DECISION

Dispute Codes MNSD, MND, MNR, FF

Introduction

This hearing dealt with an application by the tenants for a monetary order and a cross-application by the landlord for a monetary order. Both parties participated in the hearing.

Issues to be Decided

Are the tenants entitled to an award of double their security deposit?
Are the tenants entitled to recover rent paid for the month of June?
Is the landlord entitled to an award for loss of income and other damages?

Background and Evidence

The parties agreed that on or about May 23 the tenants met the landlord's agent T.T. at the rental unit, which at the time was occupied by the previous tenants, I.K. and W.S. The tenants spent several hours at the rental unit and while they had some interaction with T.T., they spent most of their time speaking with I.K. who showed them the rental unit and answered questions. The parties further agreed that a few days prior to the time the tenants viewed the rental unit, a pipe had burst in the unit causing damage to some of the walls. The tenants testified that T.T. and I.K. told them the repairs would take several weeks to complete. The tenants paid the landlord a $1,337.50 security deposit. Monthly rent was set at $2,675.00 and the tenants signed a lease which was set to run from June 1, 2009 – August 31, 2009.

The tenants testified that on Friday, June 5, they arrived at the rental unit at approximately 7:00 p.m. The tenants discovered that repairs had not been completed and that there were 2 large fans or dehumidifiers in the unit. The tenants were unable to contact the landlord until June 8 when the office was next open. On June 8 the

tenants met with an agent of the landlord, C.T., who was acting as an agent in the absence of T.T. who was out of the country. The tenants provided a form for a condition inspection and the parties went through the rental unit noting deficiencies. On that date the tenants also met with the project manager who advised that repairs would take 2-3 weeks to complete. The next day the tenants learned that the project manager had been fired. No further repairs were performed in the rental unit despite the tenants having made several complaints to the landlord regarding the condition of the unit. On June 15 the tenants sent a Mutual Agreement to End Tenancy form to T.T. through the corporate agency and asked if T.T. would consider mutually ending the tenancy. The corporate landlord declined to sign the form. On June 15 C.Y. wrote on behalf of the corporate landlord and advised that he expected the tenants to fulfill the terms of the lease agreement. That email included the following paragraph:

> We have many requests to rent the house for the summer and continue for the school term. We had turned down all the requests and we rented to you under the condition that you are okay to leave the house vacate until September, 2009 and you are not picky and understanding the fact that previous tenants except [I.K.] live in unhealthy situation such the dirty clothes were not washed for weeks, dirty dished not washed for weeks and the house was never cleaned for months (since they moved in May 1, 2009) etc. *Reproduced as written.*

The tenants continued to complain about the condition of the rental unit and on June 23 A.L. wrote an email on behalf of the corporate landlord which contained the following paragraph:

> Since you are trouble-makers we are giving you ONE MONTH NOTICE TO VACATE THE PREMISES> However, we will re-rent the house for July 1, 2009. *Reproduced as written.*

The tenants accepted this as a termination of their tenancy and substantially vacated the rental unit by the end of June. On July 3 A.L. sent an email on behalf of the landlord, excerpts from which are below:

> We are giving you final notice to ... Remove all junk ... You did not clean the premises and we had our cleaners cleaned the premises after you moved your furnitures. In order to avoid further charges you must remove

> all the above-mentioned items ... by July 6, 2009 before we call in our garbage disposal company ... to remove them ...WE DO NOT WANT YOU AND THE TROUBLE-MAKER, [W.S.], COME BACK TO THE PREMISES if so we will charge you for "Trespassing" and call police to arrest you for "Breaking and Entering" if any items are missing from the premises. We and our new tenants want that b***** out of our sight and out of our area. *Reproduced as written.*

The tenants testified that they had to leave some of their belongings behind as they were unable to remove them by July 6 and did not wish to be charged with criminal trespass.

On or about September 18 the tenants sent their forwarding address in writing to the address of the corporate landlord and marked "Attn: [T.T.]."

The tenants seek an award of double their security deposit and recovery of the rent paid for June as well as recovery of the filing fee paid to bring their application.

The landlord's agent T.T. represented the landlord and testified that he did not receive the forwarding address until he returned from his overseas trip on October 28. T.T. claimed that because the letter was sent to his attention, no one else in his office could open the letter.

The landlord took the position that the tenants terminated the tenancy by abandoning the premises and caused him to suffer a loss of income for July 1-15 as he was unable to re-rent the unit until July 16. One of the new tenants, S.M., testified that he moved into the unit on or about July 5 but did not start paying rent until July 16. T.T. testified that the tenant K.B. gave the previous tenant, W.S., permission to leave his belongings as well as garbage in and around the rental unit and that the tenants should be responsible for cleaning the unit and removing the garbage that the previous tenants W.S. and I.K. failed to remove. K.B. testified that she gave W.S. permission to leave several boxes in the storage shed but did not give permission for him to leave any belongings or garbage in or around the unit nor did she tell him or I.K. that they would not need to clean the unit. Both the tenants and T.T. provided photographs of the unit showing the condition of the unit before the tenancy, during the tenancy, after the

tenancy and during the tenancy of S.M. and his roommates. T.T. testified that he had to pay the new tenants to clean and repaint the unit and reimburse them for the cost of changing the locks when the tenants failed to return the keys to the unit. T.T. claimed that the tenants had been given keys to the outer doors as well as to the interior doors, each bedroom in the unit having a lock. The tenants acknowledged that they failed to return the keys to the outer doors but denied having been given keys to interior doors. T.T. testified that he had to replace the locks on the interior doors because of the tenants' failure to return the keys. Both the tenants as well as the new tenant S.M. expressed surprise that there were locks on the interior doors and all three testified that the doorknobs had been falling off. S.M. testified that while he knew the doorknobs had been replaced, he was unaware that any of his roommates had been given keys as was claimed by T.T.

T.T. testified that he incurred costs when advertising and showing the rental unit and further expense when he replaced windows in the bathroom and in the attic. The tenants provided a photograph taken on May 23 which shows that the window in the attic was not in place, but leaning against the wall. The tenants testified that they left the window in the same place when they left the unit. T.T. testified that his contractor may have briefly taken the window out prior to the time the tenants took the May 23 photograph, but he was sure the contractor replaced the window and the tenants removed it again later. T.T. pointed out that the condition inspection report from June 8 states that the window is OK. The tenants testified that they originally wrote that the window had popped out but that the agent C.T. showed them it could be placed back in the frame so the tenant K.B. crossed out the words "popped out" and wrote that the window was OK. T.T. brought the original copy of the condition inspection report to the hearing and upon inspection, it shows that the words "popped out" have been crossed out. T.T. testified that the bathroom window also had to be replaced as it was inoperable. The tenants pointed out that the condition inspection report records that the bathroom window was stuck open.

The landlord seeks to recover loss of income for July 1-15, and the cost of changing locks, cleaning the unit, disposing of garbage, repainting, advertising and replacing the

attic and bathroom windows. The landlord also seeks liquidated damages under the terms of the tenancy agreement as he takes the position that the tenants broke the fixed term lease. The landlord also seeks to recover the cost of the filing fee.

Analysis

First addressing the issue of the security deposit, Section 38(1) of the Act provides that the landlord must return the security deposit or apply for dispute resolution within 15 days after the later of the end of the tenancy and the date the forwarding address is received in writing. I do not accept the landlord's argument that because T.T. was not in the office until October 28, the mail containing the forwarding address could not be opened. There is no evidence to show that the envelope was marked personal and confidential and it was sent to T.T. at the corporate address, which is the address provided on the tenancy agreement. Part of the business of this corporate landlord is the management of property and it is the responsibility of the landlord to ensure that the management of properties continues in the extended absences of its agents. In this case, it appears that T.T. was out of the country from early June to late October. It is inconceivable to me that a professional organization would allow its business to sit untended for 5 months. I find no reason why the landlord could not have appointed someone to deal with T.T.'s mail, particularly as there is no indication that the mail in question was in any way confidential, as the landlord clearly appointed someone to deal with the property in all other respects during T.T.'s absence. For these reasons I find that the landlord received the forwarding address on September 23, 5 days after the tenants mailed the letter. I find the landlord failed to repay the security deposit or make an application for dispute resolution within 15 days of receiving the tenants' forwarding address and is therefore liable under section 38(6) which provides that the landlord must pay the tenants double the amount of the security deposit. I award the tenants $2,675.00.

The *Residential Tenancy Act* provides a number of ways in which parties may end a tenancy. Tenants may end a tenancy by giving the landlord notice in writing, the landlord may give the tenants a notice to end tenancy in the approved form or the parties may mutually agree to end the tenancy. Although the tenants sought to obtain

the landlord's consent to mutually end the tenancy, the landlord did not grant that consent. Instead, in the email dated June 23 the landlord ordered the tenants to vacate the rental unit and advised that the unit would be re-rented on July 1. Although this is not one of the means of ending a tenancy under the Act, it is clear that the landlord in this case had little regard for his obligations under the Act. I find that the landlord ended the tenancy, albeit illegally, in the June 23 email and find that the landlord is thereby estopped from claiming loss of rental income for the following month. I do not accept that the landlord stated in the email that the unit would be re-rented on July 1 as a means of expressing that he meant to mitigate his losses. If this were the case, the landlord could easily have stated that attempts would be made to re-rent as soon as the unit was vacant. I find that the email clearly advises the tenants that the tenancy would end on June 30. Because the landlord ended the tenancy, the liquidated damages clause is not triggered. The landlord's claims for loss of income, advertising and liquidated damages are dismissed.

The tenants contracted to rent a house with multiple bedrooms and two bathrooms. When they took possession of the unit, the bathroom in the basement of the rental unit was not usable. I have arrived at this conclusion after having examined the photographs provided by the parties and considering the fact that the landlord replaced the shower enclosure for the new tenants, which I find to be an admission that the bathroom was unable to be used in its current condition. The photographs show that not only had the bathroom not been cleaned for a considerable period of time, but the shower area was so excessively rusty and the walls falling apart, that use of the bathroom would pose a hazard. The landlord completely replaced the flooring in the lower floor for the new tenants, as the new tenants had complained that the area was not liveable. S.M. testified that the area downstairs could not be used before the renovations were made. While T.T. characterized these improvements as renovations and not repairs, it is clear that the downstairs area could not be used for its intended purpose. T.T. claimed to have had little interaction with the tenants on May 23 when they were viewing the unit, permitting I.K. to show the unit and answer questions. I find that by permitting I.K. to answer questions and not ensuring that the answers given were accurate, T.T. made I.K. his *de facto* agent and is bound by I.K.'s representations

to the tenants. I find that I.K. made representations to the tenants that the repairs to the unit would be more extensive than what T.T. intended to perform and that the tenants reasonably expected that repairs would be made to the lower floor of the unit. The tenants also had to live with the wall of one of the bedrooms on the upper floor having been dismantled as this was the room in which the pipe burst. It seems that repairs to this bedroom wall were not made during the tenancy, rendering that bedroom unusable as well. T.T. argued that repairs to the unit were undertaken by the insurance company and that the insurance company's decision to not complete the work was out of his control. I accept that T.T. had little control over the actions of the insurance company, but this does not relieve the landlord of the obligation to provide a rental unit which is suitable for occupation and to provide what he was contractually obligated to provide, namely a home with two floors and two bathrooms, all of which may be utilized for their intended purpose. It was open to the landlord to choose not to re-rent the unit until repairs had been completed, but the landlord opted to re-rent immediately and thereby assumed the risk that he would not be able to fulfill his contractual obligations due to the work which would be done by the third party insurance company.

Sections 32(1) and (5) of the Act provide as follows:

32(1) A landlord must provide and maintain residential property in a state of decoration and repair that

32(1)(a) complies with the health, safety and housing standards required by law, and

32(1)(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

32(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

Although the landlord argued that the tenants were able to view the rental unit and see that it was in an unclean and dilapidated condition, section 32(5) of the Act obligates the landlord to provide the rental unit in a state which is suitable for occupation regardless of whether the tenants were aware at the outset of the tenancy that the landlord was breaching that obligation. I do not accept that K.B. gave W.S. permission to store his

belongings and garbage in and around the rental unit other than to store 3 boxes in the shed nor do I accept that K.B. gave the previous tenants permission to vacate without having cleaned the rental unit. K.B. denied having given such permission and as there is no direct testimony from W.S. to contradict her testimony, I accept her testimony in full on this point. I find that the landlord failed to fulfill his contractual obligations and further failed to provide the rental unit in a condition which made it suitable for occupation. However, I note that the tenants were able to live in the rental unit for several weeks in June and I find that some occupational rent should be paid for that period. I find that $750.00 is a reasonable amount of rent to have paid for the weeks in which the tenants were able to occupy part of the rental unit. The tenants paid the landlord $2,675.00 in rent for the month of June. I award the landlord to return to the tenants $1,925.00 of the rent paid for that month.

I dismiss the landlord's claims for cleaning, painting and garbage disposal as I find that the cleaning, damage to walls and garbage left in and around the unit are attributable to the previous tenants. In the email of June 15 the landlord's agent acknowledged that the rental unit was unclean and garbage of the previous tenants was present at the outset of the tenancy. While the tenants acknowledged that they left some items behind, the landlord has been unable to prove what those items were or that any cost can be directly attributed to removal of the tenants' belongings. I note that the landlord provided photographs of items allegedly left behind by the tenants, but the tenants were able to prove that these items are currently in their possession. I find that the landlord's photographs were taken before the tenants had completely vacated the rental unit and are therefore unreliable to prove what was left behind at the end of the tenancy. Further, the landlord illegally ended the tenancy with only 7 days notice and I find that the tenants made every effort to comply with the landlord's timeframe for vacating the unit. The landlord's unprofessional and abusive email of July 3 in which the tenants were threatened with criminal charges if they returned to the rental unit prevented the tenants from completely removing their belongings and the landlord must therefore bear the cost of removing any belongings which were left behind.

I dismiss the landlord's claim for the cost of replacing windows in the attic and bathroom. I find that the condition inspection report shows that originally, the attic window was "popped out" which suggests that it had been removed at some point prior to the time the condition inspection report was completed on June 8. I find that the bathroom window was stuck in an open position at the time the tenants moved in. There is no evidence showing that the tenants caused any damage whatsoever to these windows and T.T.'s testimony suggests that his contractor may have removed the window in the attic.

As the tenants have acknowledged that they did not return the keys to the rental unit, I find that the landlord is entitled to recover the cost of replacing the locks on the exterior doors. I award the landlord $116.55. I dismiss the landlord's claim for the cost of replacing locks on the interior doors as the testimony of both the tenants and S.M. shows that the doorknobs were in need of attention in any event. Further, I am not persuaded that the landlord ever issued keys for the interior doors to the tenants.

Both parties seek to recover the filing fees paid to bring their applications. As the tenants have been substantially successful, I find that they are entitled to recover the filing fee and I award them $50.00. The landlord has been substantially unsuccessful and I find it appropriate that he bear the cost of his own filing fee. The landlord's claim for the recovery of the filing fee is dismissed.

I note that the landlord failed to perform a condition inspection at the end of the tenancy and generate a condition inspection report. Although T.T. claims that the letter advising the tenants that the "checkout" time was 1:00 on June 30, the landlord did not appear to have given the tenants an opportunity to schedule a condition inspection to be completed together with the landlord as is required under section 35 of the Act. The landlord has therefore extinguished any claim against the security deposit. However, this does not prevent the landlord from making a claim for damage as he has done. The awards made to the parties will be set off as against each other and a single order granted.

Conclusion

The tenants have been awarded $4,650.00 which represents $2,675.00 as double the security deposit, $1,925.00 in rent recovery for June and the $50.00 filing fee. The landlord has been awarded $116.55 as the cost of changing the exterior locks. Setting off the awards as against each other leaves a balance of $4,533.45 owing to the tenants. I grant the tenants a monetary order under section 67 for $4,533.45. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Dated: April 06, 2010