmed that it was the landlord's intention to serve the tenant with the 2 Month Notice and served the co-tenant M.E. on September 25, 2012.

The landlord did not submit any documentary evidence supporting that the tenancy agreement was formally amended in writing removing M.E. from the tenancy agreement. Section 44 of the *Act* requires that an agreement between the landlord and tenant to end a tenancy **must be in writing**. Therefore, I reject the testimony of the agent stating that because he did not properly serve the female tenant, that the landlord is not obliged to pay the female tenant the equivalent of one month's rent. Section 50 of the *Act* states:

Tenant's compensation: section 49 notice

51 (1) A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2) If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

[emphasis added]

The parties agreed that the landlord received written 10 Day Notice from the tenant which was posted to the landlord's door on October 3, 2012 and was deemed served October 6, 2012. As a result, I find that the tenant's 10 Day Notice became effective October 16, 2012. The tenant testified that she vacated early due to the 2 Month Notice and I find that the co-tenant M.E. was still a tenant until the tenancy ended on October 16, 2012, the effective date of the tenant's 10 Day Notice pursuant to section 50 of the

Act. I accept that by the landlord or agent for the landlord serving co-tenant M.E., the female tenant was also served in accordance with the *Act*. In addition, the agent confirmed during the hearing that they intended to serve the female tenant with the 2 Month Notice.

Therefore, **I find** the tenant was entitled to the equivalent of one month's rent for October 2012 due to the 2 Month Notice.

I will now consider whether the tenant is entitled to a refund for the dates of October 17, 2012 to October 31, 2012 after she had vacated the rental unit and based on the tenant's 10 Day Notice pursuant to section 50 of the *Act*.

Section 51 of the *Act* sets out that a tenant who receives a notice to end tenancy for landlord's use is entitled to compensation equivalent to one month's rent. The compensation may be in the form of one of the following:

- 1) financial restitution, where the landlord pays the tenant the equivalent of one month's rent on or before the effective date of the two month notice,
- 2) occupancy, where the tenant withholds the last month's rent and occupies the rental unit rent-free for the last month, or
- 3) a combination of both.

In the matter before me, although the tenant vacated the rental unit on October 2, 2012, the tenant's 10 Day Notice did not become effective until October 16, 2012. Therefore, based on the above, **I find** the tenant is entitled to the return of the balance of rent for October 2012 for the dates of October 17, 2012 to October 31, 2012, inclusive, which is a total of fifteen days. Monthly rent was \$800.00 per month, which equals \$25.80 per day when \$800.00 is divided by 31 days. Therefore, **I find** the tenant is entitled to the return of **\$387.00** which is comprised of fifteen days times \$25.80 per day.

Landlord's claim for unpaid rent – The landlord is not entitled to rent for October 2012 due to my finding above. The tenant was entitled to the equivalent of October 2012 rent due to the landlord's 2 Month Notice served September 25, 2012 which she has already received. Therefore, **I dismiss** the landlord's claim for unpaid October 2012 rent, without leave to reapply.

The landlord is also seeking unpaid rent for November 2012. The tenant vacated the rental unit on October 2, 2012 and the effective date of her 10 Day Notice was October 16, 2012. Therefore, as the tenancy ended on October 16, 2012 pursuant to section 50 of the *Act*, **I find** the landlord is not entitled to rent for November 2012.

Landlord's claim for damages – The landlord has claimed \$808.77 for damages to the rental unit comprised of \$740.24 to patch and paint nine walls and repair and spot paint three walls and replace damaged towel holder and \$68.53 for paint. The landlord confirmed he failed to complete a move-in condition inspection report in accordance with section 23 of the *Act*.

The tenant disputed the landlord's testimony in terms of the condition of the rental unit and the towel holder at the start of the tenancy.

I have reviewed the photos submitted in evidence by the landlord of the screw holes. I find there were only three walls where screw holes appear and based on the size of the thermostat in relation to the hole in one photo, the total of seven holes appear to be the size of a normal size screw hole. I find that by failing to complete a move-in condition inspection report, and given the disputed testimony relating to the condition of the walls at the start of the tenancy, **I find** the landlord has failed to meet the burden of proof to support the claim for damages. Furthermore, **I find** the amount being claimed to be unreasonable. The invoice provided indicates that nine walls were patched and painted and that three walls were repaired and spot painted. I find it just as likely that the landlord repainted the entire rental unit and is seeking compensation for that work through the tenant.

I do not find it reasonable that to repair three walls with a total of seven screw holes required the painting of nine walls. I do not accept that the towel holder was broken by the tenants either as it is just as likely that the towel holder was never installed correctly at the start of the tenancy. A move-in condition inspection report would have taken into account any deficiencies which the landlord could have relied on when claiming for damages after the tenancy ended. The landlord breached section 23 of the *Act* by failing to complete a move-in condition inspection report. Therefore, **I dismiss** the landlord's claim for damages in full, due to insufficient evidence, without leave to reapply.

As the tenant's claim had merit, **I grant** the tenant the recovery of the filing fee in the amount of **\$50.00**.

As the landlord's claim did not have merit, **I do not grant** the landlord the recovery of their filing fee.

I grant the tenant a monetary order pursuant to section 67 of the *Act*, in the total amount of **\$437.00** comprised of \$387.00 as compensation for the dates of October 17,

2012 to October 31, 2012 inclusive, and the \$50.00 filing fee. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

Conclusion

The tenant is granted a monetary order pursuant to section 67 of the *Act* in the amount of \$437.00. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

The landlord's application is dismissed in full due to insufficient evidence, without leave to reapply.

This decision is final and binding on the parties, unless otherwise provided under the *Act*, and 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: January 29, 2013