Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

REVIEW DECISION

Dispute Codes MNDC, FF

Introduction

This is a re-hearing of the tenants' application originally heard on May 27, 2010. The applicant was granted a monetary order and recovery of the filing fee for the cost of the application. The respondent (landlord) subsequently requested review consideration and in a decision dated July 19, 2010, a re-hearing on the matter was ordered which is before me today.

The parties appeared, gave affirmed evidence and were given the opportunity to cross examine each other on their evidence. The landlord also called a witness who was subject to cross examination by the tenants.

All evidence provided by the parties was considered with the exception of evidence received from the landlord that was not submitted nor served upon the tenants in accordance with Rule 4 of the Residential Tenancy Branch Rules of Procedure. The landlord called a witness, her brother, who testified that on or near June 25, 2010, he attended at the residence of the tenants to serve a package at his sister's request. A man answered the door and threw the envelope on the ground. The witness testified that he did not know what was in the envelope, he did not look inside the envelope, and he subsequently returned it to his sister the same day. The landlord testified that the envelope contained evidence that she intended to rely on at this hearing, and she was away for the month of July and did not have the opportunity to make another attempt at service. The tenants objected to the admissibility of that evidence. I find that the landlord had the full month of August, 2010 to serve the documentation in accordance with the Rules.

Issues(s) to be Decided

Are the tenants entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Background and Evidence

This month-to-month tenancy began on August 15, 2007 and ended on February 15, 2008. Rent in the amount of $850.00 was payable in advance on the 15th day of each month, and there are no rental arrears. On July 20, 2007 the landlord collected a security deposit from the tenants in the amount of $425.00.

The tenant testified that in July, 2007 she and her family found this unit which they could afford to rent, as the tenant had been accepted into medical school. The unit was a 2 bedroom basement suite in a building with 2 other rental units. The unit was viewed on July 20, 2007 and an application to rent the unit was completed by the tenants, but the landlord refused to complete a written tenancy agreement. She also testified that the landlord had told her that a nurse lived in the upper suite, the landlord's uncle lived in the other rental unit and that no pets or smoking was permitted in the building. Soon the tenants discovered that the uncle smoked in the unit and the tenants upstairs had 2 dogs and provided photographs to support that claim. The tenant's father had a lung disease and therefore she felt that no smoking and no pets was a material term of the tenancy. They spoke to the other tenants who confirmed that the landlord knew about the pets and the smoking. They also asked the landlord's uncle to smoke outside but he refused. When they spoke to the landlord, she denied that there were pets or that her uncle smoked.

As a result, the tenant testified that her father went to the hospital and to the doctor for allergic reactions, anti-biotics, puffers and oxygen and that they could not afford the prescriptions. He has only one functioning lung, and prescriptions would normally have cost $300.00 for about 3 months, but as a result of the smoking and pets they paid

approximately $300.00 in one month. The tenants are claiming aggravated damages for the landlord's failure to be honest about the dogs and smoking in the house and the effect that it had on his health.

In December, 2007 the tenants talked to the landlord and one of the tenants in the upper unit wherein it was agreed by all parties that the tenants could use some of the garage space to store boxes of personal items. The tenants had no storage space, and space was available in the garage, which was space that belonged to the rental unit upstairs. On the 20th of December, the landlord called the tenant stating that they had to remove all items from the garage within 24 hours or the locks would be changed, no items would be returned to them, and no reason was given. The tenant testified that she asked the tenant upstairs who replied that she did not know why the landlord took that approach; that she did not need the space but that the landlord wanted the tenants to move. To prevent losing items, the tenants put everything outside.

The tenants provided receipts of the items that were damaged as a result of being kept outside in the winter time, and testified that the items were damaged as a result of the landlord's insistence that the items be removed or they would be destroyed. The boxes had been torn open by rodents, had been rained on, and rodent feces were evident.

The tenant also testified that on January 15, 2008 the landlord locked the laundry room door and removed the tenants' mailbox from the outside of the unit. A note had been slid under the bedroom door, which is adjacent to the laundry room, a copy of which was provided in advance of the hearing and states: "Jan 15/08 This door will stay locked. The laundry room is no longer available to you. Kim"

The police were called who advised the landlord that she was not permitted to remove the mailbox, and the mail was subsequently delivered to the tenants, which included the pension cheque of one of the tenants.

On January 15, 2008 the tenants had given the landlord notice to vacate the unit on February 15, 2008, however the landlord then served the tenants the next day with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities which stated that the tenants

were in arrears $1,700.00. The tenant testified that they were only in arrears the current month, being $850.00 which was paid the same day.

The landlord testified that she had asked the tenant upstairs if the garage space could be used by the tenants, and that it was not supposed to be long-term. The tenants used it until January. She further testified that when rent had not been paid for the period of December 15, 2007 to January, 2008 she called the tenants and the father swore at her. She locked the laundry room door and slipped the note under the tenants' door. She further testified that the tenants were only allowed to do laundry one day per week and it was not their laundry day.

The landlord confirmed the evidence of the tenants that once she served the notice to end tenancy, the tenants paid the rent.

The landlord also testified that the photographs provided by the tenant are fraudulent. She stated that the photographs marked "16," "17," "18," and "19" are not of her property. Her evidence is that the grout in the tiles is a different color than the other photographs which are her property.

The landlord also testified that she never saw any dogs in any of the rental units and was unaware that the upstairs tenant had dogs. She also stated that the man in the other unit is not really her uncle, but she calls him her uncle out of respect, due to his age and their nationality and custom. She also stated that she was unaware that he smoked and denied that he ever smoked inside the unit.

Analysis

Firstly, I find it difficult to accept the evidence of the landlord that she locked the laundry room door because it was not laundry day for the tenants. The note entered into evidence that was left by the landlord clearly said that the laundry room was no longer available to the tenants.

I also find that the landlord's claim that the photographs provided by the tenant are fraudulent is not justified. When questioned about that evidence, the landlord agreed that the house in the background looked like hers, and she provided no evidence of whether the grout was different in the back area from the front or side area of the house. Further, the photographs provided by the landlord show that some areas have no grout, and the landlord failed to provide photographs depicting the entire house to substantiate her claim.

I also find that the landlord was aware that the tenants in the upper unit had pets and that the tenant in the adjoining lower level smoked. I also find that no smoking and no pets was a material term of the tenancy as far as the tenants were concerned, due to the health concerns of the father.

Further, the tenant in the upper unit, who had permitted the tenants to store items in the garage, provided a letter stating that she had permitted the use, and makes no mention of asking the tenants or the landlord to have the tenants remove those items at any time.

In order to be successful in a claim for damages, the onus is on the claiming party to establish:

1. That the loss or damage exits;
2. That the loss or damage exits as a result of the other party's negligence or failure to comply with the *Act* or tenancy agreement;
3. The amount of the loss or damage;
4. What steps the claiming party took to mitigate, or reduce such damage or loss.

I find that the tenants have established that the loss exists, and that it exists as a result of the landlord's insistence that the tenants remove those items without consulting the other tenant, thereby breaching an agreement made by the three parties. The tenants have also satisfied the third element by providing receipts that confirm part of the amount of the loss. Further, the tenants took steps to mitigate the damage or loss suffered by removing the items from the garage due to the landlord's threat of removing the items and they would not get them back.

The receipts provided by the tenants, excluding lab coats, total $2,151.49, one of which is for moving expenses from the tenants' previous address to this unit in the amount of $406.99. I find that since the tenants were moving to the new location for school, that expense would have been borne by the tenants in any event.

The tenants also provided a catalogue page showing the cost of a similar but smaller table in the amount of $349.99 for which they are claiming $650.00 for that loss. Although it is not a receipt, I accept the evidence of the tenant due to the photograph provided, that the table that was damaged is larger than the table listed in the catalogue.

With respect to the tenants' claim for aggravated damages, the question to be determined is whether or not the landlord knew, or ought to have known the extent to which the father suffered as a result of the landlord's actions, and by allowing the material term of the tenancy to be breached. I find that the landlord was aware that the dogs and smoking in the unit existed, and that the father had a lung disease and failed to acknowledge it by denying the fact that another tenant had 2 dogs and another smoked in his unit.

I find that a fair conclusion to this claim is as follows:

- $400.00 for the table
- $150.00 for the dump truck
- $947.22 for books (for which receipts have been provided)
- $300.00 for the father's medications
- $300.00 for aggravated damages

I find that the tenants have established a claim for $2,097.22 in damages. The tenants are also entitled to recovery of the $50.00 filing fee.

Conclusion

I grant the tenants an order under section 67 for the balance due of $2,147.22. This order may be filed in the Small Claims Court 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: October 13, 2010.

Dispute Resolution Officer