



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MAINSTREET EQUITY CORP.
and [tenant name suppressed to protect privacy]

Decision

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

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for a monetary order for damages including maintenance costs and liquidated damages under the agreement.

The landlord is also claiming charges for “*concenssion owing*” (reproduced as written), due to the tenant’s failure to fulfill the fixed-term tenancy tot eh expiry date.

Although served with the Application for Dispute Resolution and Notice of Hearing in person, on February 1, 2011, the tenant did not appear.

Issue(s) to be Decided

The issue to be determined, based on the testimony and evidence, is whether or not the landlord is entitled to monetary compensation for loss of rent.

Background and Evidence

Submitted into evidence was a copy of the tenancy agreement, a copy of the move-in and move-out condition inspection reports that were not completed, a copy of the tenant’s written notice to vacate dated August 30, 2013 and a copy of a “*Rental Incentive Agreement*” signed by both parties on December 18, 2013.

The landlord testified that the tenancy began on January 1, 2013 and the current rent was \$750.00. A security deposit of \$375.00 was paid.

The evidence confirms that on August 29, 2013, the tenant gave notice to move out effective the end of September 2013.

The landlord testified that \$230.00 in maintenance charges were incurred documented on a form titled “*MOVE IN/MOVE OUT CHARGE ANALYSIS*”, that lists the areas and items in the unit that were allegedly left dirty or broken along with pre-determined charges.

The landlord testified that the tenant breached the fixed term tenancy and therefore the landlord is claiming liquidated damages of \$350.00 pursuant to a term in the tenancy agreement.

In addition to the above, the landlord is claiming \$558.00 representing \$62.00 per month for 9 months. The landlord testified that this claim was based on a "*Rental Incentive Agreement*" that was signed by both parties that granted the tenant, "*a monthly rental concession in the amount of \$62.00 for the term of the lease*". A copy of the agreement was submitted into evidence and provides that,

"Tenant must be on Auto Debit to receive the incentive".

The document also states,

"If in any case the tenant breaks the lease within the specified time, any and all lease incentives agreed upon during the lease term will be immediately due and payable to Mainstreet Equity corp."

The total amount being claimed by the landlord is \$1,138.00 plus the \$50.00 cost of the application

Analysis

In regard to an Applicant's right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant does not comply with the Act, the regulations or the tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7. The party making the monetary claim bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,

3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage, and
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

Based on the testimony and evidence of the landlord, I find that the tenant did violate the fixed-term tenancy by terminating it prior to the expiry date.

Cleaning

Section 37(2) of the Act states, upon vacating a rental unit, the tenant must leave it reasonably clean and undamaged, except for reasonable wear and tear.

Section 21 of the Residential Tenancy Regulations states that, in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

However, I find that the move-in and move out condition inspection reports that the landlord had submitted into evidence were not fully completed nor signed by the parties.

I find that the landlord has, instead, documented the cleaning and repair charges being claimed after the tenancy ended, on another document in evidence titled "*MOVE IN/MOVE OUT CHARGE ANALYSIS*". This form, apparently generated by the landlord, lists several areas and items in the unit that were allegedly left dirty or broken by the tenant along with pre-determined charges. The "*Total Maintenance Charges*" are shown as \$230.00.

I note that this document makes no mention of any claim for liquidated damages and it is not clear whether the tenant agreed on the charges for Maintenance in addition to the liquidated damages, or whether the tenant believed that this form constituted all of the landlord's monetary claims against the tenant.

In any case, I find that the "*Move In/Move Out Charge Analysis*" does not carry any significant evidentiary weight and does not function to replace the mandatory move-in and move-out condition inspection reports that must comply with the content and form required under the Act and Regulations.

Section 20(1) of the Residential Tenancy Regulations states that a condition inspection report completed under section 23 or 35 of the Act must contain the following information:

- (a) the correct legal names of the landlord, the tenant and, if applicable, the tenant's agent; (*my emphasis*)
- (b) the address of the rental unit being inspected;
- (c) the date on which the tenant is entitled to possession of the rental unit;
- (d) the address for service of the landlord; (*my emphasis*)
- (e) the date of the condition inspection;
- (f) a statement of the state of repair and general condition of each room (*my emphasis*)

This section of the Regulation goes into extensive detail as to what a valid Move in and Move Out report must specifically include and the format to be used. For this reason, I conclude that the *MOVE IN/MOVE OUT CHARGE ANALYSIS* is not a substitute for valid move in or out inspection reports because it is not compliant with the Act.

On the other hand, even if this document could be considered as a separate contract between the parties for agreed-upon costs, I find that my authority under the Act pertains to enforcing terms under a tenancy agreement, or compliance with the Residential Tenancy Act. I find that my jurisdiction does not extend to other peripheral contracts.

Therefore, in the absence of the tenant to confirm their understanding of and their full agreement with the landlord's claims for damages regarding the condition of this unit, I am not prepared to grant the landlord's claims for the costs being sought for cleaning and repairs listed on the "*MOVE IN/MOVE OUT CHARGE ANALYSIS*".

Given the above, I find that the landlord has not submitted sufficient evidence justify the monetary claims for the "maintenance" charges of \$230.00. Accordingly, I find that the landlord's claim for maintenance charges must be dismissed.

Liquidated damages

With respect to the landlord's claim for liquidated damages, I find that the tenancy agreement does provide for compensation to the landlord if the tenant terminate the contract prior to the expiry date. Section 6 of the Act states that a party can make an application for dispute resolution seeking enforcement of the

rights, obligations and prohibitions established under both the Act or the tenancy agreement.

I find that both parties signed the agreement containing the \$350.00 liquidated damages clause.

According to the Residential Tenancy Guidelines:

“Liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.” (my emphasis)

I find that the \$350.00, liquidated damage clause qualifies as a genuine pre-estimate of the potential loss in the event that the fixed term tenancy is terminated prior to the agreed-upon expiry date.

Given the above, I find that the liquidated damages cause is a valid and enforceable term of the tenancy and the landlord is entitled to compensation in the amount of \$350.00.

Return of Rental Incentive

With regard to the landlord's claim for \$558.00, “*CONCENSSION OWING*”, (Reproduced as written) this is listed in the “*Details of Dispute*” section of the landlord's application as one of the landlord's claims.

I find that the landlord is apparently requesting a refund of a rental incentive granted to the tenant in the amount of \$62.00 per month for the 9-month period of occupancy.

I find that this is based on a contract signed between the parties titled, “*RENTAL INCENTIVE AGREEMENT*” that reads in part:

“If in any case the tenant breaks the lease within the specified time, any and all lease incentives agreed upon during the lease will be immediately due and payable to Mainstreet Equity Corp.” (Reproduced as written)

I accept that the parties entered into the above ancillary agreement, regarding a funding arrangement between the parties contingent upon the tenant completing the fixed term tenancy to its expiry date..

Section 58 of the Act provides that, except as restricted under this Act, a person may make an application for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:

- (a) rights, obligations and prohibitions under this Act;
 - (b) rights and obligations under the terms of a tenancy agreement that
 - (i) are required or prohibited under this Act, or
 - (ii) relate to the tenant's use, occupation or maintenance of the rental unit, or the use of common areas or services or facilities.
- (My emphasis)

Section 6 of the Act states that the rights, obligations and prohibitions are enforceable between a landlord and tenant under a tenancy agreement and either party has the right to make an application for dispute resolution if they cannot resolve a dispute over the terms of their tenancy agreement.

With respect to a contract made between the parties, that is not actually a tenancy agreement or part of the tenancy agreement, I find my authority would not likely extend to this kind of contract. I find that my authority is limited to the enforcement of the Act and a tenancy agreement . It is not within my jurisdiction to award monetary compensation to the landlord based on a contract that falls outside the Act, even though both of the parties may have willingly chosen to enter into such contract.

However, I find that, even if I accepted this separate ancillary agreement to form a valid part of the tenancy agreement, section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if ; (a) the term is inconsistent with this Act or the regulations, (b) the term is unconscionable, or (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it. (My emphasis)

I find that Part 5 of the Regulation deals with prohibited fees, Part 6 of the Regulation deals with refundable fees charged by landlord and Part 7 of the Regulations deals with non-refundable fees charged by landlord.

I find that there is nothing in the Act that contemplates that any funds or credits would be held in trust by the tenant on behalf of the landlord. In this instance, the landlord is attempting to rescind funds already credited to the tenant under a

term in an agreement. This term that grants the landlord a right to require repayment of the funds or credits, based on the tenant not successfully meeting certain residency criteria under the tenancy.

I find that a monetary credit, once given to the tenant, is no longer under the landlord's authority to rescind under any section of the residential tenancy legislation, nor would the tenant's failure to refund the credit constitute damages under section 67 of the Act. The reason I have reached this conclusion is because there is no violation of an enforceable term under the tenancy agreement to support this claim.

Given that my authority under the Act is limited to enforcement of the Act and enforcement of compliant terms within a tenancy agreement., I decline to determine terms in other associated funding contracts made between the parties. Accordingly, the landlord's claim for \$580.00 to compensate for granting the monthly rental incentive must be dismissed.

I find that the landlord is entitled to total monetary compensation of \$375.00 comprised of liquidated damages of \$350.00 and \$25.00 reimbursement for half of the cost of this partly successful application.

I hereby order that the landlord retain the security deposit of \$375.00 in full satisfaction of the claim. The remainder of the landlord's application is hereby dismissed without leave to reapply.

Conclusion

The landlord is partly successful in the application and is ordered to keep the tenant's security deposit in full satisfaction of the claim.

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: January 23, 2014

Residential Tenancy Branch

