



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNR, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking a monetary order.

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

The tenants had provided confirmation prior to the hearing that they had not been served with notice of this hearing by the landlord but that they had found out about the hearing by contacting the Residential Tenancy Branch (RTB), who confirmed the hearing date, time and call in procedures.

The tenants submitted that the landlord mentioned in a previous hearing between the parties that they would be filing another application and so when the tenants had not heard anything they contacted the RTB. The tenants provided confirmation that the landlord was provided with a forwarding address outside of the country prior to the end of the tenancy.

The landlord confirmed that he had served the tenants at a local address they had obtained from another document the tenants had provided. Section 89 of the *Residential Tenancy Act (Act)* requires a party to serve notice of dispute application hearings in one of many ways including by sending a copy by registered mail to a forwarding address provided by the tenant.

The landlord also confirmed that no evidence was provided to the tenants, as they had received the notice of hearing documents returned in the mail and that the landlord also failed to provide any evidence to the RTB.

The tenants provided no documentary evidence prior to this hearing. As the matters addressed in this hearing were a continuation, at least in part, of matters dealt with at a previous hearing and since the tenants received confirmation of this hearing from the RTB on July 23, 2010 I find that they had sufficient time to submit any evidence to both the landlord and the RTB.

I advised both parties of some options that I would consider including: dismissal of the application; adjourning the matter to allow both parties to serve each other and the RTB with any evidentiary material; or to proceed with the hearing at this time.

I also advised both parties that if we were to proceed at this time and in order to be successful the landlord must provide sufficient evidence through verbal testimony only to establish the following 4 points:

1. That a loss or damage exists;
2. That that loss or damage results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of that loss or damage; and
4. The landlord took all reasonable steps to mitigate any of the loss or damage.

Both parties agreed to proceed with the hearing at this time.

Issues(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for lost income resulting from a violation of the *Act*, regulation or tenancy agreement; and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 45, 67, and 72 of the *Act*.

Background and Evidence

The parties agree that the tenancy began on July 1, 2009 as a 1 year fixed term tenancy due to expire on June 30, 2010 for a monthly rent of \$2,150.00 that was due on the 1st of each month and that a security deposit of \$1,075.00 had been paid.

The parties further agreed that the tenants vacated the rental unit as of March 1, 2010 and that disposition of the security deposit resulting from the ending of the tenancy had been dealt with at a previous hearing.

The tenants testified that the reason they ended the tenancy was that they had been promised many things from the landlord that never materialized and in fact resulted in some of the services agreed to being terminated. The tenants indicated they provided the landlord with a letter on January 30, 2010 stating that if these items were not corrected they would be ending the tenancy.

The tenants suggest that the items that they considered to be material terms of the tenancy agreement were the provision of a telephone line; use of a functioning security system; functioning dishwasher and functioning intercom.

The landlords testified that when the tenants raised the issue of moving out by March 1, 2010 that the landlords countered with a June 1, 2010 date that was turned down by the tenants.

The landlords testified that they began advertising on Craigslist immediately and updated the posting every 3 days in both the temporary and the long term accommodation sections.

The landlords noted that they were primarily looking for a long term rental because of the strata bylaws that required minimum 1 year fixed term tenancies if owners were going to rent out their units and that they could face a potential strata fine of \$100.00 should they have short term tenancies.

The landlords testified that they were willing to face the potential fine in order to get someone into the rental unit and so began to advertise for both temporary and long term renters. The landlords confirm they were able to enter into a tenancy agreement for the period of March 15, 2010 to May 31, 2010.

The landlords testified that they continued to advertise on Craigslist throughout this whole period and were unable to rent the unit until an agreement was reached with a new tenant in mid June, 2010 for a 6 week tenancy to begin on July 1, 2010.

The tenants contend that they had grounds to end the tenancy when they did and that they should not be held responsible for any rent beyond March 1, 2010. They also suggest that they don't find it possible that the landlord could not find a renter if they had had the rental unit advertised constantly for the 4 months since the end of January.

The landlord asserts that the previous hearing dealt with the matter of the end of the fixed term and found the tenants responsible for the payment of rent from March 1, 2010 to March 15, 2010 resulting from the tenants ending the tenancy prior to the end of the fixed term and the landlord's inability to rent the unit out until March 15, 2010.

The tenants had indicated early in the hearing that they had not received copies of the tenancy agreement but later clarified that they had copies of the tenancy agreement that they had signed but they never received a copy of the tenancy agreement after the landlord signed it.

Analysis

I accept that the landlords suffered a financial loss by not receiving rent for the month of June 2010 and therefore the landlord has established that a loss or damage exists.

Section 45(2) of the *Act* states a tenant may end a fixed term tenancy by giving the landlord to end the tenancy with an effective date that is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

Section 45(3) allows a tenant to end a tenancy if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure.

As per Residential Tenancy Policy Guideline #8 when a tenant decides to provide written notice to end a tenancy because a landlord has breached a material term of a tenancy the burden of proof falls to the tenant to show that the landlord has breached a material term.

A material term is defined as one that the parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. In the absence of a copy of a written tenancy agreement I must rely on the verbal testimony provided and when verbal terms are clear and both the landlord and tenant 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. While the tenants contend that the provision of a telephone line; use of a functioning security system; functioning dishwasher and functioning intercom were material terms, they have provided no evidence to support this claim.

Specifically, as noted above in order for a term to be material, both parties must agree to the materiality of the term as would be documented in a tenancy agreement. As the tenants acknowledged that they had a copy of a written tenancy agreement, albeit unsigned by the landlord, the agreement should have evidence of the materiality of the items/services listed by the tenants.

As a result, I find the tenants have failed to show that the landlord was in breach of a material term and therefore had no grounds to end the tenancy prior to the end of the fixed term. Subsequently, I find the loss suffered by the landlord results from a violation of the *Act*.

I accept that the value of the loss suffered by the landlords resulting from the tenant's violation of the *Act* is established by the parties' agreement as to the amount of rent lost for the month of June 2010.

Finally to the matter of mitigation, as per Section 7 of the *Act*, a party who claims compensation for damage or loss that results from the other's non-compliance with the *Act* must do *whatever is reasonable to minimize the damage or loss* (emphasis added).

While I acknowledge the landlord took steps to minimize their short term loss by considering and accepting short term tenants, this approach *may* have impacted their ability to rent for a longer term that may have included the month of June, 2010.

I acknowledge the tenant's concerns that the landlord has failed to provide evidence of listing the rental unit on Craigslist, however, I accept that the landlord made attempts to rent the unit or they would not have been able to rent it on the short term basis that they did.

And while I am not completely persuaded by the tenants' argument that he finds it hard to believe the landlords was unable to rent the unit if it had been advertised for the 4 month period prior to June 1, 2010, I am not convinced that the landlords did everything that was reasonable to mitigate their losses.

If I accept that the landlords advertised on Craigslist for the full time period and that the landlords refreshed the ad every 3 days I find it would be reasonable for the landlords to try other methods of advertising when they were not being successful on Craigslist.

Not only are there other websites available, such as Kijiji, but there are also other media that landlords can use such as local community papers or in the case of larger urban centres classified ads in the large newspapers. The landlord provided no testimony indicating that they attempted these other methods.

As such I find the landlords have failed to comply with Section 7 and do whatever was reasonable to mitigate the loss and therefore failed to establish the 4th point required to be successful in their claim.

Conclusion

For the reasons noted above, I dismiss the landlord's application in its entirety.

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 28, 2010.

Dispute Resolution Officer