



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing was initially scheduled for January 20, 2011 to hear the landlord's application for a Monetary Order for unpaid rent; damage or loss under the Act, regulations or tenancy agreement; authorization to retain the security deposit; and recovery of the filing fee. Both parties appeared at the hearing. The landlord's agent requested an adjournment as the landlord could not attend the hearing due to a requirement to appear in court. The agent also stated that evidence had not been received from the tenants at the service address provided on the landlord's application.

The tenants did not consent to an adjournment; however, I determined that they had not served their evidence upon the landlord at the service address appearing on the application.

The request for adjournment was granted and the tenants were instructed to re-serve their evidence upon the landlord by sending it the landlord's agent at the service address appearing on the application.

The hearing reconvened on February 18, 2011 and both parties confirmed service of documents upon them. Both parties were provided the opportunity to be heard, to respond to submissions of the other party and to cross examine the other party.

The landlord requested the application be amended to reduce the monetary claim against the tenants. I accepted the request for the amendment as a reduced claim did not prejudice the tenants. The remainder of this decision pertains to the landlord's claims for rent for the months of September and October 2010.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation for unpaid rent or loss of loss of rent for the months of September and October 2010?
2. Is the landlord authorized to retain the security deposit?

Background and Evidence

The tenants and landlord executed a residential tenancy agreement and the tenants paid a \$650.00 security deposit on August 25, 2010. The tenancy agreement provided that a tenancy would commence September 2, 2010 for a fixed term of 12 months at the monthly rent of \$1,300.00 due on the 1st day of every month. The tenancy agreement included a signed addendum with nine terms. The addendum provided that the landlord would clean specific items, remove contents from the rental unit, change locks, and rectify damage by midnight of September 2, 2010 otherwise the security deposit would be refunded to the tenants.

On September 2, 2010 the tenants met with an agent for the landlord (referred to by initials "BL"). The rental unit was not clean or in the condition set out in the addendum. On September 2, 2010 the tenants and BL signed a document that is entitled "#2 Addendum to Contract" and herein referred to as the second addendum. The second addendum required the landlord to clean specific items and install certain items including lights in the bedrooms and a bar in the hallway closet and small bedroom closet. The second addendum provides for a deadline of September 10, 2010 and that failure to meet these terms will result in a refund of the deposit and the tenancy will be "null and void".

The tenants met BL at the rental unit again on September 10, 2010 to inspect the unit. The tenants took photographs of the unit and verbally informed BL they would not be taking proceeding with the tenancy. The tenants were not provided keys to the rental unit and did not move in to the unit.

On September 13, 2010 the tenants sent an email to BL advising BL of the reasons they were not accepting the rental unit and copies of the photographs they had taken on September 10, 2010. The landlord filed this application on September 15, 2010. The landlord re-rented the unit starting November 1, 2010.

The landlord is seeking to recover unpaid rent and loss of rent from the tenants in the amount of \$2,600.00 representing the months of September and October 2010. The landlord submitted that the terms written in the second addendum by the tenants were disingenuous and the tenants did not have an intention to fulfill the tenancy agreement upon learning of the identity of the landlord. The landlord submitted the tenants did not provide a written notice to end tenancy, did not provide a forwarding address, and that the unit was in satisfactory condition as evidenced by the photographs provided for this hearing.

The tenants denied that the terms in the addendum were disingenuous and submitted that they had every intention of moving into the rental unit. The tenants claimed they had reserved a moving truck for September 11, 2010 and purchased paint for the rental unit. Their reason for not taking possession of the rental unit was due to the landlord's failure to fulfill the terms of the addendum including failure to install closet bars, clean mouse droppings and clean the floor before it was lacquered. The tenants pointed to the inconvenience of long commutes that they suffered as a result of not moving into the rental unit. The tenants questioned when the landlord's photographs were taken as BL had not taken photographs while they were at the rental unit on September 10, 2010.

Evidence provided for this hearing included written submissions by both parties, a copy of the tenancy agreement and the two addendums signed by the parties, photographs of the unit taken by both parties, and email communication between the parties.

Analysis

Section 16 of the Act provides that the rights and obligations under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit. In this case, the parties entered into a tenancy agreement on August 25, 2010 and both parties had an obligation to fulfill the terms of the tenancy upon signing that tenancy agreement.

Section 14 of the Act provides that a tenancy agreement may be amended or changed, except for standard terms and rent increases, if both the landlord and tenant agree to the amendment. I find that on September 2, 2010 the parties changed the terms of the tenancy agreement by mutual consent as evidenced by the second addendum signed by the tenants and the landlord's agent BL.

Upon review of the second addendum I conclude that the terms agreed to were material terms as evidenced by the agreement that should the terms not be met the security deposit would be refunded and the tenancy would then become null and void. While the provision that the tenancy would become null and void may not be legally correct, I find the wording to be sufficiently clear that the intention of the parties was that the tenancy would come to an end if the terms were not met by September 10, 2010.

The tenants' photographs show a closet with a wood shelf system that has been screwed to the closet wall but no closet bar. The landlord's photographs show closets with a rod and shelf in two closets. Upon review of both sets of photographs I am satisfied they are both of the rental unit; however, since the photographs depict two

different images for the closets I find the only reasonable conclusion is that the photographs were taken at different times.

The tenants have not had access to the rental unit since September 10, 2010 and I accept the tenants took photographs on September 10, 2010. I find it less clear when the landlord took photographs of the rental unit. The landlord has stated that the rental unit was not rented until November 1, 2010 and the landlord's photographs were not submitted with the landlord's application made on September 15, 2010. Rather, the landlord did not submit photographic evidence until December 15, 2010. Therefore, I prefer the tenants' photographs as evidence of the condition of the rental unit on September 10, 2010 over the photographs supplied by the landlord.

Based on the tenants' photographs, I accept that as of September 10, 2010 the unit had mouse droppings, but more importantly, the closet had not been outfitted with a closet bar which was a material term of the tenancy agreement.

In light of the above, I find the tenancy came to an end on September 10, 2010 due to the landlord's failure to meet a material term of the tenancy agreement. Since the tenancy came to an end due to the landlord's violation I do not find the landlord entitled to loss of rent from the tenants for the months of September and October 2010. I do not find the landlord entitled to unpaid rent up until September 10, 2010 as the tenants were not provided use and occupancy of the unit before the tenancy ended.

The landlord's application has been dismissed and the landlord is ordered to return the security deposit to the tenants. The tenants are provided a Monetary Order in the amount of \$650.00 to serve upon the landlord and enforce in Provincial court (Small Claims) as an Order of the court as necessary.

Conclusion

The landlord's application is dismissed. The landlord is ordered to return the security deposit to the tenants forthwith. The tenants are provided a Monetary Order in the amount of \$650.00 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: March 10, 2011.

Residential Tenancy Branch