



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This proceeding dealt with cross monetary applications. The landlord applied for a Monetary Order for unpaid and/or loss of rent and authorization to retain the security deposit. The tenant applied for a Monetary Order for return of double the security deposit and compensation for other damages or loss under the Act, regulations or tenancy agreement.

Both parties appeared or were represented during the hearing and both parties 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.

The hearing was held over three dates with the last hearing being held face-to-face. The tenant in attendance at the hearing (referred to by initials HW) confirmed that she was also representing the other co-tenant, her son, (referred to by initials MW) because he has challenges controlling his behaviour. Interim decisions were issued after the first and second hearing dates and should be read in conjunction with this decision.

At the in person hearing the landlord brought three copies of the landlord's evidence package. The tenant and I reviewed each page of the packages and we confirmed that we were provided identical packages. Since there had been disagreement during the earlier hearing dates as to what had or had not been served the tenant was agreeable to using the landlord's evidence package brought to the in person hearing and I informed the parties that I will exclude the evidence provided by the landlord prior to the in person hearing.

The landlord also brought an "original" tenancy agreement for review by me and the tenant. The "original" tenancy agreement had been copied and included in the evidence packages but I determined it necessary and appropriate to review and inspect the "original" document during the in person hearing. The "original" document was also

given to the tenant during the in-person hearing for her review and inspection. It was then returned to the landlord.

In light of the above, in making this decision I have considered the evidence package delivered by the landlord during the in-person hearing; the “original” tenancy agreement presented and reviewed during the in-person hearing; the tenant’s documentary evidence and an image appearing on the tenant’s cell phone that was presented during the in-person hearing; and the oral submissions of both parties.

Issue(s) to be Decided

1. Is the landlord entitled to recover unpaid and/or loss of rent from the tenants as claimed?
2. Are the tenants entitled to return of double the security deposit?
3. Have the tenants established an entitlement to receive other damages or loss from the landlord, as claimed?

Background and Evidence

The landlord and three co-tenants executed a written tenancy agreement for a tenancy set to commence March 1, 2012 for a one year fixed term set to expire August 31, 2013. The tenancy agreement provides that at the end of the fixed term the tenancy would end and the tenants would have to vacate the rental unit. The monthly rent was set at \$1,500.00 payable on the first day of every month. The landlord collected a security deposit of \$750.00. A move-in inspection report was prepared and signed by the landlord and HW.

Two of the co-tenants remained in possession of the rental unit until May 31, 2015. A move-out inspection report was prepared and signed by the landlord and HW on May 31, 2015 and June 2, 2015.

Landlord’s application

The landlord is seeking to recover unpaid and/or loss of rent for the months of June 2015; July 2015 and August 2015 on the basis the parties had a fixed term tenancy in place with an expiry date of August 31, 2015 and the rental unit was not re-rented until September 1, 2015. The tenant was of the position that the parties did not have a fixed term tenancy set to expire August 31, 2015.

The landlord submitted that in the months leading up to August 2013 the landlord approached the tenants about renewing the tenancy agreement. The landlord testified that two of the tenants were agreeable to extending the tenancy whereas the third co-tenant had already moved out. The landlord attended the rental unit, bringing the original tenancy agreement with him. The landlord changed the expiry date of the fixed term to read August 31, 2014 and the date next to the parties' signatures and the parties initialled the changes. The name of the co-tenant who had already moved out was stricken on the signature page of the tenancy agreement.

The landlord submitted that in the in the months leading up to August 2014 the landlord approached the tenants about renewing the tenancy agreement again. The tenants were agreeable and the landlord attended the rental unit with the "original" tenancy agreement with him. The expiry date of the fixed term was changed to read August 31, 2015 and the date next to the parties' signatures was changed and the parties initialled the changes.

It was undisputed that the landlord and HW had a disagreement in May 2015 and the landlord sent the text message that he would not be renewing the lease. Shortly thereafter the landlord suspected the tenant had found another place to live and when he asked HW if she was moving she confirmed that to be the case. HW signed a notice to end tenancy on May 19, 2015 indicating tenants would be moving out May 31, 2015.

At first the tenant testified that she did not initial the changes made to the tenancy agreement. Then she changed her testimony to say she initialled the tenancy agreement when the fixed term tenancy agreement changed to August 31, 2014 but that she did not initial the subsequent amendments. The tenant included a copy of the tenancy agreement in her evidence package. It appears to show that the parties changed the expiry date to August 31, 2014 and the initials of the landlord and HW appear next to the changed date and next to the date appearing next to their signatures on the signature page.

The landlord produced the "original" tenancy agreement during the in-person in an effort to prove his version of events. The document was reviewed by me and the tenant. It is apparent that the expiry date of August 31, 2013 was overwritten to read August 31, 2014 and then that date was overwritten again to read August 31, 2015. The initials of the landlord and HW appear twice next to the changed expiry date whereas the initials of co-tenant MW appear only once. On the signature page, the dates appearing next to the signatures was changed twice and the initials of the landlord and HW appear twice; however, the initials of MW are not present.

Upon review of the “original” tenancy agreement the tenant submitted that she did not recall initialling the changes in 2014. She also submitted that the amendments were not valid because the third co-tenant did not agree or initial the amendments. The tenant did acknowledge that the third co-tenant had moved out of the rental unit.

The tenant also submitted that she did not get a copy of the amended agreement until the landlord filed his Application. The landlord was of the position that he always gave the tenant copies of the amended tenancy agreement and that he provided another copy as evidence for his Application.

Both parties referred to a text message that was exchanged between the parties in May 2015 where the landlord informs the tenant that he will not be renewing the lease. The landlord was of the position that this text also demonstrates that the parties had a fixed term tenancy. In the details of dispute on the tenant’s application, HW submits that [the landlord] texted me saying that he would be showing [address of rental unit] in June so we moved out.” She also states: “[the landlord] has changed lease date year gave me only photo copies I only have 2014.”

The landlord also submitted a document that was signed by the landlord and HW on May 31, 2015. The documents provides, in part: “[name of HW] will be responsible for 1,500.00 dollars for June 1, 2015 rent without proper notice, but for the additional 2 months of rent if the landlord [name of landlord] rents the place earlier [name of HW] will not be on the hook for July and August rent on the condition that the place rents for those months.” The tenant claimed she signed this document because she wanted to avoid a dispute with the landlord and because she believed the landlord knew the law.

The tenant was also of the position that she is not responsible for paying the landlord rent for June through August 2015 because the landlord was making repairs to the property in June 2015 and because the unit was re-rented in the months of July and August 2015. The landlord acknowledged that repairs were made to the property in June 2015 but denied the unit was re-rented in July and August 2015. The landlord produced a tenancy agreement showing a new tenancy started September 1, 2015. The tenant claimed that in July 2015 she was on-line and saw the advertisement for the rental unit and the status indicated that the unit was rented. The landlord responded by stating that he had a friend post the advertisements online and he could not explain why the status would show as being rented in July 2015 since it was not. The tenant also claimed that she saw people sitting on the front steps of the rental unit in August 2015. The landlord doubted that she saw that since it was not rented and if there were people on the steps they were not tenants.

Tenant's application

In filing the tenant's application the tenants did not provide a detailed calculation as to how the claim of \$2,870.00 was determined. During the hearing the tenant submitted that this is the sum of double the security deposit, or \$1,500.00, and the balance of the claim is for labour she performed on other properties owned by the landlord and rent the landlord kept from a boarder she had in the rental unit. The landlord indicated he was prepared to respond to all of these claims even though the tenant had not provided a detailed calculation.

As for return of double security deposit, the tenant submitted that she was informed by staff with the Residential Tenancy Branch that she may make such a request. The landlord submitted that the tenant authorized the landlord, in writing, to retain the security deposit as seen on the move-out inspection report. The move-out inspection report was signed by the landlord and HW on May 31, 2015 and June 2, 2015 and includes the following statement: "[name of tenants] have agreed to not received the damage deposit due to the damages that has occurred in the suite." The landlord was of the position that damage to the rental unit exceeded the amount of the security deposit but that he limited his request for compensation to the amount of the security deposit and he absorbed the losses in excess of the security deposit. The tenant disagreed that the tenants were responsible for as much damage as asserted by the landlord. Since I did not have a damage claim before me, I limited the parties' testimony and focused on whether the tenant had authorized the landlord to retain the security deposit.

The tenant also applied for compensation for helping the landlord renovate his other properties. The tenant acknowledged that she volunteered to do this work and that there was no agreement for her to be paid but then she decided she should be paid since other labourers were paid for their work. The tenant withdrew this portion of her claim before the landlord was requested to provide a response. Accordingly, I have not considered this request for compensation further.

Finally, the tenant submitted that the landlord found a person to rent the third bedroom in the rental unit for part of October 2014. The tenant submitted evidence that this person paid rent of \$370.00 for his stay in October 2014. The tenant claimed that the landlord only gave her \$150.00 of the rent he collected. The tenant was of the position she was entitled to receive the remainder of \$220.00 from the landlord. The landlord submitted that the parties agreed that the landlord would help the tenant find a suitable person to rent the third bedroom since the tenants were having financial difficulty and they agreed that they would split the rent collected. The landlord did not dispute that

\$370.00 was paid to him by the person renting the third bedroom but he maintained he gave one-half of it to the tenant at the time.

After hearing the landlord's submissions the tenant acknowledged that the parties had agreed to split the rent received from this person renting the third bedroom and in that case, she reduced her claim to the difference between \$185.00 and the \$150.00 she received. The landlord maintained that the parties were in agreement with the distribution of the money at the time. It was undisputed that the landlord gave the tenant cash and neither party documented the transfer of cash in writing.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. 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. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Landlord's application

The landlord is seeking \$4,500.00 due to the tenants' breach of a fixed term tenancy. The tenant was in dispute as to whether the parties had a fixed term tenancy. Accordingly, I find this to be the first issue to determine.

Upon consideration of all of the evidence before me, I find the landlord has met his burden to prove that HW breached a fixed term tenancy agreement. I make this finding based upon the following considerations:

1. The landlord produced the "original" tenancy agreement and upon thorough inspection of that document I am satisfied that the expiry date of the fixed term was changed to read August 31, 2015 and the change was pursuant to an agreement between HW and the landlord as evidence by their initials appearing beside the fixed term expiry date and the dates beside their signatures on the signature page of the tenancy agreement.

2. HW and the landlord signed a document dated May 31, 2015 whereby it is acknowledged that HW will be responsible for paying rent for June 2015 as well as for July 2015 and August 2015 if the rental unit was not re-rented. I see no reason for a tenant to acknowledge such a responsibility if the parties had a month to month tenancy and I find that in doing so she acknowledged the existence of a fixed term tenancy set to expire August 31, 2015.
3. The tenant's documentary evidence included a text message sent by the landlord and the text message indicates the landlord will not be "renewing lease" which I find to be consistent with the existence of a fixed term tenancy as opposed to a month to month tenancy that continues indefinitely without need for renewal.

In light of the above, I am satisfied that HW and the landlord had a fixed term tenancy agreement with an expiry date of August 31, 2015. However, I find there is much less evidence to support that such an agreement was reached with MW. The initials of MW only appear one time next to the expiry date of the fixed term, yet the expiry date was changed twice. Also, the initials of MW do not appear beside the dates on the signature page as do the initials of HW and the landlord. Further, MW did not sign the letter dated May 31, 2015 as did HW. Therefore, I hold HW bound by a fixed term tenancy agreement but I dismiss the landlord's claims against MW.

Having found HW bound by a fixed term tenancy agreement I proceed to consider whether the landlord suffered a loss of \$4,500.00 as claimed due to the tenant's breach of the fixed term tenancy and whether the landlord made reasonable efforts to mitigate losses.

I was provided evidence from both parties, that the landlord was advertising the rental unit for rent starting July 1, 2015. The landlord has an obligation to take reasonable steps to mitigate losses. This burden does not mean the landlord must do everything humanly possible. While advertising could have started earlier, I accept that the landlord repaired and updated the rental unit during the month of June 2015 since the unit was in need of such and the tenant had already agreed in writing that she would pay rent for June 2015 and in these circumstances I find the landlord acted within reason by starting advertising efforts on July 1, 2015.

The tenant alleged that the rental unit was tenanted for the months of July and August 2015. This position was disputed by the landlord and the landlord's documentary evidence shows that new tenants started their tenancy on September 1, 2015. The tenant produced an image of the advertisement indicated it was rented in July 2015; however, the landlord's documentary evidence included a copy of the advertisement posted in August 2015 and the status indicates that the unit was "not rented". I found

the tenant's disputed position, in the absence of other corroborating evidence, such as photographs or a witness, as to seeing tenants apparently occupying the rental unit in July and August 2015, to be insufficient. Further, I found the tenant's testimony subject to change frequently; whereas, the landlord provided consistent testimony during the hearing. Considering all of these factors, I find that prefer the landlord's submissions that the rental unit was not tenanted in July and August 2015 over the tenant's assertion that it was.

In light of the above, I find the landlord is entitled to recover unpaid and/or loss of rent for the months of June 2015, July 2015 and August 2015 in the sum of \$4,500.00 from HW. I further award the landlord recovery of the \$50.00 filing fee paid by the landlord. Therefore, I provide the landlord with a Monetary Order against HW in the sum of \$4,550.00 to serve and enforce.

As to the landlord's request to retain the security deposit, for reasons provided below, I find the landlord has already been authorized to retain the security deposit in writing by the tenant due to the condition of the rental unit at the end of the tenancy and it unnecessary for me to further authorize the landlord to retain the security deposit. Accordingly, the award for unpaid and/or loss of rent is not reduced by the amount of the security deposit.

Tenant's application

Sections 38(1) and (6) of the Act provides that a tenant may seek return of double the security deposit where a landlord fails to return or make a claim against the security deposit within the time limit for doing so. However, under section 38(4) of the Act, a landlord may retain all or part of a security deposit if the tenant authorizes the landlord to make deductions from the security deposit in writing.

Upon review of the condition inspection report signed by the parties on May 31, 2015 and June 2, 2015 I am satisfied that the tenant authorized the landlord to retain the security deposit in writing due to the condition of the rental unit at the end of the tenancy. Although the amount of \$750.00 is not specified, I find the wording sufficiently clear that the entire security deposit was signed over to the landlord by the tenant. Accordingly, in signing over the security deposit to the landlord I find the tenant no longer has any claim for return of the security deposit and the tenant is not at liberty to make such a claim because she has changed her mind. Therefore, I deny the tenant's request for return of double the security deposit.

As for the tenant's request that the landlord be required to pay the tenant a further \$35.00 for rent received from the person who rented the third bedroom, I make no such award. I found both parties provided an equally probable version of events as to what transpired in October 2014. Since the tenant has the burden to prove an entitlement to the amount claimed, I found the equally probable version of events, coupled with the tenant's frequently changing position during much of the proceeding left me unsatisfied that she has met her burden of proof. Therefore, I dismiss this portion of the tenant's claim against the landlord.

For all of the reasons provided above, I dismiss all of the tenant's claims against the landlord.

Conclusion

The landlord has been provided a Monetary Order in the sum of \$4,550.00 against the tenant HW and the claims against MW are dismissed.

The tenants' monetary claims against the landlord have been dismissed.

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: March 22, 2016

Residential Tenancy Branch