



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNR, MNDC, MNSD, O, FF

Introduction

A substantial amount of documentary evidence, photo evidence, and written arguments has been submitted by the parties prior to the hearing. I have thoroughly reviewed all submissions.

I also gave the parties the opportunity to give their evidence orally and the parties were given the opportunity to ask questions of the other parties.

All testimony was taken under affirmation.

Issues(s) to be Decided

This decision deals with two applications for dispute resolution, one brought by the tenant and one brought by the landlords. Both files were heard together.

Tenants application

This is a request for a monetary order for \$1200.00, and a request to be allowed to be released from a 1 year lease without penalty.

Landlords application

This is a request for a monetary order for \$6,099.09, for losses resulting from the tenants breaking the lease, and a request to retain the full security deposit towards the claim.

Background and Evidence

The tenants broke the one year lease after only one month in the rental unit, claiming that they were told that it was a non-smoking unit only to find that the downstairs tenants smoked and as a result the applicant suffered extreme asthma attacks.

The tenants testified that:

- She the female tenant is very asthmatic and so their number one issue when renting is to ensure that it's a non-smoking building.
- On at least four occasions the landlord told her it was a non-smoking building.
- Upon moving into the rental unit, they discovered that the downstairs tenants were smoking.
- As a result of the smoke she suffered extreme asthma attacks to the point where she could not stay in the rental unit.
- They therefore gave the landlord notice that they would be vacating at the end of September 2009 and did so.

The tenants are therefore asking that they be released from the lease without penalty, and since it is their belief that the landlord breached a material term of tenancy agreement, they want to be compensated for time spent out of the rental unit and they want the return of the full security deposit, a total claim of \$1200.00.

The landlord testified that:

- Neither of the tenants was ever told that the building was a non-smoking building.
- The tenants had approached him after signing the tenancy agreement and requested that they be allowed to back out of the tenancy due to financial issues.
- The tenants later decided to move into the rental unit and did so on September 1-3.

- Approximately September 8 or 9 the downstairs tenant informed him that one of her guests at a party, had smoked a marijuana cigarette, she apologized for this and informed the landlord that it would not happen again.
- September 13, 2009 was the first time the tenants complained about smoke and at the same time handed him the letter dated September 11 stating they would be vacating.
- This was the first time smoking was ever discussed with the tenants.
- Since this was a one year lease, and since he knew he had to mitigate his losses, he started advertising the unit for rent right away, however he was unable to re-rent the unit until halfway through November 2009 and only after reducing the rent in increments of 10% until reaching \$1200.00 per month, a difference of \$300.00 per month.
- The tenants failed to return all the keys when they vacated and as a result he had to have the locks changed. The keys were returned three days after he had the locks changed.

The landlord is therefore requesting that the tenant's application be dismissed, as he never informed them that it was a non-smoking property, and that they bear the cost of all the advertising that he did in his attempt to mitigate his losses, and any lost income that resulted from their breaking the lease. The landlord is also requesting an order that the tenants bear the cost of having the locks changed and the cost of postage paid for the dispute resolution packages.

Analysis

It is my decision that the tenants have not met the burden of proving that they were ever told that this was a non-smoking building. It is just their word against that of the

landlord. The burden of proving a claim lies with the person making the claim and when it is just that persons word against that of the other that burden of proof is not met.

The tenants also claim that because the female tenants asthma is so severe, ensuring that the building is non-smoking is their number one issue when they rent a unit; however there is nothing in the tenancy agreement about it being a non-smoking unit. If this was such an issue I would think that the tenants would ensure it was a material term of the tenancy agreement, as they argued.

Therefore it is my decision that the tenants do not have reasonable grounds to be released from the term of the tenancy without consequences.

It is my decision that the tenants are liable for any loss that was suffered by the landlord due to breaking of the lease.

When a tenant breaks a lease the landlord is required to mitigate any losses and therefore must attempt to re-rent the rental unit and it is my finding that in this case the landlord did so.

The landlord was not able to re-rent the unit until 1 1/2 months after the tenants vacated and therefore it's my decision that the tenants are liable for that lost income.

The landlord was also unable to rent the unit at the same rent and in fact had to reduce the rent by \$300.00 per month before he was able to re-rent it. Therefore over the term of the tenancy the landlord will lose a further \$2700.00 and although the tenants feel this is a penalty it is my decision that they are liable for this loss.

The tenants don't feel that they should be held liable for the \$300.00 per month because the market dropped and the rental unit was no longer worth what they had agreed to pay; however it is not the landlord's fault that the market dropped and therefore he is not required to bear the loss. Had the tenants complied with the terms of the lease he would not have suffered this loss.

It is also my decision that the tenants are liable for the advertising costs paid by the landlord. The landlord is required to mitigate his losses and therefore advertising is necessary to attempt to re-rent the unit. These are costs, again, that the landlord would not have had, had the tenants complied with the terms of the lease and therefore these costs must be borne by the tenants. The tenant stated they believe the amounts are unreasonable however these are actual costs and I do not find them to be unreasonable.

I also allow the landlords claim for re-keying the locks. This tenancy ended on September 30, 2009 and all keys should have been returned by then and since they were not it was not unreasonable for the landlord to have the locks re-keyed.

I further order that the tenants bear the \$100.00 cost of the filing fee paid by the landlord for his application for dispute resolution.

I deny the claim for postage as this is a cost of the dispute resolution process and I have no authority to award costs other than the above filing fees.



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Conclusion

Tenants application

The tenant's application is dismissed in full without leave to reapply.

Landlords application

I have allowed \$6,090.65 of the landlords claim. I therefore order that the landlord(s) may retain the full security deposit:

\$750.00

I further Order that the tenants pay to the landlord the following amount:

\$5,340.65

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 25, 2009.

Dispute Resolution Officer