

Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MNDC FF

Introduction

This hearing dealt with an application by the tenant for a monetary order. Both parties participated in the conference call hearing and had opportunity to be heard.

Issue(s) to be Decided

- Was the tenancy frustrated?
- Is the tenant entitled to the recovery of her rent, security deposit and storage fees?
- Is the tenant entitled to recover rent paid to another landlord?

Background and Evidence

The parties agreed that on or about August 20, 2008 the tenant's brother, _____, acting as her agent, viewed the rental unit and entered into a tenancy agreement on the tenant's behalf. The parties further agreed that \$900.00 in rent for September and a \$450.00 security deposit were paid on that date.

_____. testified that the tenant was moving to the area from another province and that the tenant's belongings arrived before she did, so he rented a storage unit for one month into which he placed her belongings.

On August 25, the tenant moved several boxes and some clothing into the rental unit. The tenant testified that within 2 hours of arriving at the rental unit, she had a violent physical reaction which included difficulty breathing and uncontrollable coughing. The tenant testified that the basement had a strong odour and that she suspected mold was in the rental unit. The tenant testified that she visited a doctor right away, but did not provide evidence of that doctor's visit. The only medical evidence provided by the tenant was a letter dated October 16, 2008 which stated that the tenant has asthma and

should therefore avoid exposure to irritants that may aggravate the condition. The tenant testified that shortly after she attempted to move in she telephoned the landlord. The landlord was out of town when the tenant telephoned him and the parties arranged for the former owner, _____, to inspect the suite.

_____ appeared as a witness and testified that he had owned the rental unit prior to the time the landlord purchased it approximately 3 years ago. _____ testified that when he inspected the rental unit at the end of August, he could smell that the air was stale and he noticed some stains, but saw no mold. _____ theorized that the stale air was due to the rental unit having been closed up for some time.

_____ testified that during the time he owned the rental unit, a flood occurred and that a restoration company repaired the damage by replacing the sub-floor of the hallway. _____ testified that the hallway took the brunt of the water damage and that the flood did not extend very far into other parts of the basement.

The tenant testified that she tried on several occasions to persuade the landlord to pay for testing for mold in the rental unit and the landlord refused. The landlord testified that he had no objection to mold testing but felt no obligation to pay for the testing as he is confident that there is no mold in the rental unit.

The tenant and _____. testified that on September 10 they found the landlord in the rental unit and detected a strong smell of bleach. The tenant suggested that the landlord was cleaning the rental unit in an effort to remove mold, an allegation which the landlord denies. The tenant further testified that at that time the landlord said that she should not return to the rental unit. On September 10 the tenant provided the landlord with a written request for the refund of her damage deposit and rent. The parties agreed that as of September 10 the tenant still had boxes in the kitchen and living room and clothes in at least one closet. The parties further agreed that as of the date of the hearing the tenant had not returned the keys to the rental unit or provided her forwarding address in writing.

The tenant testified that she contacted the Residential Tenancy Branch requesting that an employee telephone the landlord to advise him that the tenant was entitled to access the rental unit during September. The landlord acknowledged having received a call to

that effect from the Branch.

_____ testified that on or about September 1, 2008 the landlord came to his place of employment and began arguing with _____.

The tenant provided photographs of the rental unit which she claims show the presence of mold. The tenant further provided a letter from Stutters Disaster Kleenup commenting on the photographs. In the letter from Stutters, the author identified two photographs as showing evidence of water damage and one which showed "suspect spots."

The tenant seeks return of her security deposit, rent paid for September, storage fees for her belongings and the room and board that she paid for another rental unit in September and October. The tenant argued that the tenancy was frustrated and that she should therefore receive a full refund of all monies paid and recovers any loss resulting from the said frustration.

The landlord agreed to repay the security deposit to the tenant.

Analysis

The tenant bears the burden of proving her claim. I find that the tenant has not proven her claim for the following reasons.

In order to substantiate her claim that the tenancy was frustrated, the tenant must prove that the contract was incapable of being performed because an unforeseeable event so radically changed the circumstances that fulfillment of the contract as originally intended was impossible. I find that while the tenant's circumstances may have changed in that she developed or was made aware of asthma that had previously not bothered her, the circumstances of the tenancy had not changed. The tenant authorized her agent, _____, to enter into a binding tenancy agreement on her behalf. _____ had opportunity to inspect the rental unit and apparently found that it satisfied his requirements as he gave the landlord both a deposit and rent for September. Frustration is a doctrine which comes into play only in extreme circumstances, usually as a result of an act of God. I find that frustration has not occurred in this tenancy.

The tenant has the obligation of proving that there is mold in the rental unit which made it uninhabitable. While I appreciate that the tenant tried to arrange for the landlord to pay for mold testing, because the tenant bears the burden of proving that mold exists, she was also responsible to pay for testing. Even if the tenant had arranged for Stutters Disaster Kleanup to inspect the rental unit, it is unlikely that this would have helped her meet her burden of proof as a certified mold specialist would have had to identify any molds present in the rental unit to determine their level of toxicity and whether they could invoke an asthmatic reaction. Evidence of water damage is not sufficient to prove that toxic molds are present in the rental unit. Further, the landlord should not be held responsible because the tenant has asthma. The tenant has an obligation to inspect accommodation prior to entering into a tenancy agreement to determine whether it will meet her requirements. While I recognize that the tenant used an agent to act on her behalf because she was not in the province at the time, this does not lessen the tenant's responsibility to ensure that the rental unit was suitable accommodation for her.

As for the tenant's allegation that the landlord denied her access to the rental unit, I accept that the landlord told the tenant on September 10 that she could not access the rental unit. However, since the landlord made that statement, an employee of the Residential Tenancy Branch and a member of the RCMP both told the landlord that he was required to permit the tenant access. I accept the landlord's testimony that he was fully prepared to grant the tenant full use of the rental unit after September 10. The landlord's visit to _____. 's place of employment and his seemingly inappropriate behaviour there appears to have been for the purpose of advising _____. that the tenant would not receive a refund rather than to deny further access to the tenant. The fact that the tenant visited the rental unit during September, kept at least some of her belongings there until September 10 and retained the keys to the rental unit throughout September leads me to find that she did not intend to surrender possession of the unit to the landlord.

As the landlord agreed to return the tenant's security deposit, I grant the tenant's claim for the return of the deposit. The landlord must also pay \$1.46 in interest which has accrued. The remainder of the tenant's claim is dismissed.

The tenant also sought recovery of the filing fee paid to bring this application. As the

landlord is not obligated to return the security deposit until the tenant provides her forwarding address in writing and as the tenant acknowledged that she refused to provide that address to the landlord, I find that the tenant must bear the cost of the filing fee.

Conclusion

I grant the tenant an order under section 67 for the sum of \$451.46. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated: November 06, 2008.