



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NPR LIMITED PARTNERSHIP
and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

This hearing dealt with applications by both the corporate landlord and tenants pursuant to the *Residential Tenancy Act* (the “Act”).

The corporate landlord applied for:

- a Monetary Order for damages and loss pursuant to section 67;
- authorization to retain the security deposit and pet damage deposit pursuant to section 38; and
- recovery of the filing fee from the tenants pursuant to section 72 of the *Act*.

The tenants sought:

- a Monetary Order for damage and loss pursuant to section 67;
- recovery of all or a portion of the security deposit and pet damage deposit pursuant to section 38; and
- an order that the landlord comply with the Act, regulations or tenancy agreement pursuant to section 62.

Both parties attended the hearing and were given a full opportunity to be heard, present sworn testimony and make submissions. The corporate landlord was represented by its agents ST (the “landlord”) and KSG. The landlord confirmed that they are the corporate landlord named in the tenants’ application. The tenants were primarily represented by their advocate KM (the “tenant”).

As both parties were in attendance I confirmed that there were no issues with service of either party’s application for dispute resolution or either party’s evidentiary materials. The parties confirmed receipt of one another’s materials. In accordance with sections 88 and 89 of the *Act*, I find that the parties were duly served with copies of the respective applications and evidence.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage and loss as claimed?
Are the tenants entitled to a return of the security deposit and pet damage deposit?
Are the tenants entitled to a monetary award for damage and loss?
Should the landlord be ordered to comply with the Act, regulations or tenancy agreement?
Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

The parties agreed on the following facts. This fixed term tenancy began in March, 2017 and was scheduled to end on February 28, 2018. The monthly rent was \$1,350.00. The tenancy agreement provides that an incentive equivalent of \$450.00 will be applied towards rent during the duration of the tenancy. The clause states that "Should this agreement not be fulfilled, the tenant(s) will be liable for repayment of said incentive."

The tenants paid a security deposit of \$399.00 and pet damage deposit of \$675.00 which are still held by the landlord. The parties participated in a condition inspection at the start of the tenancy and no major deficiencies were noted. The tenancy agreement provides that if the tenants break the agreement liquidated damage of \$675.00 is payable for all costs associated with re-renting the unit.

On June 1, 2017, after the tenants had paid the rent for that month, they discovered mold behind a wall in the basement of their unit. The tenants reported the issue to the landlord and asked for alternate accommodations to be arranged as they were concerned that the mold posed a health risk. The landlord attended at the rental unit on June 2, 2017 to begin work on the unit. The landlord offered the tenants temporary accommodation in a furnished suite for two days but declined the tenants' request to rehouse them in another unit. The landlord said there were no safety concerns and the restoration work would be completed in a few days.

The tenants chose to move out of the rental unit. They removed their furniture and personal belongings. On June 6, 2017 the tenants and landlord participated in a move-out inspection of the unit. The tenants agreed to a deduction of \$30.00 for suite cleaning and \$125.00 for carpet cleaning. The tenants agreed to a deduction of an undetermined amount for the removal of a couch. The tenants gave evidence that they believed that the cost of couch removal would be about \$60.00. The tenants testified that they did not agree to any other deductions and do not recall other items being listed on the condition inspection report they completed with the landlord. The tenant completed the portion of the move-out inspection report indicating that they "agree that this report fairly represents the condition of the rental unit" and signed and dated the report. The tenants did not sign the portion of the report setting out the amounts to be deducted from the deposits. The tenants gave their forwarding address on the condition inspection report completed on June 6, 2017. A copy of the condition inspection report was submitted into written evidence.

The tenants seek a monetary award in the amount of \$1,975.00 which is comprised of the full security deposit of \$399.00 and pet damage deposit of \$695.00 as well as reimbursement of the June rent paid of \$900.00. The tenants testified that they rounded the sum up by \$1.00 for a total monetary claim of \$1,975.00.

The tenants submit that the landlord did not take appropriate action in a timely manner to deal with the mold issue in the rental unit and therefore they are not obligated to pay any damages for breaking the fixed term tenancy agreement.

The tenants submit in the alternative that the tenancy agreement was frustrated as they had contracted with the landlord for safe housing and the discovery of the mold made the landlord's ability to provide them with that housing impossible. The tenants argue that the performance of the rental contract has become a thing radically different from that which was undertaken.

The landlord testified that they took appropriate and timely steps in response to the tenant's discovery of mold. The landlord said that they arranged for restoration work on June 2, 2017 and there were no health or safety concerns that prevented the tenants from continuing to reside in the rental unit.

The landlord testified that they are seeking a monetary award in the amount of \$3,087 for the following items which are noted on the inspection report.

Item	Amount
Recovery of Rent Incentive (\$450.00 x 7 months)	\$3,150.00
Suite Cleaning	\$30.00
Carpet Cleaning	\$125.00
Administrative Costs	\$41.00
Liquidated Damages	\$675.00
Couch Disposal	\$140.00
Less Security Deposit	-\$399.00
Less Pet Damage Deposit	-\$675.00
TOTAL	\$3,087.00

The landlord said that they resolved the mold issue and the rental unit was perfectly safe when the tenants chose to move out. The landlord testified that they were able to rent the unit out to new occupants starting on June 29, 2017. The landlord submitted into written evidence copies of their timesheets and invoices in support of their claim for monetary award for the costs of cleaning and restoration.

Analysis

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. The claimant also has a duty to take reasonable steps to mitigate their loss.

The tenants' central submission is that the landlord breached the *Act*, regulations and tenancy agreement by failing to take appropriate steps to repair the rental unit and resolve the mold issue. The tenants submit that the landlord's failure to comply gave rise to the tenants' right to end the fixed term tenancy on a date earlier than specified under the tenancy agreement pursuant to section 45 of the *Act*.

Section 32 of the *Act* sets out that the landlord must provide and maintain residential property in a state of repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant. The tenants submit that the landlord failed to provide the rental unit in a state of reasonable repair after the mold was discovered behind one of the walls.

The tenants say that the landlord failed to take reasonable steps to repair the rental unit and resolve the mold issue. I accept the undisputed evidence of the parties that the tenants informed the landlord of the issue and the landlord took action in a matter of days. The undisputed timeline of the parties is that the mold was discovered on June 1, 2017 and the tenants informed the landlord on that date. The landlord made arrangements to ascertain the scope of the issue and began work on the next day, June 2, 2017. I find that the steps taken by the landlord were appropriate, timely and reasonable. The landlord even offered the tenants temporary accommodation for the days that the work was expected to occur. I find based on the evidence that the landlord took all reasonable efforts and complied with their requirements under the *Act* to maintain and repair the rental unit.

The tenants submit in the alternative that the tenancy was frustrated as the discovery of the mold in the walls is an unforeseeable event that radically changed the circumstances such that it made fulfillment of the contract as originally intended impossible. I do not find that the mere presence of mold has affected the ability of the parties to fulfill their tenancy agreement. There is insufficient evidence to find that the rental unit was made uninhabitable or even hazardous for the occupants due to the mold. I find that the discovery of mold did not frustrate the tenancy agreement and the parties were still obligated to fulfill the terms of the *Act*, regulations and agreement.

The tenants gave evidence that after discovering the mold on the 1st of June, they moved their possessions from the rental unit on the 3rd and 4th. They claim a return of the rent payment of

\$900.00 for the month of June. I do not find that the tenants have any entitlement to a refund of their rent.

Section 26(1) of the *Act* provides that the tenant must pay the rent when due regardless of whether the landlord complies with the *Act*. In the case at hand I have found that the landlords have not violated the *Act*, regulations or tenancy agreement and acted in a reasonable manner arranging for repairs to the unit. As the tenancy was ongoing the tenants were obligated to pay the full rent amount. The tenants chose to break their fixed term tenancy agreement and vacated the unit but they were still required to pay their monthly rent. Based on the totality of the evidence submitted I find that the tenants did not act reasonably, rationally or prudently by choosing to breach the tenancy agreement days after discovering mold. The tenants were still bound by the terms of the tenancy agreement. I find that there is no basis for a monetary award for the return of the \$900.00 paid by the tenants for June, 2017 rent. Accordingly, I dismiss this portion of the tenants' claim.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit and pet damage deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit and pet damage deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the deposits as per section 38(4)(a).

I accept the tenant's evidence that they did not give written authorization that the landlord may deduct any amount from the security or pet damage deposit for this tenancy. The tenants gave evidence that they do not recall if all of the charges the landlord was seeking were listed on the condition inspection. I find this to be irrelevant as I accept the evidence that the tenants did not consent in writing to any deductions either on the report or in later correspondence.

In the present matter the parties gave evidence that the tenants provided the landlord with a forwarding address on the condition inspection report completed on June 6, 2017. The landlord filed their application for dispute resolution for authorization to retain the deposits on June 8, 2017, within the 15 days provided in the *Act*.

The landlord claims the amount of \$3,150.00 for return of the \$450.00 incentive paid for the duration of the tenancy. The parties signed a tenancy agreement that states that the landlords would apply an incentive of \$450.00 for monthly rent but the tenants would be liable for repayment should they not fulfill the terms of the agreement. In effect, while the monthly rent was \$1,350.00, a tenant would only pay \$900.00 if they resided in the rental unit for the full term of the tenancy agreement.

The written tenancy agreement signed by the parties clearly indicates that the monthly rent is \$1,350.00. The parties gave evidence that the tenants only paid \$900.00 for the monthly rent

during the tenancy. Even if this incentive clawback clause was not in the tenancy agreement it is clear that the tenants failed to pay the full amount of monthly rent set out in the signed agreement. I accept the landlord's evidence that the tenancy agreement contains a provision that the tenants are liable for repayment of the \$450.00 monthly incentive should they break the fixed term tenancy. I find that the tenants have broken the fixed term tenancy and vacated the rental unit in June, 2017. I accept the landlord's evidence that the amount of incentive provided to the tenants during the tenancy which they are now obligated to repay is \$3,150.00. Accordingly, I issue a monetary award in the landlord's favour in that amount for this portion of the claim.

I accept the evidence of the parties that the tenancy agreement contains a liquidated damage clause which allows the landlord to claim \$675.00 from the tenants for the cost of re-renting the unit. As I have found that the tenants have violated the tenancy agreement by moving out during the fixed term, I find that the landlord is entitled to a monetary award of \$675.00 for liquidated damages.

I accept the landlord's evidence of the costs incurred in cleaning the rental unit. I find that the charges as detailed in the tenant ledger are reasonable costs of labour and cleaning to prepare a rental unit for a new tenancy. I find that the landlord is entitled to a monetary award for the costs incurred in the amount of \$336.00 for the cleaning, carpet cleaning, couch removal and administrative costs.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenants' \$399.00 security deposit and \$675.00 pet damage deposit in partial satisfaction of the monetary award issued in the landlord's favour.

As the landlord's application was successful they are also entitled to recover the filing fees for their application.

Conclusion

The tenants' application is dismissed.

I issue a monetary order in the landlord's favour in the amount of \$3,187.00 under the following terms, which allows the landlord the damage and loss suffered and the filing fee for their application:

Item	Amount
Recovery of Rent Incentive (\$450.00 x 7 months)	\$3,150.00
Suite Cleaning	\$30.00
Carpet Cleaning	\$125.00

Administrative Costs	\$41.00
Liquidated Damages	\$675.00
Couch Disposal	\$140.00
Less Security Deposit	-\$399.00
Less Pet Damage Deposit	-\$675.00
Filing Fee	\$100.00
TOTAL	\$3,187.00

The tenants must be served with this Order as soon as possible. Should the tenants 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: November 21, 2017

Residential Tenancy Branch