



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, O, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* ("the *Act*"). The landlord applied under the *Act* for:

- a monetary order for unpaid rent pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- an 'other' remedy under the *Act*; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenants applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both tenants and the landlord attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions.

Tenant BM testified that he served the landlord with the tenants' Application for Dispute Resolution package by registered mail on August 26, 2014. The landlord confirmed receipt of this package. The landlord testified that she served the tenants with copies of her Application for Dispute Resolution package by registered mail on January 6, 2015. Both tenants confirmed receipt of this package. I accept that the landlord was duly served with the tenants' dispute resolution package and associated evidence and that the tenants were both duly served with the landlord's dispute resolution package and associated evidence.

Issues to be Decided

Is the landlord entitled to a monetary award for unpaid rent and for damage or loss arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenants' security deposit

towards any monetary award? Is the landlord entitled to recover the filing fee for this application from the tenants?

Are the tenants entitled to a monetary award for the return of a portion of their security deposits? Are the tenants entitled to a monetary award for damage or loss arising out of this tenancy? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

Both parties testified that this tenancy began on May 1, 2014. The fixed term tenancy was scheduled to continue on a month to month basis after April 30, 2015. The rental amount was set at \$950.00 payable on the first of each month. The landlord testified that she continues to hold the \$475.00 security deposit paid by the tenants on April 4, 2014. The tenants no longer reside in the rental unit.

The landlord testified that the tenants physically moved in to the rental unit on May 2, 2014. She testified that, on the first day that they were in the unit, Tenant BM called to complain about an overwhelming smell of cat urine. She testified that, on contacting the previous tenant who owned a cat during her tenancy, she discovered that the previous tenant had not cleaned the carpets before vacating the rental unit. She testified that, without attending to the residence, she agreed to provide the tenants with compensation for carpet cleaning.

Tenant BM testified that the smell of urine in the rental unit was overwhelming. He also testified that he discovered several dried cat feces on the bedroom carpet. He testified that, since they were satisfied with the location of their new rental and because they wanted to make things work, they made several attempts to clean and get rid of the cat waste smell.

Tenant BM testified that he rented a carpet cleaner. He testified that when he was finished cleaning the rental unit and the smell of the cleaner wore off, the smell of cat urine was stronger than before. Tenant BM testified that, after several conversations with the landlord and several attempts to get rid of the smell, the tenants decided to vacate the rental unit. On May 11, 2014, the tenants provided written notice to the landlord that they intended to vacate the rental unit. Tenant BM testified that the month of May had been paid in full and so they continued to store their personal items at the rental unit but could not stay there.

The landlord testified that she agreed to accept short notice from the tenants if they moved some of their boxes for the rental unit to be shown to prospective tenants. She testified that she believes it was the tenants' sensitivities and not an objective problem regarding the urine smell. She testified that she was able to re-rent quickly and easily once the tenants' possessions were out of the rental unit. These possessions, mainly in boxes, were not removed until the end of May 2014.

The tenants sought \$1,475.00 in compensation reflecting:

- a refund of the one month of rent paid, \$950.00;

- an order for the return of the tenants' security deposit in the amount of \$475.00; and
- recovery of their \$50.00 filing fee with respect to this application.

Initially, the tenants also sought \$61.01 in pet cleaning fees however Tenant BM testified that the landlord had compensated the tenants for those costs.

The landlord sought \$475.00 in compensation to reflect the fact that the tenants' lack of notice resulted in a rental loss to the landlord. She testified that there were too many boxes and possessions belonging to the tenants within the rental unit to show the unit to prospective tenants before the end of their tenancy. She did not testify as to whether she had posted ads or made other types of efforts to garner interest in the rental unit and diminish her losses in this regard.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 45 of the *Act* provides that a tenant may end a month to month tenancy by giving a landlord written notice in the proper form that is effective;

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

Section 45(3) allows that, "if a landlord has failed to comply with a material term of the tenancy agreement or, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice". As a result of the unbearable smell in the rental unit, the tenants chose not to stay. They did not, according to the requirements of section 45, provide sufficient notice or sufficient opportunity for the landlord to correct the situation before they vacated the rental unit.

I note, however, that the tenants paid rent for the entire month of May. There is no reason that the tenants could not keep their belongings as they liked within the rental unit during this period of time. The landlord would have access to the rental unit on the first of the month, not unlike any other end to tenancy. If the tenants had provided notice on the first day of their tenancy, paid rent and stored their belongings, the landlord would have faced the same obstacles she

described. For these reasons, I do not find that the landlord has a rental loss in May as a result of this tenancy and therefore is not entitled to compensation under this heading.

With respect to the tenants' security deposit, section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*).

With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, the evidence is that the tenant provided a forwarding address in writing with their notice on May 11, 2014 and vacated the rental unit at the end of May 2014. Therefore, the landlord had 15 days after May 31, 2014 to take one of the actions outlined above. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant." As there is no evidence that the tenants have given the landlord written authorization at the end of this tenancy to retain any portion of the security deposit, section 38(4)(a) of the *Act* does not apply to the tenants' security deposit.

The landlord seeks to retain the tenants' security deposit in partial satisfaction of the landlord's claim for loss of rent based on the failure of the tenants to provide 30 days' notice as required by the *Act*. Over the course of more than seven months, the landlord did not take steps to retain the tenants' security deposit for the loss she alleges. The tenants applied in August 2014 for return of their security deposit and the landlord did not take action at that point, either. I therefore find that the landlord has extinguished her right to retain any portion of the tenants' security deposit. The landlord is not entitled to retain the tenants' \$475.00 security deposit.

Rent is not subject to refund in a circumstance where a tenant did reside and store their belongings in the rental unit. While the tenants described unsatisfactory circumstances within the rental unit that resulted in their immediately vacating the rental unit, they made use of the rental unit over the course of May 2014. The tenants had paid rent for the month of May and were justified in keeping their belongings in the unit if they chose to do so. Given that they made the choice to continue to possess the rental unit for the remainder of May, they are not entitled to a return of their rent for that month.

Given the finding that the landlord is not entitled to retain the tenants' security deposit, that the landlord failed to mitigate any loss that she may have incurred and all of the circumstances surrounding this tenancy, I find the tenants are entitled to the return of double the value of their \$475.00 security deposit, totalling \$950.00.

The tenants sought to recover the cost of mailing their application. The only recoverable cost related to the dispute resolution hearing process is the filing fee for the application. As the tenants were partly successful in their application, I find the tenants are entitled to recover their filing fee.

Conclusion

The tenants are entitled to a monetary order in the amount of \$1,000.00 against the landlord. The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: April 1, 2015

Residential Tenancy Branch