

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, OLC, O, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution. The landlord has applied for a monetary order. The tenants have applied for a monetary order and an order to have the landlord comply with the *Residential Tenancy Act (Act)*, regulation or tenancy agreement.

The hearing was conducted via teleconference and was attended by the landlord and both tenants.

At the outset of the hearing I noted the tenants have moved out of the rental unit prior to the hearing. I asked the tenant if they wished to continue to pursue the part of their application requesting an order to have the landlord comply with the *Act*, regulation or tenancy agreement.

Because the landlord was seeking unpaid rent resulting from the tenancy agreement the tenants wanted to continue with their entire application as submitted.

Issues(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for compensation for damage/cleaning of the rental unit; for all or part of the security deposit and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to sections 35, 36, 37 38, 67, and 72 of the *Act*.

In addition it must be decided if the tenants are entitled to an order to have the landlord comply with the *Act*, regulation or tenancy agreement; to a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to sections 28, 44, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord provided the following documentary evidence prior to the hearing:

- A handwritten summary of issues;
- A copy of a tenancy agreement and a 23 item addendum signed by both parties on June 29, 2009 for a 13 month fixed term tenancy starting on July 31, 2009 for a monthly rent of \$1,300.00 due on the 31st or end of each month with a security deposit of \$650.00;

- Two copies of Condition Inspection Reports – the first one submitted shows no signature by the landlord for the move in inspection and the second one submitted does have the landlord's signature for the move in inspection. The move out inspection is not signed by the tenants.
- A copy of a handwritten note asking the tenants to stop smoking in the rental unit;
- A copy of a "Caution Notice to Tenant" advising that if the tenants fail to stop smoking in the rental unit the landlord may have grounds to end the tenancy dated January 12, 2010;
- A copy of a 1 Month Notice to End Tenancy for Cause dated January 12, 2010 for an effective date of February 28, 2010 citing the tenants had engaged in an illegal activity that has or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord and the tenants have breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;
- A copy of a Mutual Agreement to End a Tenancy signed by the landlord and the tenants on January 21, 2010 with an effective date of February 28, 2010;
- A copy of a notice from the tenants dated January 31, 2010 giving the landlord one month's notice to end the tenancy with an effective date of February 28, 2010;
- Copies of letters from friends and visitors of the landlords indicating they have smelled smoke when visiting the landlord;
- A copy of a contract proposal for painting the rental unit dated April 1, 2010 in the amount of \$1,698.00;
- A copy of a receipt for carpet cleaning in the amount of \$270.10 dated March 8, 2010;
- Copies of two receipts for two air filter - one \$72.79 and the second \$222.88
- Copies of receipts for advertising the rental unit ; and
- 15 photographs of the rental unit.

The tenants have submitted the additional following documents into evidence:

- Copies of written witness statements from friends, family and a previous landlord;
- Copies of written statements from third parties confirming one of the tenant's quests (his daughter) does not consume tobacco products;
- Copies of correspondence from the tenants to the landlord from January 2010, including a request from the tenants dated January 1, 2010 to mutually end the tenancy as they have "received too many notes, numerous altercations, the yelling through the walls, threats to "come after us" and been in an uncomfortable living environment for the previous 4 months ;
- Copies of several handwritten notes from the landlord dating from August 3, 2010 up to the end of January 2010 on various issues for the tenants but primarily regarding smoking in the rental unit and telling the tenants to stop smoking in the unit; and

- Copies of 3 police reports regarding this address for police visits dating from January 12, January 15, and January 17, 2010 – requests for police visits were made by both parties.

The landlord testified that the tenants owed her rent for the month of July 2009 as she had held the rental unit for them on the promise they would pay for July at a later date. The tenants dispute that any such agreement was made.

The landlord also contends the tenants signed the tenancy agreement acknowledging they or their guests would not smoke in the rental unit and that they failed to live up to this condition and that she issued them a 1 Month Notice to End Tenancy for Cause because she felt that was a material term of the tenancy agreement.

The landlord also testified that she had signed the Mutual Agreement to End Tenancy because she was forced to because the tenants would just get worse with their smoking if she did not agree to end the tenancy.

The landlord testified that she had seen one of the tenants smoking in one of the bedrooms once when she was outside and that when she came to speak to him about it he denied. The tenant denied the event ever occurred. Other than this the landlord's testimony is that she could tell the tenants or their guests had been smoking because she and her guests could smell the smoke in her home.

The tenants deny smoking in the house and point out that some of the times the landlord had complained about the smell the people she said were smoking weren't even there. For example, she had indicated it was when one tenant's daughter was there and yet neither he nor his daughter was there the entire weekend.

The tenants noted that on the last visit from the police on January 17, 2010 the officer had spent time in the rental unit and then went upstairs to speak with the landlord and returned and told the tenants that he did not smell anything in the landlord's unit or the tenant's unit.

The landlord contends that by the time police get there the tenants had sprayed air freshener and opened windows and set up fans to dissipate the smell. The landlord noted that on some occasions the police took up to 3 hours to attend, however on the January 17, 2010 visit the police attended within ½ hour of the tenant's calling the police.

At the end of the tenancy the tenants indicate they had completed about 75% of a walk through for a condition inspection on February 28, 2010 and the landlord was getting upset so they ended it and agreed to come back in a couple of days.

Both parties agreed the landlord had agreed in writing to return the security deposit less \$100.00. The landlord, however, found that after she fully inspected the rental unit, she

determined it was going to take additional work, including painting, carpet cleaning and air filtration due the smell of smoke.

The landlord contends the inspection was completed on March 2, 2010 and that the tenant had still not removed everything at that time and the rental unit required cleaning.

The tenants testified that they had suffered a loss of quiet enjoyment because of the harassing notes and messages posted on the door and slid under the door and sometimes made by phone calls. The landlord denies any excessive harassment, she just wanted them to stop smoking.

The tenants also noted that the landlord banged on and yelled through walls not only when the tenants were there alone but also when they had friends and family or other guests. The tenants are seeking \$8,500.00 in damages roughly based on the total amount of rent paid for the duration of the tenancy.

Analysis

Section 44 of the *Act* outlines that a tenancy may end by a written mutual agreement, by a landlord's notice or by a tenant's notice. In the case of a fixed term tenancy, Section 45 states the tenant may only provide notice to end the tenancy for the end date of the fixed term or if the landlord has failed to comply with a material term of the tenancy agreement.

Section 47 of the *Act* allows a landlord to end a tenancy by issuing a 1 Month Notice to End a Tenancy for Cause for breaching a material term of the tenancy. In this case the landlord initiated the end of the tenancy by issuing the 1 Month Notice to End the Tenancy on January 12, 2010 with an effective date of February 28, 2010.

The tenant's did not file an Application for Dispute Resolution to request cancelling this notice to end tenancy within 10 days of receipt of the notice and therefore are deemed to have accepted the tenancy would be ending on February 28, 2010. The subsequent mutual agreement and tenants' notice to end the tenancy reinforce the end of the tenancy that the landlord had already initiated.

As the landlord initiated the end of the fixed term tenancy and subsequently signed a mutual agreement to end the tenancy she cannot now claim any lost rent for April May and June or to the end of the fixed term or for advertising the rental unit. I therefore dismiss this portion of the landlord's application.

In the case of verbal agreements, I find that where verbal terms are clear and both the landlord and tenants agree on the interpretation, there is no reason why such terms cannot be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes as they arise.

As such, the landlord's claim for rent for July 2009 is dismissed as there is no written agreements and the tenant dispute any such agreement to pay rent for July 2009 to hold the rental unit was ever made.

In relation to cleaning and damages to the rental unit, I find the landlord has failed to provide any evidence to substantiate her claim that the tenant's or their guests smoked in the rental unit. I also find, in part based on the submission of the police report that indicates there was no smell of smoke found by the officer in attendance, the landlord's testimony regarding the smell of smoke to be unreliable.

As a result, I dismiss the portion of the landlord's application for air filters and cleaner, painting, and drapery cleaning. As to the landlord's claim for damages to her new stove, she provided no testimony or evidence to substantiate the \$400.00 claim; I dismiss this portion of the landlord's application.

Based partly on the agreement the parties had to deduct \$100.00 from the security deposit and the photographic evidence submitted by the landlord, I accept the landlord's claim of \$200.00 for 8 hours of cleaning.

In addition, I find the landlord agreed to extend the tenancy into the first couple of days of March 2010 when the condition inspection was not completed on February 28, 2010 and therefore is not entitled to rent for March 2010.

In relation to the tenant's application to have the landlord comply with the *Act*, regulation or tenancy agreement which the tenants took to mean a request to end the tenancy agreement, as the tenants moved out based initially on the landlord's notice to end the tenancy for cause, I find no issue to have the landlord comply with and therefore I dismiss this portion of their application.

Section 28 of the *Act* entitles the tenant to quiet enjoyment including the rights to reasonable privacy; freedom from unreasonable disturbance; and exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with Section 29.

The tenants have provided substantial documentation of the landlord's notes that she has provided to them during the course of the tenancy and particularly since January 2010. In each of the notes the landlord is adamant the tenants and their guests are smoking. I find the tone of the notes to be aggressive, confrontational, and escalating.

The notes started being delivered to the tenants within 3 days of starting the tenancy and do not appear to have let up at all during the tenancy. Based on the notes alone I accept the tenants were deprived of their right to reasonable privacy and freedom from unreasonable disturbance.

As to the value of the loss of quiet enjoyment, the tenants are requesting compensation in the amount of \$8,500.00. Section 7 of the *Act* requires that a tenant (or landlord) who

claims compensation for damage or loss that results from the landlord's (or tenant's) non-compliance with the *Act* must do whatever is reasonable to minimize the damage or loss.

I find the tenants did attempt to mitigate their loss of quiet enjoyment by attempting to mutually end the tenancy agreement and providing the landlord with a letter outlining their specific concerns related to the loss. However, while the loss of quiet enjoyment did occur during the entire tenancy, the tenants have failed to show that they had tried to mitigate these losses prior to January 1, 2010.

Having said this, from the evidence provided, the landlord's ongoing documentary harassment increased after the tenants provided her with their letter dated January 1, 2010 with 20 new notes provided by the landlord to the tenants in addition to the caution notice and notice to end tenancy.

Conclusion

I find that the tenants are entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **\$3,150.00** comprised of \$2,600.00 compensation for loss of quiet enjoyment less \$200.00 for cleaning plus \$650.00 return of the security deposit and the \$100.00 fee paid by the tenants for this application.

This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

As the landlord was mostly unsuccessful in her application I dismiss the portion of her application for recovery of the filing fee for her application.

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: June 22, 2010.

Dispute Resolution Officer