



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR MNDC MNSD FF / MNDC MNSD FF

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

Landlord:

- a monetary order for unpaid rent and compensation for damage and/or loss 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;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Tenant:

- 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 the security deposit pursuant to section 38;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The hearing was conducted by conference call. All named parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. No issues were raised with respect to the service of the respective applications and evidence submissions.

Issues

Is the landlord entitled to a monetary award for unpaid rent and compensation for damage and/or loss?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Is the tenant entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement?

Is the tenant entitled to return of all or a portion of the security deposit pursuant to section 38?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

The tenancy for this residential house began on November 23, 2017. The lease was for a one year fixed term until November 30, 2018. The monthly rent was \$8500.00 payable on the 1st day of each month. A security deposit of \$4250.00 was paid at the start of the tenancy which the landlord continues to retain. On August 29, 2018 the tenant notified the landlord via telephone that they would be breaking the lease early. This notice was followed up in e-mail dated September 3, 2018. The tenant vacated the rental unit on September 30, 2018, two months prior to the end of the one year fixed term.

Landlord's Application:

The landlord is claiming unpaid rent in the amount of \$17,000 for the months of October and November 2018 for the tenant's breach of the fixed term lease. The landlord testified the property was listed for rent immediately through a property management company and provided a letter from the agent in support. The property was originally listed at a rent of \$9750.00 and towards the end of September 2018 it was reduced to \$8950.00. The landlord testified they had four showings over this period but were not successful in securing a new tenant. The landlord acknowledges they may have been a little too aggressive with the rent amount but testified this was done to cover increasing carrying costs such as property taxes and insurance.

The tenant argues that although the landlord listed the property immediately, the landlord did not market the property aggressively. The tenant further argues that the landlord tried to rent the property at a significantly higher rent so the landlord did not take proper steps to mitigate losses. The tenant submits the landlord provided no evidence to support that the higher rent amount was a reasonably economic rent. The

tenant also submits that the landlord did not regularly refresh the craigslist ads. The tenant argues the landlord did eventually secure a new tenant after reducing the rate further down to the same rate the tenant was paying.

The landlord replied that they have been using the property management company for a number of years and although the listing was also placed on craigslist that is not their primary source for finding tenants for a luxury rental such as this.

The landlord is claiming \$4250.00 in liquidated damages as provided for under the tenancy agreement. The landlord testified this charge is for covering carrying costs such as utilities expenses while the unit sat empty.

The tenant argues the landlord is double dipping by claiming both unpaid rent up to the end of the lease and charging for liquidated damages. The tenant also argues that the liquidated damages amount is a penalty.

The landlord is also claiming damages to interior millwork in the amount of \$892.50 and damage to an exterior plant in the amount of \$250.00. The landlord testified he sent the tenant e-mail listing the various damages to the rental unit. The landlord submitted before and after pictures highlighting the damages areas. The landlord submitted an estimate for the repair work for the interior damages. The landlord did not submit any invoice for the claim for the plant damage.

The tenant argues that some of the damage the landlord claims is the same damage as listed on the move-in condition report, therefore it was pre-existing damage. The tenant argues that they were two adults residing in the unit with no pets and no children and they did not cause the alleged damage. The tenant argues that any damage was normal wear and tear. The tenant also argues that the landlord never completed or provided them with a move-out inspection report even though they did a formal walk through with the landlord at the end of the tenancy. The tenant submits that they repeatedly asked for a copy of the move-out inspection but none was provided. The tenant submits that the tenancy agreement stipulates that gardening is the responsibility of the landlord. In either event, the tenant submits that they watered the plants regularly.

Tenant's Application:

The tenant is seeking return of the security deposit including double the amount as a penalty. The tenant claims the landlord did not file an application or serve them within

15 days of the end of the tenancy. The tenant further argues that the landlord's right to claim against the security deposit was extinguished as the landlord failed to complete a move-out inspection report.

The landlord argues that his original application was amended to include a request for retaining the security deposit on October 15, 2018.

The tenant is also claiming reimbursement of utilities in the amount of \$750.00. The tenant submits that the landlord was supposed to reimburse the tenant \$125.00 per month for utilities to cover the use by another tenant on the property. The tenant submits they received reimbursement only up to March 2018. The tenant submits that the landlord submitted a copy of a cheque for the months of April to June 2018 but they never received or cashed this cheque.

The landlord testified that he did issue a cheque to the tenant for April to June 2018 utilities but he does not know if this cheque was ever cashed. The landlord acknowledges utilities were not reimbursed after this period.

Analysis

Section 7 of the Act provides for an award for compensation for damage or loss as a result of a landlord or tenant not complying with this Act, the regulations or their tenancy agreement. Under this section, the party claiming the damage or loss must do whatever is reasonable to minimize the damage or loss.

As per section 45 of the Act, a tenant may not end a fixed term tenancy earlier than the date specified in the tenancy agreement as the end of the fixed term unless the landlord has breached a material term of the tenancy agreement.

Section 37 of the Act requires that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

Section 38 of the Act provides that when a tenancy ends, the landlord may only keep a security deposit if the tenant has, at the end of the tenancy, consented in writing, or the landlord has an order for payment which has not been paid. Otherwise, the landlord must return the deposit, with interest if payable, or make a claim in the form of an Application for Dispute Resolution. Those steps must be taken within fifteen days of the end of the tenancy, or the date the tenant provides a forwarding address in writing, whichever is later. A landlord who does not comply with this provision may not make a

claim against the deposit and must pay the tenants double the amount of the security deposit, pet deposit, or both, as applicable.

Landlord's Application:

As per section 45 of the Act, the tenant is not permitted to end a fixed term tenancy early unless the landlord breached a material term which was not the case. I find the landlord took reasonable steps to mitigate his loss by immediately hiring a property management company to find another tenant. The landlord had some showings but was not successful in securing a tenant throughout the duration of the lease. I find the increased rent amount was a reasonable economic rent. This was a high end property rented to the tenants at a rate of \$8500.00 per month. The landlord listed it originally for \$9750.00 which is an increase of 14.7%. I note that had this been a continuing tenancy, the landlord would have legally been able to raise rent at a rate of 4.0%. Therefore, the increase was 10.7% above the allowable annual increase for a tenancy under the Act. I note that in this case, the landlord was not bound by the increase provisions under the Act. I find that within one month the landlord reduced the rent to \$8950.00 which is only a 5.29% increase compared to the allowable 4.0%. The tenant's argument that the landlord should have advertised it for the same rent could potentially penalize the landlord if the landlord were to enter into an additional one year lease at the same rate. I find that this is not a reasonable expectation as it is the tenant who contravened the Act by breaking the lease. I accept the landlord's testimony that the increased advertised rent was a reasonable increase to cover rising carrying costs for the property.

The landlord is awarded **\$17,000.00** as claimed for unpaid rent.

The liquidated damages clause in the tenancy agreement provides for this charge in the event of the tenant breaking the lease early and is intended to cover the costs incurred in re-renting the unit. As the landlord has been awarded rent up to the end of the lease, the landlord must bear this cost. The landlord would ordinarily have been responsible for the re-renting costs at the end of the tenancy. The landlord's argument that this was intended to cover carrying costs such as utilities is not supported by the lease agreement. I dismiss the landlord's claim for liquidated damages.

With respect to the landlord's claim for damages, I find the landlord's claim for damage to the plant is not supported by the tenancy agreement which clearly specifies that gardening is the landlord's responsibility. Additionally, I find the landlord has failed to provide sufficient evidence that the interior millwork damage was caused by the tenant

and that it was beyond normal wear and tear. I find that the landlord prejudiced the tenant's ability to respond to these claims and provided insufficient evidence of the condition of the unit at the end of the tenancy by not completing a move-out inspection report. This part of the landlord's claim is dismissed.

As the landlord was not entirely successful in this application, I find that the landlord is not entitled to recover the \$100.00 filing fee paid for this application.

The landlord has established an entitlement to a monetary award in the amount of \$17,000.00.

Tenant's Application:

The landlord's original application was filed on October 3, 2018 and an amended application to include a request for retaining the security deposit was filed on October 15, 2018. The tenant vacated the rental unit on September 30, 2018 and provided a forwarding address shortly after vacating. I find the landlord's application was filed within 15 days in accordance within the Act. The tenant's claim for double the security deposit is dismissed.

I find the landlord submitted insufficient evidence for reimbursement of utilities to the tenant for April to June 2018. The copy of the cheque submitted by the landlord does not indicate whether or not this cheque was endorsed by the tenant. The landlord acknowledged utilities were outstanding after this period. The tenant is awarded **\$750.00** as claimed.

As the tenant was not entirely successful in this application, I find that the tenant is not entitled to recover the \$100.00 filing fee paid for this application.

The tenant has established an entitlement to a monetary award in the amount of \$750.00.

Offsetting the above awards, the landlord is entitled to a net award of \$16,250.00.

The landlord continues to hold a security deposit in the amount of \$4250.00. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award pursuant to section 38 of the Act.

Therefore, I find that the landlord is entitled to a Monetary Order in the amount of **\$12,000.00.**

Conclusion

Pursuant to section 67 of the *Act*, **I grant the landlord a Monetary Order in the amount of \$12,000.00.** 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: January 31, 2019

Residential Tenancy Branch