



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: *MND, MNR, MNSD, MNDC, FF*

Introduction

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act*, for a monetary order for the cost of utilities, the cost of a mattress and cabinet that were destroyed during the tenancy and for the recovery of the filing fee. The landlord also applied to retain the security deposit in partial satisfaction of the claim. Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

These parties were involved in a prior dispute resolution proceeding which was heard by myself on August 30, 2013. The landlord made reference to the decision dated September 03, 2013 in his application and during this hearing. That hearing dealt with the landlord's claim for unpaid utilities, cleaning and repairs.

In the decision dated September 03, 2013, I awarded the landlord his claim for utilities and cleaning. The landlord's claim for other damages which included the replacement of a mattress were considered and dismissed.

Issues to be decided

Is the landlord entitled to \$1,010.00 for utilities and the cost of replacing a mattress and a cabinet or is the landlord making claims for items that were dealt with in the previous hearing? Is the landlord entitled to the recovery of the filing fee and to retain the security deposit in satisfaction of his claim?

Background and Evidence

The tenancy started in September 2010 and ended on March 30, 2013. The monthly rent was \$900.00 and the tenant paid a security deposit of \$450.00. The landlord filed a copy of the tenancy agreement. A term of the agreement required the tenant to pay the cost of utilities that were in excess of \$100.00.

The landlord stated that the tenant did not pay the excess utilities for the period of December 2010 to May 2011 and filed copies of the utility bills. The tenant stated that the bills were paid. Neither party had receipts to support their testimony.

The landlord filed a copy of a letter to the tenant dated March 19, 2013 in which he mentions the cost of unpaid utilities and requests a move out inspection. The tenant wrote on the note "*Took the HD Box since I paid for it, the rest it evens itself out*" The landlord stated that from the tenant's reply, he understood that the tenant permitted him to retain the security deposit towards the cost of utilities. The landlord stated that this was also the reason why he did not make a claim for all unpaid utilities during the last hearing.

The landlord stated that despite asking the tenant for an appointment to do a move out inspection, the tenant did not respond. The landlord stated that by this refusal to respond, he understood that the tenant's right to the return of the security deposit was extinguished and therefore he was entitled to retain the security deposit.

The landlord also wanted to revisit his claim for the cost of replacing his mattress and cabinet that he alleges was damaged by the tenant. I explained to the landlord that matters that were dealt with in the prior hearing would not be revisited.

Analysis

Upon review of the evidence filed by the landlord with regard to his claim for utilities, I find that the landlord is making a claim for utilities for the period of December 2010 to May 2011. If the tenant owed utilities at that time the landlord had the option of serving the tenant with a notice to end tenancy for unpaid utilities. The landlord did not do so and the tenancy continued for almost two years after. The landlord also had the opportunity to claim unpaid utilities during the hearing on August 30, 2013 but chose to rely on the note that the tenant wrote in response to the letter dated March 19, 2013.

In that note, the tenant does not specifically state that he gives the landlord permission to retain the security deposit and during the hearing the tenant stated that they had paid all utilities and therefore did not owe the landlord for unpaid utilities.

As explained to the parties during the hearing, the onus or burden of proof is on the party making a claim to prove the claim. When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails.

In this case, the tenant stated that utilities were all paid while the landlord argued that they were not paid. I find that the landlord is claiming utilities from the early part of the tenancy and allowed the tenancy to continue for over two years without making a claim. The landlord is also claiming utilities for the last month of the tenancy. The landlord could have made this claim when he applied for utilities in his previous application.

For all the above reasons, I dismiss the landlord's application for the cost of utilities.

Black's Law Dictionary defines *res judicata*, in part as follows:

Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

Based on the above principle of *res judicata*, I dismiss the landlord's claim for the cost to replace the mattress and the cabinet.

Section 24 of the *Residential Tenancy Act* states that the right of a tenant to the return of a security deposit is extinguished if the landlord had offered the tenant at least two opportunities and the tenant has not participated on either occasion.

The landlord must offer to a tenant a first opportunity to schedule the inspection by proposing one or more dates and times. If the tenant is not available at the time offered by the landlord, the landlord must propose a second opportunity, different for the first opportunity to the tenant by providing the tenant with a notice in the approved form.

The landlord stated that he relied on s.24 when he applied to retain the security deposit. The landlord filed a letter in which he states that he would like to make an appointment to view the suite. A date and time was not mentioned in the note. Other than this request the landlord did not file evidence of any appointments made and not attended by the tenant. Since the landlord did not propose two opportunities to do a final inspection, I find the tenant's right to the return of the security deposit is not extinguished.

Accordingly, for all the above reasons, I dismiss the landlord's claim to retain the security deposit. Since the landlord has not proven his claim, he must bear the cost of filing this application.

Residential Tenancy Policy Guideline#17 states that an arbitrator may order the return of a security deposit to a tenant on a landlord's application whether or not the tenant has applied for arbitration for its return.

Accordingly I order the landlord to return the security deposit to the tenant in the amount of \$450.00. I grant the tenant a monetary order under section 67 of the *Residential Tenancy Act*, for **\$450.00**. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

The landlord's application is dismissed. I grant the tenant a monetary order in the amount of \$450.00.

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: December 13, 2013

Residential Tenancy Branch

