

Dispute Resolution Services

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

DECISION AND REASONS

Dispute Codes: *MNR, MNDC, FF*

Introduction:

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*. The landlord applied for a monetary order for loss of income and the tenant applied a monetary order for the return of funds from a post dated rent cheque that was cashed by the landlord, after the tenant moved out. Both parties applied for the recovery of the filing fee. Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

Issues to be decided

Is the landlord entitled to a monetary order for loss of income or is the tenant entitled to the return of the funds of the post dated cheque that was cashed by the landlord after the tenant moved out?

Background and Evidence

The tenancy started on June 28, 2008 for a fixed term ending on June 30, 2009. The monthly rent was \$4,500.00 due on the first day of each month. The tenant moved out on December 15, 2008.

Tenant's Application

The tenant testified that he entered into a tenancy agreement with the landlord on June 28, 2008 for a fixed term of twelve months. The tenant stated that due to financial problems and the economic down turn, he could no longer afford the rent of \$4,500.00 per month and in an email on November 07, 2008, he advised the landlord of his intentions to end the tenancy. The landlord acknowledged the tenant's note and agreed to advertise the availability of the property.

On November 28, 2009 the tenant sent the landlord a formal notice to end the tenancy on January 31, 2009 and indicated that he would be moving out prior to that date. The tenant moved out on December 15, 2009.

The tenant stated that despite his suggestions to the landlord to lower the rent to reflect the current economic times, in order to find a new tenant as quickly as possible, the landlord refused to do so. Both parties conducted a move out inspection on January 29, 2009. The tenant stated that the landlord did not advise the tenant that he would be required to pay rent for the balance of the term and therefore he did not expect the landlord to cash the post dated cheque for February.

The tenant has filed evidence by way of email correspondence between the two parties to support his account of events as they occurred and a copy of the landlord's on line advertisement which lists the property at the full rent of \$4,500.00. The date at the bottom of the print out is February 05, 2009. The tenant has applied for the return of the rent that the landlord received by cashing the tenant's post dated cheque for the month of February 2009. The tenant stated that despite ample notice (November 07, 2008 to January 31, 2009) and his suggestion to lower the rent, the landlord did not make serious efforts to find a new tenant.

Landlord's Application

The landlord stated that the tenant entered into a fixed term tenancy. He did not dispute the tenant's testimony of the dates of notice to end tenancy, moving out and the final inspection. The landlord stated that he advertised the vacancy on his company website and got a tenant for May 01, 2009 at a lower rent of \$4,100.00. The landlord stated that he did not advertise a lower rent earlier as he was open to negotiations

The landlord did not file any documentary evidence to support his case and is claiming a loss of income for the months of April and May. The landlord indicated that in addition, he was entitled to the rent cheque for February as the tenant was in a fixed term agreement and had violated the terms of the agreement by moving out prior to the end date.

Analysis

Section 7(2) of the *Residential Tenancy Act*, states that where a tenant breaches a term of the tenancy agreement, the party claiming damages has a legal obligation to do whatever is reasonable to minimize the loss.

This duty is commonly known in law as the duty to mitigate which means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

In this case, the tenant ended the tenancy prior to the end date as stipulated in the tenancy agreement. Therefore, the tenant violated a term of this agreement and the landlord is claiming a loss due to this breach. The landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the unit at a reasonably economic rent.

The tenant provided notice on November 07, 2008 and paid rent up to January 31, 2009. Despite the tenant's suggestion to the landlord to accept a lower rent, the landlord did not lower the rent. Eventually, after suffering a loss of income for an additional three months, the landlord re-rented the unit on May 01, 2009 at a lower rent. I find that the landlord did not mitigate his losses by advertising the unit at a rent that was reasonably economic and in keeping with the down turn in real estate at that time.

In addition, the landlord did not file any evidence to indicate that he had made reasonable efforts to mitigate his losses. The only evidence of a single advertisement was filed by the tenant. Therefore, I find that the landlord has not proven his case and is not entitled to a monetary order for rent for the months of March and April 2009 and the filing fee. The landlord must also return the rent that he received by cashing the tenant's post dated cheque.

I find that the tenant has proven his case and I grant the tenant a monetary order in the amount of \$4,550.00 which consists of rent for February and the filing fee. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the tenant a monetary order in the amount of \$4,550.00.

Dated July 27, 2009.

Dispute Resolution Officer