Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes OPR, OPC, CNC, MND, MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution. The landlords have applied for an order of possession and for a monetary order. The tenants have applied to cancel a notice to end tenancy and for a monetary order.

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

At the outset of the hearing the tenants confirmed that they vacated the rental unit by August 31, 2010 with the exception of cleaning and attending a move out inspection with the landlord on September 1, 2010.

The landlord testified that other tenants in the building submitted statements that these tenants were in the residential property on numerous occasions since the start of September and had never returned the keys. The tenants testified they left the keys in the kitchen.

Upon review of the statements submitted one of the tenants simply states that she "can account for the couple's comings and goings on September 1, 2 and 4th". Another tenant submits "on the morning of September 4th, 2010, I again heard footsteps upstairs".

Based on these written submissions, I am not persuaded that it was these tenants who may or may not have been in the residential property after September 1, 2010, as such, I find the tenancy ended on August 31, 2010 when the tenants vacated the rental unit and that this is acknowledged by and when the landlord attended a move out inspection on September 1, 2010.

As a result, I find there is no need for the tenant's to seek to cancel the notice to end tenancy and I amend their application to exclude this matter. In addition, I find there is no need for the landlords to seek an order of possession, as they already have

possession of the rental unit; I therefore amend the landlords' application to exclude the matters related to an order of possession.

The tenants submitted a DVD of a recording of the interactions between the landlord, the tenants and the tenants of the rental unit below the dispute unit during the move out inspection. The landlord asserts that this should not be used as evidence as it was illegal to obtain as they had not provided consent. The tenants testified that they had notified everyone during the taping and no one objected.

Residential Tenancy Branch Rules of Procedure do not specifically prohibit the use of audio recordings but does address the matter in a couple of areas. First, Rule #4.1 instructs respondents who intend to dispute an application to submit "copies of all available documents, photographs, video or audio tape evidence...."

In addition, Rule 10.3 directs the Dispute Resolution Officer to consider preliminary matters such as "summoning a witness or documents or photographs, video or audio tape evidence..." There is no other direction provided and the landlord did not submit any evidence that the practice of recording a conversation or interaction between two parties requires the consent of both parties by law.

As such, I accept the tenants' submission of the DVD copy of the audio recording of the move out inspection as valid and acceptable evidence in this proceeding.

Issues(s) to be Decided

The issues to be decided are whether the landlords are entitled to a monetary order for unpaid rent and utilities; for damage to the rental unit and to a rental unit below the tenants; 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 38, 67, and 72 of the *Residential Tenancy Act (Act).*

In addition it must be decided whether the tenants are entitled to a monetary order for loss of quiet enjoyment; for moving expenses; costs associated with the use of paper diapers; for all or part of the security deposit and to recover the filing fee from the landlords for the cost of the Application for Dispute Resolution, pursuant to sections 28, 38, 67, and 72 of the *Act.*

Background and Evidence

The landlord submitted a copy of tenancy agreement signed by the parties on May 20, 2010 for a 10 month fixed term tenancy beginning on June 15, 2010 for a monthly rent of $2,200.00 due on the 15th of the month, a security deposit of $1,100.00 was paid.

The tenancy agreement stipulates that water, electricity, and heat are included in the rent. Despite not being indicated in the additional terms section of the tenancy agreement the landlord has submitted an addendum to the tenancy agreement that states utilities are $100.00 per month and include hydro and gas only.

The tenants submitted into evidence a copy of a 1 Month Notice to End Tenancy for Cause issued by the landlords on July 30, 2010 for an effective vacancy date of August 31, 2010 citing the tenants significantly interfered with or unreasonably disturbed another occupant of the landlord and the tenants seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

The landlords issued this notice to end tenancy as a result of other tenants' complaints regarding the noise these tenants were causing that was disturbing other tenants and includes complaints that because the children were not in daycare they were causing an "intolerable noise level". The tenants submitted a letter of confirmation dated August 5, 2010 from a local daycare confirming both children have been in a five day a week daycare program since June 1, 2010.

The landlords have submitted written statements from these other tenants that state because of the noise levels the other tenants on the property were all suffering from sleep deprivation and some even moved out of the property during this time frame. Although in the hearing the female landlord noted that two of the tenants left the property as they were on vacation.

The landlords also allege, through the other tenants in the rental unit below, these tenants did not take out their garbage or remove fecal matter from diapers prior to putting the diapers into the laundry, causing an unbearable smell in the residential property. The landlord stated they have pictures to confirm this, but these were not submitted into evidence. The tenants testified that they followed manufacturers cleaning instructions including removing all fecal matter and pre-washing diapers prior to a full cleaning in the washing machine.

The landlord testified that he had the tenants from the rental unit below, who had complained to him about the situation try to resolve the matter themselves. The

statements submitted by the landlord from these other tenants indicated that every time they approached the male tenant he was unapproachable and rude and the noise became more unbearable after they had spoken.

Analysis

In making a claim for compensation for loss or damages resulting from one party's breach of the *Act*, regulation or tenancy agreement the party making the claim must provide sufficient evidence to support the following four point test:

1. That a loss or damage exists;
2. The loss or damage results from a violation of the *Act*, regulation or tenancy agreement;
3. The establishment of the value of the loss or damage; and
4. Steps taken by the party to mitigate any damage or loss.

In relation to the landlords' claim for $100.00 from the tenants for the payment of utilities for the period of August 15 to September 14, 2010, Section 6(3) of the *Act* stipulates a term in a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it.
As the tenancy agreement between these two parties stipulates, in one section, that utilities such as water, electricity and heat are included in the rental and then in the addendum the landlord expects $100.00 for electricity and gas, I find that the tenancy agreement is written in a confusing manner.

By this noted wording I find this term in the tenancy agreement is not enforceable and therefore the landlords have suffered no loss or damage as a result of a violation of the *Act*, regulation or tenancy agreement and dismiss this portion of the landlord's claim.

In relation to the landlord's claim for compensation resulting from damage to the rental unit below the dispute rental unit, I find the landlords have failed to provide any evidence that the water damage to the ceiling of the rental unit below was caused by the tenants or anyone permitted on the property by the tenants. In addition the landlord has failed to provide evidence to establish the value of any damage. For these reasons, I dismiss this portion of the landlords' application.

While the landlord has submitted evidence that he had a contractor install kitchen cabinetry in December 2009, the documentation submitted does not confirm whether the cabinetry included "door stoppers" as the landlord alleges are missing, I find the landlords have not provided any evidence to establish that they suffered any loss or

damage. Again, the landlord has failed to provide any evidence to establish the value of any damage and I, therefore, dismiss this portion of the landlord's claim.

I accept the male tenants' testimony that the smoke detector was removed in error and that he had returned it prior to vacating the property, and as a result the landlord has not suffered any loss or damage.

In relation to the damages to the flooring, the landlord has provided several close up photographs but does not provide any context for those photographs, such as how much of the total floor area has been affected, how was the damage cause and if that cause was through any cause other than reasonable wear and tear.

Even if the landlords had proven the damage was a result of anything more than wear and tear, they have failed to establish the value of that loss. I therefore dismiss this portion of the landlord's application.

On the matter of rent, Section 26 of the *Act* requires a tenant to pay rent when it is due under the tenancy agreement whether or not the landlord complies with the *Act*, regulations or tenancy agreement. As such, I find the tenants are responsible for rent for the period commencing on August 15, 2010 as per the tenancy agreement, in the amount of $2,200.00.

However, based on the confirmation from the tenants that their children were in a 5 day per week daycare program; the unlikelihood that a family of four with 2 small children will make sufficient noise to disturb adults to the point of sleep deprivation 24 hours per day/7 days per week; the fact the landlord provided no evidence of the claims of fecal matter in diaper that caused an odour in the residential property; and the behaviour of the tenants from the unit below during the move out inspection I accept the dispute rental unit tenants' testimony as a more accurate accounting of the events.

As the landlords provided no testimony that the tenants from the unit below were at any point acting as their agents, I find the landlords failed to intervene in a matter between two sets of tenants that resulted in the tenants of the dispute rental unit being harassed and unreasonably disturbed and therefore suffered a loss of quiet enjoyment in contravention of Section 28 of the *Act*. I also find the tenants' calculation of that value to be reasonable, in light of the impact on the tenancy.

In relation to the tenants' claim for compensation for the use of paper diapers, I find that although it may have been in response to the treatment they were receiving from the

other tenants it was a choice that they made and the landlord is not responsible for that choice, I dismiss this portion of their application.

I also find that the tenants accepted the landlords' 1 Month Notice to End Tenancy for Cause and did vacate the rental unit in accordance with that notice. Section 47 of the *Act* states a landlord may end a tenancy for cause by issuing a notice to do so with an effective date that is not earlier than one month after the date the notice is received, **and** the day before the day in the month that the rent is payable under the tenancy agreement.

As per the tenancy agreement, the day in the month the rent is payable is the 15th, which means the effective date of the end of the tenancy should have been September 14, 2010. As the tenants vacated in accordance with the landlord's inaccurate notice the tenants suffered a loss of ½ month's occupancy.

As the tenants moved out in accordance with notice to end tenancy, I find the tenants had accepted the notice and the landlord is therefore not responsible for the moving costs incurred by the tenants, I dismiss this portion of the tenant's application.

Conclusion

Based on the above, I find that the tenant is entitled to monetary compensation pursuant to Section 67 in the amount of **$3,456.45** comprised of $1,206.45 compensation owed for loss of quiet enjoyment (July 29 to August 14, 2010); $1,100.00 compensation owed for loss of occupancy (September 1 – 14, 2010); $1,100.00 for return of the security deposit; and the $50.00 fee paid by the landlord for this application.

I order the tenant may deduct $2,200.00 owe for rent that was due on August 15, 2010 in partial satisfaction of this claim. I grant a monetary order in the amount of **$1,256.45**. This order must be served on the landlords and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

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: September 22, 2010.

Dispute Resolution Officer