



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNR RR MNDC MNSD FF

Introduction:

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) A monetary order pursuant to Sections 46 and 67 for unpaid rent;
- b) An Order to retain the security deposit pursuant to Section 38; and
- c) An order to recover the filing fee pursuant to Section 72.

This hearing also dealt with an application by the tenant pursuant to the Act for orders as follows:

- d) An Order to declare the tenancy at an end and a monetary order or rent rebate as compensation for losses suffered due to frustration of the contract pursuant to section 44(1)(e) of the Act;
- e) To recover the security deposit; and
- f) To recover the filing fee for this application.

SERVICE

Both parties attended the hearing and each confirmed receipt of each other's Application for Dispute Resolution. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing.

Issue(s) to be Decided:

Has the landlord proved on the balance of probabilities that rent is owed and they are entitled to a monetary order for rental arrears, to recover the filing fee for this application and to retain the security deposit to offset the amounts owing?

Has the tenant demonstrated that the tenancy agreement was frustrated and they are entitled to recover losses suffered plus the security deposit and to recover filing fees for the application? If so, to how much have they proved entitlement?

Background and Evidence:

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. It is undisputed that the tenancy commenced in September 12, 2013, that rent is \$4400 a month for this furnished unit and a security

deposit of \$2200 was paid in August 2013 plus a furniture deposit which has already been returned. It is undisputed that the tenant did not pay May 2014. The tenant said they were in possession of the unit until May 11, 2014 and finished giving back all keys on May 17, 2014. The landlord claims \$1703 for 12 days rent in May plus the filing fee.

The tenant states the tenancy was frustrated as of April 29, 2014 when there was a flood caused by a boiler bursting over the tenant's unit and significant damage occurred. They ask for compensation as follows:

- a) a rent rebate for 2 days in April (\$292); the tenant claimed that D.N., a contractor who reported to the landlord's insurer told them they should have moved out immediately as the water in the walls and floor would smell and maybe promote mould. They sent an email stating this to the landlord on May 6, 2014. The landlord said that D.N. denied saying this and in fact, her brother is now living in the unit while it is remediated. An email from the strata manager also states the unit is habitable and the furniture will not be packed out but will have to be moved as restoration progresses.
- b) their security deposit of \$2200 to be refunded; they vacated on May 11th and provided a forwarding address in writing to the landlord on May 7, 2014. The landlord filed her application on May 26, 2014 which I find is within the 15 days allowed under section 38 to avoid the doubling provision. They gave no permission to retain any of the deposit and none has been returned.
- c) Loss of work for the male tenant \$2016 for 9 days. He states this is his primary place of business as he works from home. He said there were 7 fans and 2 dehumidifiers running in the unit so it was extremely noisy. The landlord pointed out that it was not leased as a place of business and if so, section 4 states the Act would not apply; she said the tenant should have had business insurance if this was the case. She also noted that the tenant's tax documents were from 2011 and it showed he earned \$119,000 for four months as he was on commission and he could have mitigated his damages by working elsewhere.
- d) \$662 for loss of a day's work of the female tenant as the restoration company requested one of them to be present to monitor the water flow. The landlord said one of them or their handyman would have been available to do this but the tenant never asked. She also noted this evidence should carry little weight as it is not a sworn document; there are no official documents to prove the female tenant's pay rate.
- e) \$70 for a missed training session.
- f) \$45 for stopped payment charges (3x\$15) for the rent was paid by automatic drafts and only the tenant could stop them.
- g) \$48.96 for extra power charges due to fans etc. being used by the restoration company. The landlord does not dispute this charge.

The parties disputed whether or not the unit was habitable. The landlord said she told the tenant they should move out if the unit was uninhabitable as her insurer covers rental loss in that case. The tenants said they only spent about 3 nights there in May and were staying in a friend's or relative's home. The tenant said D.H., the landlord's representative told her it was uninhabitable but the landlord denies this. The landlord points to the female tenant's email where she states the unit is inhabitable but very inconvenient and asks for a rent reduction of 50%. She pointed out that although the tenants said they were not sleeping there most nights, they were always there when she called and the furniture was not packed off site. The tenants said they could only use the bedroom, the other furniture was stacked and there were hoses into the kitchen sink. There was dust everywhere causing eye irritation and other health problems. With all the machinery and noise, they could not use the rest of the apartment.

In evidence is the Notice to End Tenancy for unpaid rent, many emails between the parties and third parties, a recording of a conversation between the female tenant and the landlord's representative and another with D.H.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis

The onus is on the applicant to prove on a balance of probabilities their claim. I find the landlord has proved that the tenant did not pay rent for May 2014 and they occupied the unit until May 11, 2014. Although the tenant contended they stayed only a few nights, I find this unlikely as the restoration company was not able to access the unit on May 5, 2014 per an email from the company to the landlord stating the tenants had asked the company to pre-plan their visits so 'that it won't disrupt them'. On May 6, 2014, the landlord said if the unit was uninhabitable, they recommended the tenants should leave and they understood if the tenants wanted to terminate the tenancy, if it would take several months to return the unit to a state of inhabitable. They promised to return the security deposits promptly if the tenants chose to terminate the lease. Section 34 of the Residential Tenancy Policy Guidelines states that a contract is frustrated if without fault of either party, a contract becomes incapable of being performed as originally intended. The Guidelines uses an example of a flood. I find this tenancy contract was frustrated as the tenancy was intended to be for a large well furnished unit at a rent of \$4400 a month and the flood reduced the living area to one bedroom, no usable space or furniture in the living area and a kitchen filled with restoration equipment. I find the lease was terminated on May 11, 2014 when the tenants chose to terminate it by vacating and the tenants are liable for reduced rent only to May 11, 2014, as explained below.

Although there were arguments as to whether or not the unit was habitable, I find people's definitions vary as to what is habitable. However, I find the weight of the evidence is that even if not uninhabitable, it was very uncomfortable in the unit as there was noisy equipment and hoses, it was extremely hot, they could not open windows during the drying and elevators did not work properly as the water affected them too. Furthermore, they rented a furnished apartment for \$4400 a month and could not use the furniture as it had to be piled up and the only place they could sit was the bedroom. In this case, I find from the weight of the evidence that the discomfort caused by the living space limited to one bedroom, the lack of usable furniture, inability to use the kitchen due to the hoses, the heat and noise from the machines and the inability to open windows in April and May would be sufficient to cause many persons to find they could not live there. I find the tenancy was significantly devalued by these circumstances. The tenants did not get what they bargained for. Taking into account that the rent was for a large furnished unit (over 1000 sq. ft.), I find it reasonable that the tenancy for the month of May was significantly devalued. In the emails, I find the landlord repeatedly said the tenants could terminate the lease if they could not live there. The tenants' evidence that they could not live there is well supported by the description of the conditions. Based on the weight of the evidence, I find the landlord entitled to recover partial rent for May. The tenants would have paid \$141.93 for each day of May (\$4400/31) if conditions were normal and they got what they bargained for. However, I find the living conditions significantly devalued the tenancy so I find the landlord entitled to recover only 50% of the rent for the 11 days or \$780.64 for May.

I find the flood occurred on April 29, 2014 and the unit became excessively uncomfortable from that date. The tenants paid rent of \$146.66 per day in April 2014. I find them entitled to a rent refund of 50% of the two days in April or \$146.66.

In respect to the tenants' claims for loss of pay or work, I find insufficient evidence to support their claims. I find the male tenant did not rent the unit as a work place and the landlord should not be liable for his loss of income; I also find insufficient data to support his claim. I also find insufficient evidence to support the female tenant's claim for loss of pay for one day of work. Her supervisor's statement is not a sworn statement and no objective evidence was provided to support her calculations. I also find she did not contact the landlord or have the restoration company contact the landlord to make alternate arrangements for monitoring of the water; I find the landlord's statement credible that they could have arranged for D.H. or another representative in town to attend the unit. I also find the landlord not liable to reimburse the tenant for a missed training class as I find insufficient evidence to support this claim. I dismiss this portion of the tenants' claims.

The landlord agrees that the tenant should be reimbursed for the extra utility cost which they calculated was caused by the use of the restoration company machines. I find the tenant entitled to recover \$48.96 for this extra cost. In respect to the stopped payment charges, I find the landlord not liable for the stop payment charge for May. The tenant owed rent for May and it should not have been stopped; they paid their rent by automatic draft and the landlord advised them that the bank told her that only the tenant could stop the payments. They had to stop payment on two further drafts so I find them entitled to recover \$30 for the two payments they stopped after terminating the lease.

I find the tenant entitled to recover their security deposit in accordance with section 38 of the Act. It has not been returned and they gave no permission to retain it. Since the landlord filed their application in time, the doubling provision does not apply. The tenant's security deposit will be used to offset the amount owing to the landlord and the balance be returned through a monetary order in their favour.

Conclusion:

I find the landlord entitled to a monetary amount as calculated below and to recover the filing fee for their application.

I find the tenant entitled to a monetary order as calculated below and to recover their filing fee also.

Calculation of Monetary Award:

Tenants' security deposit (no interest 2012-14)	2200.00
Refund portion of April rent	146.66
Recover utility cost	48.96
Recover bank charges	30.00
Filing fee to tenant	50.00
Less May rent owed to landlord	-780.64
Less filing fee to landlord	-50.00
Total Monetary Order to Tenant	1644.98

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: September 09, 2014

Residential Tenancy Branch

