



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding JUST VIRANI CONSULTING INC.
and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* for a monetary order for unpaid rent, loss of income, cost of repairs, late fees, liquidated damages and for the recovery of the filing fee. The landlord also applied to retain the security deposit.

The landlord testified that on February 29, 2016, he served the tenant with the notice of hearing in person, at the rental unit in the presence of a witness. The tenant signed in acknowledgment of having received the hearing package. The landlord filed a proof of service form duly filled out and signed by the tenant and the landlord's witness.

Despite having been served the notice of hearing, the tenant did not attend the hearing. The landlord attended the hearing and was given full opportunity to present evidence and make submissions.

Issues to be decided

Is the landlord entitled to a monetary order for unpaid rent, loss of income cost of repairs, late fees, liquidated damages and for the recovery of the filing fee?

Background and Evidence

The landlord testified that the tenancy started on July 01, 2015 for a fixed term of one year. The rental unit is located on the upper level of the landlord's home. The landlord lives downstairs.

The tenancy agreement filed into evidence is titled "*House sharing application & Agreement*" and does not state the end date of the term. This agreement (HSA) also does not indicate the options available to the tenant, at the end of tenancy. It is not clear whether the tenant would have to move out or enter into another fixed term tenancy or the tenancy would continue on a month to month basis.

The HSA also states that the tenancy does not fall under the Residential Tenancy Act. A term of the HSA states “*For every cheque/charge returned by the financial institution, we will pay \$50.00*”. At the end of the typewritten agreement is a term added on in handwriting “*Applicant will install new carpets (or hardwood flooring) in the two rooms with green carpets at her cost*”. This added on term is not initialled by either party.

The monthly rent was \$1,900.00 payable on the first of each month. Prior to moving in, the tenant paid a security deposit of \$950.00. The landlord stated that on March 02, 2016, he found that the tenant had moved out and had abandoned unit. The landlord stated that the unit was left in a damaged condition.

The landlord is claiming the following:

| | | |
|-----|---|----------------------|
| 1. | Filing fee for prior application | \$100.00 |
| 2. | Filing fee for this application | \$100.00 |
| 3. | Late payment – two months | \$50.00 |
| 4. | Administration fee – two months | \$50.00 |
| 5. | NSF cost – two months | \$90.00 |
| 6. | Liquidated damages (rent for four months) | \$7,600.00 |
| 7. | Repairs | \$1,902.88 |
| 8. | Repairs | \$1,061.20 |
| 9. | Supreme court filing fee | \$80.00 |
| 10. | Photocopying | \$4.50 |
| 11. | Bathroom fan | \$34.52 |
| 12. | Bathroom fan | \$29.10 |
| 13. | Three locksets | \$160.65 |
| 14. | Cheque to client | \$828.13 |
| | Total | \$12,090.98\$ |

The landlord has filed photographs and copies of invoices to support his monetary claim.

Analysis

The “House Sharing Agreement”(HSA) filed into evidence by the landlord contains a clause that states that the tenancy does not fall under the *Residential Tenancy Act*. In this case I find that this portion of the HSA is not enforceable as section 5 of the *Residential Tenancy Act*, prevents people from contracting outside of the *Act*.

Based on the sworn testimony of the landlord and in the absence of evidence to the contrary, I find as follows:

1. Filing fee for prior application - \$100.00
2. Filing fee for this application - \$100.00

Legislation does not permit me to award an applicant the filing fee for an application by direct request process. Accordingly the landlord's claim for the return of the filing fee for a prior application is dismissed. The landlord's application has merit and therefore I award the landlord \$100.00 towards the recovery of the filing fee paid for this application.

3. Late payment - two months - \$50.00
4. Administration fee – two months - \$50.00
5. NSF charges for two months - \$90.00

Section 7(1)(d) of the Residential Tenancy Regulations states that the landlord may charge an administration fee of not more than \$25.00 for the return of a tenancy's cheque by a financial institution or for late payment of rent.

Section 7(1)(c) of the Residential Tenancy Regulation states that a landlord may charge a service fee charged by a financial institution to the landlord for the return of a tenant's cheque.

Section 7(2) states that a landlord must not charge the fee unless the tenancy agreement provides for that fee.

The landlord filed a copy of the tenancy agreement (HSA) into evidence which contains a clause requiring the tenant to pay \$50.00 for cheques returned by a financial institution. Since section 7(!)(d) as stated above allows for a fee of not more than \$25.00 for the return of cheques from a financial institution, I award the landlord his claim of \$50.00 for two cheques returned by a financial institution.

The landlord has provided proof of having incurred a cost of \$90.00 from a financial institution for two returned cheques. Based on section 7(1)(c), I also award the landlord his claim for NSF charges of \$90.00

The agreement does not mention charges for a late payment of rent. Pursuant to section 7(2) I dismiss the landlord's claim for late fees of \$50.00.

Based on the above, I award the landlord his claim for items # 4 and 5 and dismiss his claim for item #3.

6. Liquidated damages(rent for four months) - \$7,600

The tenancy agreement (HSA) filed into evidence has a term #15 regarding liquidated damages which states the following:

“All amounts due under this agreement shall become due and payable for the full term, as liquidated damages – not as a penalty, forthwith upon breach of any provision, covenant, term or rule, without obligation for mitigation.”

Section 4 of the *Residential Tenancy Policy Guideline* deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

A 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.

In this case, I find that the tenancy agreement or the house sharing agreement as the landlord has named this agreement does not provide a genuine pre-estimate of what it would cost the landlord to re-rent the unit, in the event that the tenant breached a term of the tenancy agreement by moving out prior to the end date of the fixed term.

In addition, the landlord is now claiming a total amount of \$7,500.00 which is equal to four months' rent. I find this sum of \$7,500.00 to be extravagant when compared to what it would cost the landlord to re rent the unit.

Clauses of this nature can also be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. I find the amount of the clause to be invalid and I therefore interpret the liquidated damages provision to be a penalty and unenforceable. Accordingly, the landlord's claim for \$7,500.00 is dismissed.

The landlord has been awarded rent for February 2016 and loss of income for March 2016 at a prior hearing. The landlord is at liberty to file a claim for loss of income for the months following March 2016, if he was unable to re-rent the unit.

7. Repairs - \$1,902.88

The landlord has filed an invoice for a list of repairs which include repair of grass patches at the entrance, replace carpet, replace vinyl siding in the carport, repair toilet bowl and fix broken water pipe. The landlord filed photographs to support his claim.

The landlord stated that the tenant ran a car repair shop out of the carport and parked cars on the grass in the front of the house. The photographs filed into evidence show multiple vehicles in the car port and on the grass and damaged vinyl siding. I find that the landlord is entitled to the cost of replacing grass and repairing the vinyl siding.

The landlord stated that the carpet was about 10 years old and the tenant had agreed to replace it at her own cost but failed to do so. The landlord referred to the hand written term in the agreement that was not initialed by both parties, and states that the tenant will install new carpets or hardwood flooring at her own cost. In the absence of initials by the tenant beside this handwritten clause, I find that the tenant is not responsible for the cost of replacing carpet at the start of tenancy.

Section 40 of the *Residential Tenancy Policy Guideline* addresses the useful life of an item. I will use this guideline to assess the remainder of the useful life of the carpet. As per this policy, the useful life carpet is ten years. The landlord agreed that the carpet was about 10 years old and therefore by the end of the tenancy, the carpet had outlived its useful life and would be required to be replaced at the landlord's cost. Accordingly, the landlord's claim for the cost of replacing the carpet is dismissed.

Even if I accept the term in the agreement, which I do not, the landlord would have had to replace the 10 year old carpet at his own cost, based on section 40 of the *Residential Tenancy Policy Guideline*

The invoice also covers the cost of fixing a toilet bowl and a water pipe. I find that the landlord must bear the cost of maintaining the rental unit, unless the damage was deliberate on the part of the tenant.

Based on my findings I award the landlord a total of \$336.00 towards repairing the grass and the vinyl siding plus the applicable taxes.

8. Repairs - \$1,061.20

The landlord has filed an invoice which includes the repair of a gas heater, repair blinds, replace window screens , install fans in bathrooms, clean carpets, replace a broken tap, remove items from the deck and replace locks.

Claims for the cost of repair of a gas heater, installation of fans and replace a broken tap are the cost of maintenance of a rental property and therefore the landlord must bear these costs.

The landlord was unable to provide information on the age of the blinds and therefore I am unable to determine the amount of useful life left at the end of tenancy. Accordingly, I dismiss this portion of the landlord's claim.

As stated above the carpets are at least 10 years old and therefore the landlord would be required to replace them at his own cost. Therefore I dismiss the landlord's claim for the cost of cleaning the carpets. The landlord has provided photographs of items left behind by the tenant. I award the landlord his claim of \$160.00 for the removal of these items. The landlord stated that two window screens were missing. I award the landlord \$70.00 towards the cost of replacing them.

The landlord stated that the tenant changed the locks and did not provide the landlord with a key. The landlord had to hire a locksmith to install new locks. I award the landlord his claim of \$110.00 for the cost of doing so.

Overall the landlord has established a claim of \$380.80 for the items mentioned above.

9. Supreme Court filing fee - \$80.00

The landlord has filed a copy of proof of payment and therefore I award the landlord his claim.

10. Photocopying- \$4.50

The legislation does not permit me to award any litigation related costs other than the filing fee. Accordingly, the landlord's claim for the cost of photocopying is dismissed.

11. Bathroom fan - \$34.52

12. Bathroom fan - \$29.10

The landlord is responsible for the maintenance of the rental unit. The landlord has not proven negligence or deliberate damage to the fans, on the part of the tenant that rendered these fans inoperable. The landlord's claim is dismissed.

13. Three locksets - \$160.65

As stated above, the tenant changed the locks and did not provide the landlord with a key. The landlord was forced to replace the locks. I award the landlord his claim.

14. Cheque to tenant - \$828.13

The landlord stated that he processed the tenant's tax return and when the tenant complained that he had not received the tax refund, the landlord gave the tenant a personal cheque in anticipation of recouping the amount when the tax refund arrived. The landlord stated that the tenant received the refund but did not reimburse the landlord. The landlord is claiming the return of the money he gave the tenant. This matter does not fall under the *Residential Tenancy Act*. Accordingly I have no jurisdiction in this matter. The landlord is at liberty to pursue his claim in another court.

Overall the landlord has established a claim as follows:

| | | |
|-----|---|-------------------|
| 1. | Filing fee for prior application | \$0.00 |
| 2. | Filing fee for this application | \$100.00 |
| 3. | Late payment – two months | \$0.00 |
| 4. | Administration fee – two months | \$50.00 |
| 5. | NSF cost – two months | \$90.00 |
| 6. | Liquidated damages (rent for four months) | \$0.00 |
| 7. | Repairs | \$336.00 |
| 8. | Repairs | \$380.80 |
| 9. | Supreme court filing fee | \$80.00 |
| 10. | Photocopying | \$0.00 |
| 11. | Bathroom fan | \$0.00 |
| 12. | Bathroom fan | \$0.00 |
| 13. | Three locksets | \$160.65 |
| 14. | Cheque to client | \$0.00 |
| | Total | \$1,197.45 |

The landlord has established a claim in the amount of \$1,197.45. I order that the landlord retain the security deposit of \$950.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 of the *Residential Tenancy Act* for the balance due of \$247.45. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the landlord a monetary order of **\$247.45**.

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: October 14, 2016

Residential Tenancy Branch

