DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with cross applications. The landlord applied for a Monetary Order for damages or loss under the Act, regulations or tenancy agreement; retention of the security deposit and recovery of the filing fee. The tenants applied for return of double their security deposit and recovery of the filing fee. Both parties appeared at the hearing and were provided the opportunity to be heard.

At the commencement of the hearing, I heard that the landlord served the Landlord's Application for Dispute Resolution upon the tenants on December 19, 2009 which is more than three days after making the application. However, the tenants appeared at the hearing and were prepared to deal with the issues raised by the landlord; therefore, I proceeded to hear the landlord's application. I also heard that the landlord mailed the landlord's evidence to the tenants at one tenant's place of employment on an unspecified date and the tenants claimed they did not receive the landlord's evidence. The landlord's evidence, which comprised of a tenancy agreement, addendum to the tenant agreement, condition inspection report, and photographs of walls and floors in the rental unit were described to the tenants during the hearing and I permitted the tenants to comment on the evidence; therefore, I have considered the evidence in making my decision.

The landlord confirmed receiving the tenant's Application for Dispute Resolution but that the evidence was late. The landlord responded to the tenants submissions during the hearing and I accepted the tenants' evidence in reaching this decision.

Issues(s) to be Decided

1. Is the landlord entitled to loss of rent for the months of December 2009, January 2010 and February 2010?
2. Are the tenants entitled to return of double the security deposit?
3. Return or retention of the security deposit and Monetary Order.

Background and Evidence

The parties provided undisputed evidence as follows. The one-year fixed term tenancy commenced March 1, 2009. The tenants paid a $650.00 security deposit on February 11, 2009. The tenants were required to pay rent of $1,300.00 on the 1st day of every month. The tenants and a landlord's agent performed a move-in inspection together and a condition inspection report was prepared. The tenants delivered a letter to the landlord's wife on October 20, 2009 expressing their desire to end the tenancy early. The letter indicated the tenants could end the tenancy November 28, 2009 or December 2, 2009 or whatever date worked for the landlord. The October 20, 2009 letter resulted in a discussion between the landlord and tenants approximately one week later. The tenants vacated the rental unit November 29, 2009. The landlord performed a move-out inspection without the tenants on December 5, 2009 and mailed it to the tenants. On December 12, 2009 the tenants provided the landlord with their forwarding address. On December 19, 2009 the parties met at the rental unit for purpose of inspecting the rental unit. The landlord did not prepare a new inspection report to reflect the inspection that took place on December 19, 2009.

Landlord's application

In making the landlord's application on December 9, 2009, the landlord submitted he lost rent for the months of December 2009 through February 2010. At the hearing, the landlord was asked when he re-rented the unit to which he replied February 1, 2010. When the landlord was informed that he could not claim loss of rent for a month for which he received rent, the landlord expanded his testimony to state that he entered into a new tenancy agreement on February 1, 2010 to commence March 1, 2010. The landlord was asked about the advertising efforts he made to re-rent the unit to which the

landlord replied his agent advertised online. The landlord attributed the lack of interest in the rental unit due to a slow winter rental market. Upon enquiry, the landlord acknowledged that he has tried to sell the house and has been trying to sell it for quite some time. The landlord was of the position that he should not have to bear the loss of rental income because the tenants ended their fixed term tenancy early.

In addition to loss of rent, the landlord also requested compensation of $300.00 for scratches in the hardwood flooring, a stain in the carpet and damage to two walls. The landlord has not made the repairs to these items, but the damage has devalued the property.

In support of the landlord's claims, the landlord included a copy of the tenancy agreement and the addendum signed by the parties on February 11, 2009. The addendum was read to the tenants during the hearing and the tenants recall signing such a document. The addendum provides for the following:

> Should the tenant(s) end the fixed term lease early, both the landlord and tenant(s) agree to the following terms:
>
> 1. The landlord will make every effort to find a new tenant to rent the property so as to mitigate their losses.
> 2. The tenant(s) will be responsible for the rent and utilities until a suitable tenant can be found.
> 3. The tenant(s) will be responsible for the cost incurred by the owner to place a new tenant ($1,300.00).

The landlord's photographs show scratches on the living room floor, a slightly darker area on a carpet, dirty and scuffed walls and a toilet paper holder pulled out of the wall.

In response to the landlord's claim for loss of rent, the tenants submitted that during their discussion with the landlord at the end of October 2009 the tenants told the

landlord of their pending purchase of a new home and enquired about ending their tenancy early. The tenants state their possession date was very flexible as the purchase was still under negotiation and the vendors had indicated a willingness to transfer the property at a later date. The tenants claim the landlord appeared happy for the tenants that they were buying their own house and agreed November 30, 2009 was be an acceptable date to end the tenancy. The tenants also claim the female tenant's mother was looking for a new home and the landlord was asked about a sublet; however, they claim the landlord was not interested in a sublet as the landlord advised them he was selling the rental unit anyways.

When the tenants were vacating the rental unit they gave the keys to the landlord's wife, who had arrived at the rental unit. The landlord's wife advised the tenants the landlord was not available for an inspection of the rental unit for a week. The tenants claim that upon receiving the move-out inspection in the mail they contacted the landlord to inspect the unit together.

The tenants submitted a written statement of a witness who present during the move-out inspection. The witness claims she asked the landlord about giving the tenants permission to end the lease early and about the tenants enquiring about a sublet. The witness states the landlord stated to the witness that he had allowed the tenants to end the tenancy early and that he was not interested in a sublet because he was selling the house. The witness claims the tenants vacated November 28, 2010 and the tenants met the landlord at the rental unit on December 12, 2009.

The tenants also provided a written statement from the tenant's mother who stated she was willing to sublet the rental unit and that it was her understanding the tenants were to speak to the landlord about the possibility of subletting the rental unit; however, the tenant later told her that the landlord was not interested in a sublet as he was selling the house.

With respect to the landlord's claim for damages, the tenant acknowledged that the floor was scuffed from the couch moving when his young daughter pushed it but the tenant claimed they had felt pads under the feet of the couch. The tenants acknowledged that one wall required cleaning and another wall likely required repainting. The tenants claim no knowledge of a carpet stain and that the carpets were not cleaned before they moved in.

Tenants' application

In making the tenant's application on December 15, 2009 the tenants submitted that the parties had agreed the end of tenancy was December 1, 2009. The tenants are claiming return of double the security deposit on the basis that the landlord did not conduct a move-out inspection or provide them with a detailed list of damages within 15 days of the tenancy ending.

Analysis

Upon review of all of the evidence before me, I make the following analysis and findings.

Loss of rent

Section 44 of the Act provides for the ways a tenancy ends. A tenancy ends when the tenants vacate the rental unit. I am satisfied the tenants vacated and returned the keys to the rental unit by November 29, 2009 and the tenancy ended at that time. Unless parties mutually agree to end the tenancy early, where a tenant ends a fixed term earlier than the expiry date the tenant will be considered in breach of the tenancy agreement and may be liable for losses incurred by the landlord.

Although there was some indication the parties may have mutually agreed to end the tenancy early, there is also evidence that the tenants were aware that they would be

held responsible for loss of rent in the event the landlord could not rent the unit under the addendum.

Section 7 of the Act provides that a party may recover losses incurred as a result of a violation of the Act, regulations or tenancy agreement by the other party; however, the party that claims the loss must show that every reasonable step was taken to minimize the loss. Terms 1. and 2. of the addendum that was described previously in this decision are consistent with section 7 of the Act. I do not find Term 3 of the addendum to be sufficiently clear to be enforceable, nor did the landlord provide evidence of expenses to re-rent the unit.

In considering whether the landlord is entitled to loss of rent it is important to note that the party making the claim has the burden to prove the claim. In this case, the landlord has the burden to show that he incurred a loss as a result of a violation of the tenancy agreement by the tenants and that the landlord made reasonable efforts to minimize the loss.

I have dismissed the landlord's request for loss of rent for December 2009 through February 2010 for the following reasons. The landlord did not provide a copy of the tenancy agreement entered into with the new tenant to establish when the new tenancy was formed and commenced or the rental rate. The landlord did not provide documentary evidence or sufficiently detailed information to show the advertising efforts made to re-rent the unit. Therefore, I have not been satisfied that the landlord incurred a loss of rent for all three months that he claimed or that the landlord made every reasonable effort to minimize the loss of rent.

With respect to the landlord's claim for damage to the rental unit, I am satisfied there are scratches to the flooring and dirt and scuffs on the walls that were caused during the tenancy. A tenant is liable to repair damage the tenant, or a person permitted on the property, caused during the tenancy. Damage does not include normal wear and tear.

I do not find the scratches in the floor to be normal wear and tear. I also find the tenants liable to compensate the landlord for cleaning and repainting of the walls. I find the landlord's estimate of $300.00 for devaluation to the flooring and walls to be reasonable and I award that amount to the landlord.

Tenants' application

Section 38(1) of the Act provides that a landlord must return the security deposit to the tenant or make an application to retain the security deposit within 15 days of the tenancy ending or upon receiving the tenant's forwarding address in writing. If the landlord does not comply with section 38(1) of the Act, then section 38(6) applies and the security deposit is doubled.

The landlord made this application within 15 of the tenancy ending and served the application upon the tenants within 15 days of receiving the tenants' forwarding address. Therefore, I do not find the landlord violated section 38(1) of the Act and the landlord is not obligated to pay the tenants double the security deposit. I am satisfied the landlord knew the tenancy was going to end at the end of November 2009 and did not set up a time for a move-out inspection together and when the parties did participate in an inspection together, the landlord did not prepare a move-out report. Therefore, I find the tenants are entitled to recover the amount of their security deposit of $650.00.

Monetary Order

I have found the tenants are entitled to recover their $650.00 security deposit from the landlord. I also find the landlord is entitled to recover $300.00 from the tenants for damage to the rental unit. I offset these two awards and I ORDER the landlord to pay the tenants the net amount of $350.00 forthwith. I provide the tenants with a Monetary Order for the net amount of $350.00 to serve upon the landlord. If the landlord does not pay the Monetary Order the tenants may enforce it in Provincial Court (Small Claims) as an Order of the court.

I find both parties were partially successful in their applications and must bear the costs of making their respective applications. Therefore, I have made no award for recovery of the filing fee.

Conclusion

Both parties were partially successful in their respective applications and the landlord has been ordered to pay the tenants $350.00 forthwith. The tenants have been provided a Monetary Order in the amount of $350.00 to serve upon the landlord.

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: May 12, 2010.

Dispute Resolution Officer