



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with cross applications. The landlord applied for a Monetary Order for unpaid rent and/or utilities; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. The tenant applied for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; and return of the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the outset of the hearing the landlord stated the tenant's digital evidence included an audio recording made without her knowledge. I enquired as to whether the landlord was seeking to have the evidence excluded. The landlord stated that she merely wanted it noted that it was made without her knowledge. During the hearing, the landlord requested that I listen to certain recorded statements. As such, I have listened to the audio recording and have considered the content in making this decision.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation from the tenant for loss of rent; unpaid utilities; lawn cutting; unreturned garage remote; and, advertising costs?
2. Has the tenant established an entitlement to recover of amounts paid to the landlord for utilities and moving expenses?
3. Disposition of the security deposit.

Background and Evidence

The tenancy commenced September 1, 2012 and the tenant paid a security deposit of \$700.00. The tenant was required to pay rent of \$1,400.00 on the 1st day of every month. The tenancy was for a fixed term set to expire September 1, 2014. The tenancy ended June 30, 2013. The landlord was provided the tenant's forwarding address on July 2, 2013.

Landlord's Application

Loss of Rent

The landlord seeks compensation for loss of rent in the sum of \$2,800.00 calculated as \$200.00 per month for the remaining 14 months of the fixed term.

Upon receiving notice from the tenant that the tenant wished to end the tenancy, the landlord began advertising the rental unit for \$1,400.00 per month, plus utilities. The landlord submitted that the unit was re-rented at a reduced rent of \$1,200.00 per month (herein referred to as Tenant #2 and Tenancy #2). Tenancy #2 ended August 31, 2013 and the landlord refunded Tenant #2 \$670.00 of their \$700.00 security deposit, as evidenced by a statement written by Tenant #2. When I pointed out that a security deposit of \$700.00 corresponds to a monthly rent of at least \$1,400.00 the landlord stated that a portion of the deposit was for a pet deposit. I also noted that the landlord provided did not provide a complete tenancy agreement for Tenancy #2 and that the page providing for the payment of a security deposit and pet deposit had been omitted. I also noted that the landlord's advertisement for the rental unit indicated NS/NP the common short form for no smoking/no pets.

The landlord submitted that a subsequent tenant commenced September 1, 2013 at the reduced rent of \$1,200.00 (Tenancy #3). The landlord provided a copy of page 2 of the 6-page tenancy agreement for Tenancy #3 as evidence.

The tenant questioned the validity of the landlord's submissions with respect to the tenancy agreements entered into after her tenancy ended. The tenant submitted that she approached the tenants that had moved in after the tenant moved out and asked to see their tenancy agreement to confirm the new tenants were paying only \$1,200.00 per month. The tenant she spoke did not produce a copy of their tenancy agreement but verbally told the tenant they were paying rent of \$1,400.00 per month. The tenant also pointed out that the landlord does not permit pets.

The landlord confirmed that she was aware that the tenant had approached the new tenants to enquire about their terms of tenancy.

Lawn cutting

The landlord submitted that the lawn cutting was the responsibility of the tenant and that the tenant did not do so for six months. Instead, the landlord's husband cut the lawn during this time and the landlord is seeking compensation of \$50.00 per week, or \$1,200.00. The landlord pointed to the tenancy agreement where it indicates the landlord provided the tenant with a "lawn mower" as evidence the tenant was required to cut the lawn. The landlord acknowledged that the residential property is a house with two rental suites.

The tenant submitted that there was a verbal agreement between the parties that when the tenant's spouse was in town he would cut the grass and when her husband was out of town working the landlord's husband would cut the grass. For the period in question the tenant's husband was out of town and the landlord's husband would just show up and start cutting the grass.

Garage remote

The landlord submitted that the tenant did not return the garage remote at the end of the tenancy and the landlord purchased a new one on July 2, 2013 at a cost of \$30.00. The landlord is seeking to recover the cost of the replacement remote from the tenant.

The tenant acknowledged that the garage remote was not returned on June 30, 2013 because the landlord would not refund the security deposit that day. The garage remote was returned on July 2, 2013.

I note that in the audio recording the landlord can be heard saying that all the locks had been changed by the time the tenant's husband came to the landlord's house with the garage remote on July 2, 2013.

Advertising costs

The landlord is seeking to recover \$48.00 spent advertising for replacement tenants in the local newspaper.

The tenant did not have an objection to paying for the advertising as the tenant decided to end the fixed term tenancy early due to her husband's employment situation.

Utilities

The landlord applied for unpaid utilities of \$500.00, an estimate at the time of filing, representing 50% of utilities incurred at the residential property since May 2013. The landlord subsequently submitted the actual utility bills received. The landlord submitted that the parties had agreed that the tenant would pay 50% of hydro, gas and water bills. The tenant paid for utilities for the period of September 2012 through May 1, 2013 and then stopped paying.

The tenant was of the position that utilities were included in rent, as reflected in the written tenancy agreement. The landlord acknowledged the written tenancy agreement reflects inclusion of utilities in rent but submitted this section of the tenancy agreement was completed erroneously and did not reflect their agreement.

As the tenant is also seeking to recover the amount of utilities she paid to the landlord for the period of September 2012 through May 1, 2013 I have also recorded the parties' respective submissions regarding utilities under the section Tenant's Application, below.

Tenant's Application

Security deposit

The tenant is seeking return of the security deposit as there was no damage to the rental unit and the landlord failed to prepare move-in and move-out inspection reports. The tenant suggested that the landlord may be liable to pay double the security deposit under the provisions of the Act.

I noted that the landlord did not request compensation for damage to the rental unit but did seek compensation for other amounts, including unpaid and/or loss of rent and utilities within 15 days of receiving the tenant's forwarding address.

Moving expenses

The tenant submitted that the landlord had agreed to pay for their moving expenses since the landlord required them to vacate by June 30, 2013 as opposed to July 1, 2013. The tenants incurred moving costs of \$248.00.

The landlord acknowledged that she had agreed to pay for moving costs since she had new tenants set to move in on July 1, 2013 and the tenant had insisted that she was entitled to possession of the unit until July 1, 2013. The landlord wished to rescind the agreement since the Act required the tenants to move out on the last day of the month.

Utilities

The tenant submitted that when the tenancy formed there was “no discussion” concerning who was to pay for utilities. The landlord completed the section of the tenancy agreement that provides for what is included in rent. The landlord indicated that water, electricity and gas were included in rent; whereas, the landlord circled and left cablevision unchecked since the landlord had told her cable was not included.

The tenant explained that she paid the utility bills as requested of the landlord because the landlord did not provide a copy of the tenancy agreement to her until February 2013. Even after receiving the tenancy agreement the tenant continued to pay utilities requested by the landlord because it was a long term tenancy and the tenant was pregnant.

It was undisputed that the tenant had paid the landlord \$1,484.00 for utilities for the period of September 2012 through to May 1, 2013. The tenant requests that this amount be refunded to her.

The landlord was of the position that an error was made in checking the boxes in the tenancy agreement that indicate water, gas and electricity are included in rent and that that the parties were in agreement that the tenant was to pay 50% of these utilities. The landlord pointed to the advertisement for the rental unit posted in August 2012 in support of this position. The landlord also stated that the tenancy agreement was provided to the tenant in October 2012 and the tenant continued to pay the utilities as requested without any mention that the tenant should not be paying for utilities.

Analysis

Both parties have filed monetary claims against the other. As such, each party has a burden to prove their respective claims. The burden of proof is based on the balance of probabilities.

Awards for compensation are provided in section 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. Verification of the value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Upon consideration of everything presented to me, I provide the following findings and reasons with respect to the parties' respective claims against the other.

Landlord's Application

Loss of Rent

Where a tenant breaches their tenancy agreement and ends a fixed term early, the tenant may be held responsible for loss of rent for the remainder of the fixed term.

The landlord submitted that the landlord has and is incurring a loss of \$200.00 per month since the tenancy ended. The tenant questioned the veracity of the landlord's claim.

Upon consideration of the evidence submitted by the landlord, I find I have significant reservations about the landlord's claim that the rental unit was re-rented for only \$1,200.00 per month. I find the landlord has failed to prove her loss considering the following:

- The landlord provided only some of the pages for the tenancy agreements purportedly for Tenancy #2 and Tenancy #3 and failed to provide critical pages including the pages that provides for the amount of deposits and signatures.
- The amount of rent appearing on the one-page of the tenancy agreement provided for Tenancy #3 appears altered.
- The landlord provided evidence that Tenant #2 paid a "security deposit" of \$700.00 which is consistent with a monthly rent of \$1,400.00.
- The landlord's verbal assertion that Tenant #2 also paid a pet deposit was not supported by any documentary evidence, and was contradicted by the landlord's advertisement for the rental unit which stipulated no pets allowed.
- The landlord did not produce other documentation or records, such as bank records, to support her assertion that the unit was re-rented for only \$1,200.00 per month.

In light of the above, I find I am not satisfied that the landlord re-rented the unit for \$1,200.00 per month. As such, I deny the landlord's claim for loss of rent.

Lawn cutting

The parties provided two different versions as to what the agreement was with respect to the tenant's obligation to provide lawn cutting services. As the applicant, the landlord bears the burden to prove the tenant was responsible for all of the lawn cutting duties during the tenancy.

The tenancy agreement merely indicates that a lawn mower was provided by the landlord and I find the provision of a lawn mower just as likely supports the tenant's version of the agreement with respect to lawn cutting duties. Further, since the property included multiple units, as provided in Residential Tenancy Policy 1, landlords are typically responsible for yard maintenance in such buildings I find the landlord's version of the agreement contradictory with ordinary practice. Therefore, I find the tenant's version of the agreement concerning lawn cutting to be reasonable and more likely.

Finally, parties that are seeking compensation from another party must show that they took reasonable steps to minimize their losses. That being said, if I were to accept the landlord's version of the grass cutting agreement, the landlord apparently did not take any action to enforce the agreement since the landlord allowed this practice to continue for six months.

In light of the above, I deny the landlord's claim of \$1,200.00 for lawn cutting.

Garage remote

The Act requires that a tenant return all keys or means of access to the landlord at the end of the tenancy. This requirement is not connected in any way to the return of the security deposit by the landlord. The Act provides a remedy or tenants who do not receive a refund of their security deposit.

In light of the above, I find the tenant violated this part of the Act by not returning the garage remote until July 2, 2013. Based upon the evidence before me, I also accept that the landlord had purchased a new garage remote by the time the tenant's remote was returned. Therefore, I grant the landlord's request for the tenants to compensate her \$30.00 for the replacement remote.

Advertising costs

As the tenant breached the tenancy agreement by ending the fixed term early and the tenant was agreeable to compensating the landlord for advertising, I award the landlord \$48.00 being the actual cost, as indicated during the hearing.

Utilities

I was presented with disputed verbal testimony that the tenant was required to pay utilities in addition to rent under the agreed terms of tenancy. The tenant relied upon the tenancy agreement in support of her position rent included utilities. The landlord was of the position the section of the tenancy agreement that deals with utilities was completed in error and that the mistake went unnoticed at the time by the parties.

Where a clerical error is made in drafting a contract, the error may have the effect of changing the whole contract or a material term of the contract. Where neither party notices that an error was made and the parties did not intend for it to be present, the error is referred to as a “mutual mistake”. In a case of mutual mistake the remedy is often to reform the contract to reflect the parties’ true intentions.

Although parties are expected to read and understand the terms they are signing and agreeing to, where there is a mistake that goes unnoticed by both parties it is unjust to allow one party to benefit from the mistake at the expense of the other. Therefore, I have considered whether the tenancy agreement reflects a mutual mistake with respect to payment of utilities.

Upon careful deliberation on this issue, I find, on the balance of probabilities, that a mutual mistake was made in drafting the tenancy agreement and that the parties had truly intended and agreed that the tenant would pay utilities in addition to the monthly rent.

I base my decision upon the following factors and considerations:

- The advertisement the tenant responded to in August 2012 indicates the landlord was seeking \$1,400.00 per month “plus half of the utilities”
- The tenant hesitantly stated that there was “no discussion’ regarding utilities when the parties met to negotiate or finalize the terms of tenancy.
- The tenant paid the landlord the utilities without question or mention of any disagreement even after receiving a copy of the written tenancy agreement.

I found the tenant’s response that there was “no discussion” concerning utilities when the parties met to enter into the tenancy as especially perplexing. Where a prospective tenant is viewing a suite in a house with more than one rental unit it is extremely common for the tenant to enquire as to whether: the units are separately metered; the tenant has to put utilities in their name; whether the tenant has to pay utilities to the landlord or the other occupants of the other unit; and, the tenant’s share of utilities that

are not separately metered. Where a landlord has advertised a unit for a monthly amount of rent “plus utilities” I find that there would have to be discussion and/or negotiation in order to achieve an agreed upon term that utilities were included. As such, given the landlord’s advertisement, the only logical explanation for having “no discussion” concerning utilities is that the tenant accepted that the tenant was to pay rent “plus utilities” as advertised.

While it is not unusual for a party to let some issues of concern go unmentioned so as not to create problems, I find it unlikely that a tenant would remain silent about a material term that relates to a significant cost, such as utilities, so as to keep the peace, as alluded to by the tenant. Rather, I find the tenant’s silence to be consistent with my conclusion that the parties were in agreement that the tenant would pay for utilities at the time of forming the tenancy.

Having found the tenancy agreement contains a mutual mistake and that the parties had agreed that the tenant would pay 50% of utilities, in particular water, electricity and heat, I uphold that agreement.

The landlord is seeking and I award the landlord compensation of 50% of the following utility bills:

Water (\$383.91 less \$159.78 for sewer)	\$ 224.13
Gas (\$107.01 + \$99.95)	206.96
Hydro	<u>328.70</u>
Sub-total	\$ 759.79
	<u>x 50%</u>
Utilities owed by tenants	\$ 379.90

In summary, the landlord has been awarded compensation totalling \$457.90 for the garage remote, advertising and utilities.

Tenant’s Application

Security deposit

Although the landlord extinguished her right to retain the security deposit for damage to the rental unit due to failure to complete condition inspection reports, the landlord did not make a claim for damage. Rather, the landlord sought compensation for amounts other than damage and did so within 15 days of receiving the tenant’s forwarding address. Therefore, I find the landlord did not violate section 38 of the Act and the tenant is not entitled to doubling of the deposit.

As provided later in this decision, the security deposit shall be offset by amounts owed to the landlord and the balance remaining shall be refunded to the tenant.

Moving costs

The Act requires that a tenant must vacate the rental unit by the last day of the rental period. Since the tenant was required to pay rent on the 1st day of every month the rental period was between the first day of every month and the last day of every month. The tenant gave notice to end the tenancy in May 2013 and the landlord accepted the tenant's notice and proceeded to secure replacement tenants for July 1, 2013. The tenant did not pay any rent for July 2013. Therefore, I find the tenant was required to vacate the rental unit by June 30, 2013.

The Act provides that parties cannot agree to contract outside of the Act to avoid their obligations under the Act. Further, my authority to enforce rights and obligations is limited to the rights and obligations as provided by the Act, the Regulations or the tenancy agreement. Therefore, I decline to enforce any agreement the parties may have made with respect to the paying for the tenant's moving costs as there is no requirement for such under the Act.

Utilities

As provided previously in this decision, I have found the tenant had agreed to pay for utilities. Therefore, I dismiss her request to recover the amounts paid to the landlord during the tenancy.

Filing fees and Monetary Order

Both parties requested recovery of the filing fees they paid for their respective Applications. I decline to make any such award given the limited success of both parties in their respective Applications.

Pursuant to section 72 of the Act, I offset the amounts awarded to each party and Order the landlord to return the balance of \$242.10 to the tenant without further delay [calculated as \$700.00 security deposit less \$457.90 owed to the landlord].

Provided with the tenant's copy of this decision is a Monetary Order in the amount of \$242.10 to serve upon the landlord. The Monetary Order may be filed in Provincial Court (Small Claims) to enforce if necessary.

Conclusion

The tenants have been provided a Monetary Order in the net amount of \$242.10.

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 15, 2013

Residential Tenancy Branch

