



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CAP REIT LP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND MNSD MNDC FF

Introduction

This hearing was convened as a result of the landlord's application for dispute resolution seeking remedy under the *Residential Tenancy Act* (the "Act"). The landlord applied for a monetary order for unpaid rent, for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, for authority to keep all or part of the security deposit, and to recover the filing fee.

An agent for the landlord (the "agent") appeared at the teleconference hearing and gave affirmed testimony. During the hearing the agent was given the opportunity to provide oral testimony and speak to their evidence. A summary of the testimony is provided below and includes only that which is relevant to the hearing.

As the tenant did not attend the hearing, service of the Notice of a Dispute Resolution Hearing (the "Notice") was considered. The agent testified under oath that the tenant was served by registered mail on November 15, 2012 to the address provided in a November 7, 2012 letter from the tenant submitted in evidence which includes the new forwarding address of the tenant. A copy of the registered mail tracking number was submitted in evidence. The agent stated that he went online to track the registered mail package and that the package was listed as "not picked up" and was returned to sender. The agent stated that according to the online tracking website, the registered mail package arrived in the tenant's new town in a different province on November 18, 2012 and that the tenant was provided a final notice on November 24, 2012 but did not pick up the registered mail package.

I find the tenant was duly served on the fifth day after mailing, in accordance with section 90 of the *Act*. I note that refusal or failure to accept service is not grounds for a Review.

Issues to be Decided

- Is the landlord entitled to a monetary order under the *Act*, and if so, in what amount?
- What should happen to the tenant's security deposit under the *Act*?

Background and Evidence

A fixed term tenancy agreement began on October 1, 2012 and was to expire on September 30, 2013. Monthly rent in the amount of \$1,475.00 was due on the first day of each month. The tenant paid a security deposit of \$737.50 and a pet damage deposit of \$737.50 at the start of the tenancy. The tenant vacated the rental unit on November 7, 2012.

The landlord has submitted a monetary claim for \$4,475.00 comprised of the following:

| | |
|----------------------------|-------------------|
| Unpaid November 2012 rent | \$1,475.00 |
| Loss of December 2012 rent | \$1,475.00 |
| Loss of January 2013 rent | \$1,475.00 |
| Filing fee | \$50.00 |
| TOTAL | \$4,475.00 |

The agent testified that on November 8, 2012, the landlord received a letter from the tenant dated November 7, 2012 and stated he wanted to terminate his lease agreement effective immediately and provided a forwarding address in another province. This letter was submitted in evidence.

The agent testified that the tenant had vacated the rental unit immediately even though the tenant had a fixed term tenancy that did not expire until September 30, 2013. The landlord wrote back to the tenant on the same date that they received the letter from the tenant on November 8, 2012 indicating that they did not accept the tenant breaking his lease; however the tenant had already vacated the rental unit. The November 8, 2012 letter from the landlord was submitted in evidence. On November 9, 2012, the agent entered the rental unit and performed the move-out condition inspection without the tenant as the tenant had already left the province and left the keys to the rental unit inside the rental unit.

The agent testified that on November 8, 2012, the landlord began to advertise the rental unit in the hopes of finding a new tenant. The agent stated that the landlord has two main components to their advertising, broader general advertising, and more specific local advertising. The local advertising is comprised of a posting to a free popular internet website. A copy of that posting was submitted in evidence dated November 8, 2012. That free internet posting advertisement did not mention that the rental unit was available immediately.

The agent stated that he did not have additional evidence to testify to in terms of the companies broader advertising; however did confirm that they have an ongoing ad on the company website for rental units. The agent referred to page submitted in evidence which shows the apartment building and a general description of units available including a two bedroom unit similar to the rental unit available as early as "immediate". The page submitted in evidence shows the website as the landlord company website and was printed November 9, 2012.

The agent stated that there was an advertisement made offering the rental unit as a discounted rent of \$1,399.00, however, the agent did not submit any evidence to support such an advertisement. The agent stated that they found a new tenant who will be moving into the rental unit on March 1, 2013. The new tenant is moving from another rental unit in the same building so the amount of rent will be the same at \$1,475.00.

The agent stated that the winter time is a very difficult time to find a new tenant as it is a "tough rental season". The agent testified that it is much easier to rent during the summer months versus the winter months.

The agent submitted a copy of a rental incentive program that was left at the door of each rental unit in the building as a means of trying to find a new tenant for the rental unit. The agent stated that this was done on at least on one occasion after the tenant vacated the rental unit but could not be sure if it was done on more than one occasion. The agent stated that the document submitted in evidence relates to their program where a tenant can earn \$150.00 off their rent for every new neighbour they refer to the landlord that are accepted by the landlord as a new tenant in the building.

Analysis

Based on the documentary evidence and the 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.

In this instance, the burden of proof is on the landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the tenant. Once that has been established, the landlord must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the landlord did everything possible to minimize the damage or losses that were incurred.

Claim for unpaid November 2012 and loss of December 2012 rent– The agent testified that rent for November 2012 was not paid by the tenant prior to the tenant vacating the rental unit without proper notice under the *Act*. Section 45 of the *Act* states:

45 (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

[emphasis added]

Based on the above, **I find** the tenant breached section 45 of the *Act*, by breaching a fixed term tenancy by giving notice earlier than the end date specified in the tenancy

agreement. I accept that the landlord did not mutually agree that the tenant could break their lease and did not provide proper notice under the *Act*.

Pursuant to section 26 of the *Act*, a tenant must pay rent when it is due in accordance with the tenancy agreement. Based on the above, **I find** that the tenant has failed to comply with a standard term of the tenancy agreement which stipulates that rent is due monthly on the first of each month.

Given the above, **I find** the landlord has met the burden of proof and **I find** the landlord has established a monetary claim of **\$2,950.00** comprised of \$1,475.00 in unpaid November 2012 rent due to the tenant breaching section 26 of the *Act*, and loss of \$1,475.00 December 2012 rent due to the tenant breaching section 45 of the *Act*.

Claim for loss of rent for January 2013 – The landlord is also claiming for loss of rent for the month of January 2013 at \$1,475.00. The agent stated that they advertised the rental unit on a free local website and provided one screenshot of a November 8, 2012 internet posting. The agent stated that they have secured a new tenant who will be moving into the rental unit on March 1, 2013 and will be paying the same amount of rent, \$1,475.00.

The onus is on the landlord to prove that they did whatever was reasonable to minimize the damage or loss. In the matter before me, the onus is on the landlord to prove that they did everything that was reasonable to secure a new tenant. The agent stated that rent was reduced to \$1,399.00 but failed to provide any evidence in support of his testimony.

The agent described and provided a document in evidence describing their incentive program where a tenant who refers a new tenant can earn \$150.00 off their rent if the referred person becomes a new tenant. The agent was unsure as to how many times that program was advertised but was sure it was at least once after tenant vacated the rental unit.

The agent stated that the company website has an ongoing ad for rental units, however, the only specific ad which specifically named the rental unit was the local free website and in that ad, failed to mention that the rental unit was available immediately. The general company website listed the apartment building but was not specific to the rental unit. There was no evidence submitted that supports that advertisements were made on a regular basis after the tenant vacated the rental unit.

Based on the above, **I find** that the landlord has failed to prove that they did everything that was reasonable to secure a new tenant after the tenant vacated the rental unit. I

accept that the rental unit was advertised on November 8, 2012, but at the very least, would have expected the landlord to submit evidence of ongoing rental ads, internet postings and posting renewals and other efforts to secure a new tenant. Therefore, I **dismiss** this portion of the landlords' claim due to insufficient evidence, without leave to reapply.

As the landlord was partially successful in their application, I **grant** the landlord the recovery of the filing fee in the amount of **\$50.00**.

The landlord continues to hold the tenant's security deposit of \$737.50 and pet damage deposit of \$737.50, which has accrued no interest since the start of the tenancy.

Monetary Order – I find that the landlord has established a total monetary claim in the amount of **\$3,000.00** comprised of \$1,475.00 in unpaid November 2012 rent and \$1,475.00 in loss of December 2012 rent plus the \$50.00 filing fee, and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the tenant's security deposit and pet damage deposit as follows:

| | |
|--|-----------------------|
| Unpaid November 2012 rent | \$1,475.00 |
| Loss of December 2012 rent | \$1,475.00 |
| Filing fee | \$50.00 |
| Subtotal | \$3,000.00 |
| <i>(Less tenant's security deposit and pet damage deposit)</i> | <i>-(\$1,475.00)</i> |
| BALANCE OWING TO LANDLORD | \$1,525.00 |

I **grant** the landlord a monetary order pursuant to section 67 of the *Act* in the amount of **\$1,525.00**. This order must be served on the tenant and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

Conclusion

I find that the landlord has established a total monetary claim of **\$3,000.00**. I authorize the landlord to retain the tenant's security deposit of \$737.50 and pet damage deposit of \$737.50 in partial satisfaction of the claim, and I grant the landlord a monetary order under section 67 for the balance owing to the landlord in the amount of **\$1,525.00**. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

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: February 20, 2013

Residential Tenancy Branch

