



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* (the *Act*).

The landlord applied for:

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

The tenant applied for:

- authorization to obtain a return of all or a portion of the security deposit and pet damage deposit pursuant to section 38;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order that the landlord comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord was assisted by her agent, CW.

Both parties disputed service and testified that they had not been served with the other party's application or evidentiary materials at all.

The landlord testified that the landlord's application for dispute resolution dated February 9, 2017 and evidentiary materials were served on the tenant by registered mail on February 17, 2017. The landlord submitted a copy of the customer receipt and registered mail tracking number as evidence of service. I confirmed with the tenant that the mailing address provided on the customer receipt is the tenant's mailing address.

Section 89(1) of the *Act* establishes the following Special rules for certain documents, which include an application for dispute resolution for a monetary award:

89(1) An application for dispute resolution,...when required to be given to one party by another, must be given in one of the following ways:

- (a) by leaving a copy with the person;*
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;*
- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;*
- (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;*
- (e) as ordered by the director under section 71(1) [director's orders: delivery and service of document]...*

I find that the landlord served the tenant in accordance with section 89(1)(c) of the *Act* by sending a copy of the application for dispute resolution to the tenant's address, as confirmed by the tenant in the hearing. Therefore, pursuant to section 90 of the *Act* I find that the tenant was deemed served with the landlord's application for dispute resolution and evidentiary materials on February 22, 2017, the fifth day after mailing.

The tenant testified that he served the landlord with the tenant's application for dispute resolution and evidentiary materials by placing them in the mail box at the landlord's address. Leaving a copy in the mail box or mail slot for the address at which a party resides is not an acceptable method of service allowed by section 89(1) of the *Act*. Consequently, I cannot find that the landlord was properly served with the tenant's application for dispute resolution and evidentiary materials. Accordingly, I dismiss the tenant's application.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for damages and loss as claimed? Is the landlord entitled to retain all or a portion of the security deposit for this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around each are set out below.

The parties agree on the following facts. This fixed term tenancy began in September, 2015 and was scheduled to end March 31, 2017. The tenancy ended on February 5, 2017. The monthly rent was \$1,575.00, payable on the first of the month. A security deposit of \$787.50 was paid and is still held by the landlord. The tenant was also charged a non-refundable \$150.00 move in fee.

In addition to the security deposit and the move-in fee the tenant testified that he paid \$200.00 to the concierge of the building at the start of the tenancy. The landlord said that is a deposit administered and managed by the strata corporation and the \$200.00 was never given to her.

No condition inspection report was prepared at the start of the tenancy. The landlord testified that a time for the move-in inspection was scheduled but the landlord's agent and tenant were not able to meet. The landlord said that other dates for a move-in inspection were proposed but the parties could not agree to them. The landlord testified that a condition inspection was scheduled to occur on the move-in date but tenant declined on that day as he felt there was insufficient time to move in and perform an adequate inspection. The landlord said that the tenant inspected the rental unit on his own and provided a list of deficiencies he noted.

The tenant disputes that the landlord provided him with reasonable options to perform a move-in inspection. The tenant said that after the initial attempt at a move-in inspection, the parties were unable to agree on another date. The tenant testified that the landlord did not provide sufficient time on the move-in date for an inspection and the tenant did not agree to an inspection on that date.

The landlord testified that the tenant did not participate in a move-out inspection at the end of the tenancy. The landlord said that the tenant was offered multiple opportunities but the tenant declined to participate. The landlord submitted into written evidence a

copy of a Notice of Final Opportunity to Schedule a Condition Inspection providing an inspection date of February 10, 2017. The landlord testified that the tenant refused service of the Notice. The landlord submitted into written evidence a copy of a letter dated February 9, 2017, from the tenant demanding the landlord cease and desist attempting to contact him. The landlord completed the move-out condition inspection report without the tenant's participation.

The landlord seeks a monetary award in the amount of \$2,423.40 under the following heads of damage:

Item	Amount
Carpet Cleaning	\$68.25
Painting and Repairs	\$86.67
Paint and Lightbulbs	\$82.88
Carpet Replacement	\$1,248.10
Loss of Rental Revenue & Unpaid Rent Feb 1-5, 2017	\$787.50
Bike Room Key Replacement	\$50.00
Filing Fee	\$100.00
Total	\$2,423.40

The landlord testified that there were significant signs of damage in the rental unit including, scuff marks on the floors, broken cabinet hinges, broken drawers, debris on the patio, paint marks on the wall, burnt out lightbulbs and an extremely dirty carpet. The landlord said that the rental unit was professionally cleaned and submitted into written evidence the receipts and invoices for the work done. The landlord said that while the carpet was professionally cleaned, it remains stained and believes that it needs to be replaced. The landlord submitted into written evidence a copy of a quote for replacement of the carpet.

The landlord testified that the tenant failed to pay rent for the five days of February that he occupied the rental unit. The landlord said that she mitigated her losses by finding a new occupant for the rental unit but they took possession on February 15, 2017 and therefore she suffered a loss of rental revenue for the period of February 1 to 15.

The tenant disputes the landlord's assessment of damage to the rental unit. The tenant submitted into written evidence a lengthy rebuttal of the landlord's move out condition inspection report denying the landlord's assessment of the rental unit condition and the

landlord's right to claim damages. Throughout the rebuttal, the tenant characterizes the landlord's claims as imaginary, false, exaggerations, and illegal.

Analysis

Section 23 of the *Act* sets out the requirement for the landlord and tenant to inspect the condition of the rental unit together at the start of the tenancy and prepare a condition inspection report. The landlord must offer the tenant at least 2 opportunities for the inspection. Section 24 sets out that the party who does not comply with the requirements of section 23 extinguishes their right to claim against the security deposit.

The parties agree that a condition inspection report was not prepared at the start of the tenancy. The landlord testified that two opportunities for a move-in inspection were scheduled and the tenant failed to participate in an inspection on both occasions. The tenant testified that a move-in inspection did not occur on the first scheduled date as the parties were unable to meet, and the landlord failed to provide a reasonable opportunity to reschedule the move-in inspection.

I find the landlord's evidence in regards to the opportunities for a move-in inspection to be more credible. I accept the landlord's evidence that the tenant was given two opportunities for a move-in inspection and did not use those opportunities. I find that after the initial attempt at a move-in inspection the parties agreed to a move-in inspection on the move-in date. I accept the landlord's evidence that the tenant cancelled the inspection as he felt that there was not enough time to attend to administrative matters. Based on the totality of the evidence presented by the parties I find that the landlord complied with section 23(3) of the *Act* by arranging two opportunities for a condition inspection, both of which were initially agreed upon by the tenant. I find that the tenant did not participate on either occasion and has extinguished his right to a return of the security deposit pursuant to section 24(1) of the *Act*.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. 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 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.

I accept the landlord's evidence that there were damages to the rental unit at the end of the tenancy that required repairs and cleaning. I find that the landlord has presented

sufficient evidence to show that on a balance of probabilities the rental unit was damaged and required some repairs. I accept the landlord's evidence that the carpet required professional cleaning, the walls needed to be painted, lightbulbs had burnt out and needed to be replaced and there was general cleanup required after the tenant vacated. I accept the receipts submitted by the landlord as evidence that the total amount of loss for the cleaning and repairs is \$237.80.

I find there is insufficient evidence in support of the landlord's claim for the cost of carpet replacement. The landlord testified that a new tenant has occupied the rental unit as of February 15, 2017. As the rental unit could be occupied without having the carpet replaced I find there is insufficient evidence to show that there is a loss for which the tenant is responsible. Consequently, I dismiss this head of claim.

I accept the landlord's evidence that the fixed term tenancy was ended by the tenant. I accept the landlord's evidence that the parties did not agree in writing to end this tenancy. The tenant argued that he ended the tenancy pursuant to section 45(3) of the *Act*, as the landlord failed to comply with material terms of the tenancy. A material term of the tenancy is defined in Residential Tenancy Policy Guideline 8 as a term that is so important that the most trivial breach of that term gives the other party the right to end the agreement. I do not find that the complaints by the tenant, individually or cumulatively, are a material term of this tenancy. I find that many of the issues raised by the tenant are subjective complaints, or terms that are not so essential to the tenancy as to be considered material terms. Accordingly, I do not find that the tenant had the ability to end the tenancy pursuant to section 45(3) of the *Act*.

I accept the landlord's testimony that they took reasonable measures to mitigate their loss by finding a new occupant for the rental unit. The landlord testified that a new occupant took possession of the rental unit on February 15, 2017, ten days after the end of the tenancy. I accept the landlord's evidence that the tenant did not pay rent for February. I find that the landlord suffered a loss of rental income arising from the tenant's breach of the fixed term tenancy. I find that the loss suffered is the equivalent of the rental income for half the month of February, \$787.50. Accordingly, I issue a monetary award in that amount in the landlord's favour.

I find that there is insufficient evidence to support the landlord's claim for a bike room key. There is insufficient written evidence to show that a bike room key was issued to the tenant at the start of the tenancy. While the condition inspection report prepared at the end of the tenancy mention a bike room key, in the absence of sufficient written evidence at the start of the tenancy I find there to be insufficient evidence to show the

landlord suffered a loss as a result of the tenant's breach. Consequently, I dismiss this portion of the landlord's claim.

As the landlord was substantially successful in their application, the landlord is entitled to recover the \$100.00 filing fee for this application.

I accept the parties' evidence that the security deposit paid for this tenancy is \$787.50. I accept the landlord's evidence that the \$150.00 paid by the tenant is a non-refundable move-in fee charged by the strata corporation for the rental building. I also accept the landlord's evidence that the \$200.00 paid by the tenant to the concierge was not given to the landlord. I find the \$150.00 fee to be a fee charged pursuant to the Residential Tenancy Regulation 7(1)(f) and non-refundable. I find that the total security deposit for this tenancy is \$787.50.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenants' security deposit of \$787.50 in partial satisfaction of the monetary award issued in the landlord's favour.

Conclusion

The tenant's application is dismissed.

I issue a monetary order in the landlord's favour in the amount of \$337.80 under the following terms, which allows the landlord to recover the damage and loss suffered and the filing fee for their application:

Item	Amount
Carpet Cleaning	\$68.25
Painting and Repairs	\$86.67
Paint and Lightbulbs	\$82.88
Loss of Rental Revenue & Unpaid Rent Feb 1-5, 2017	\$787.50
Filing Fee	\$100.00
Less Security Deposit	-\$787.50
Total	\$337.80

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order 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: June 19, 2017

Residential Tenancy Branch