Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, RR, O, FF

Introduction

This hearing dealt with an application by the tenants for a monetary order, an order for the return of the security deposit, an order permitting them to reduce future rental payments and a declaration that the tenants are entitled to terminate their lease early. Both parties participated in the conference call hearing.

At the beginning of the hearing I advised the tenants that as the tenancy had not yet ended, I would not consider their claim for the return of the security deposit. The tenant S.L. argued that the landlord had extinguished her right to claim against the deposit and therefore I should consider the claim. I repeated that I would not order that the landlord to return the deposit prior to the end of the tenancy at which point S.L. demanded that I recuse myself. I declined to do so and advised S.L. that I had rendered my decision with respect to the security deposit and that she was free to judicially review that decision. I explained to S.L. that in order for the hearing to proceed, she had to refrain from interrupting. The tenant was given a few moments to compose herself after which she did not request to withdraw her application, so the hearing proceeded.

At the hearing the parties agreed that the tenancy would be ending as they had signed a mutual agreement to end the tenancy on September 30, 2011 and the tenants had been served with a 10 day notice to end tenancy which they did not intend to dispute. As the tenancy will be ending, it is unnecessary for me to address the claim for an order permitting the tenants to reduce future rental payments and a declaration that they should be entitled to terminate their lease early. I dismiss those claims.

Issue to be Decided

Are the tenants entitled to a monetary order as claimed?

Background and Evidence

The rental unit is located on the upper floor of a home in which the lower floor holds a separate tenanted unit. On April 1, 2011 the parties signed a tenancy agreement which indicated that electricity and heat were not included in the rent and that storage in the attic was included in the rent.

On April 28 the parties signed an addendum to the agreement which stated that the attic was provided to the tenants for the consideration of an additional $100.00 per month.

The parties agreed that while the tenants were directed to put the hydro and natural gas accounts in their own name and were told that they would share the expense with M.B., the occupant of the lower unit, they were not told what percentage of the utility payments were their responsibility. The tenants testified that they discussed the issue with M.B. and that he agreed to pay 50% of the utilities. M.B. paid 50% of the utility costs, which were on equalized payments, in the months of April and May.

M.B. testified that he agreed to pay 50% of the utilities, but he did not think it fair since there were 2 occupants in the upper unit and he was the sole occupant in the lower unit. M.B. stated that he felt that it would be more appropriate for him to pay one third of the utility costs. The tenants and M.B. agreed that the monthly equalized payments were $46.00 for hydro and $101.00 for natural gas and that M.B. had paid $40.00 in June, no payment in July and $65.00 in August. The tenants seek to recover $117.00 in unpaid utilities which represents charges through the end of August.

The tenants testified that despite the provision in the tenancy agreement which stated that the attic was included in the rent, they were harassed about using it. The tenants drew up the addendum to the tenancy agreement and included the provision requiring an additional payment of $100.00 in order to ensure that they were able to use the attic freely. The landlord testified that including the attic in the original tenancy agreement was a mistake. She argued that she signed the agreement under duress and stated that she had originally intended to charge an additional $300.00 for use of the attic. The tenants seek to recover $400.00 which represents $100.00 payments made in May – August inclusive, arguing that they should not have had to pay for that space as it had been included in the original tenancy agreement.

The tenants presented evidence that they had been deprived of quiet enjoyment of the rental unit. Their complaints included a number of issues, including the following. The tenants stated that M.B. smoked marijuana both inside and outside the lower unit and that the smoke created a hardship for the tenant V.R. who was allergic to smoke. V.R. provided a doctor’s note confirming that he was allergic to smoke. M.B. testified that he

is legally permitted to use marijuana for medical purposes and acknowledged that he occasionally smokes in the rental unit, although he tries to smoke outside when possible. The landlord testified that at the beginning of the tenancy she told the tenants that this was a non-smoking house but claimed that she told the tenants that M.B. used marijuana for medical purposes. The tenants denied having been told that M.B. used marijuana. The tenants testified that they have complained to the landlord frequently about M.B. smoking in the house but have continued to be exposed to smoke. The landlord testified that she spoke to M.B. on a number of occasions, requesting that he smoke outside. The landlord argued that the tenant S.L. is a smoker and that it could well be the smoke she produces that is causing V.R. to react. S.L. denied having smoked inside the rental unit.

The tenants gave evidence that M.B. has not been diligent in cleaning up after his dog who defecates in the back yard, which is an area shared by the two suites. M.B. testified that he has tried to pick up after the dog but acknowledged that as he is wheelchair bound, this is not always possible.

The tenants claimed that the rental unit is in a state of disrepair and the landlord has ignored requests for repairs. Some of the issues which the tenants claim to have brought to the attention of the landlord are rips in the linoleum which the tenants claim pose a tripping hazard, linoleum pulling away from walls, a stainless steel plate in the linoleum which the tenants claim also poses a tripping hazard, a broken oven door handle, a refrigerator door handle without a plastic trim plate, draughty windows, a hole in the kitchen cupboard which is covered with mesh but through which one can see outside, inoperable blinds and a build up of mould on a window frame. The landlord denied having received complaints about the repair issues and claimed that she has repaired urgent issues as required.

The tenants testified that they assembled what they called a medicine wheel in the front yard of the unit, constructing it out of stones. They claim that the medicine wheel has been a source of contention as the landlord repeatedly asked them to move it and called it by other names, including referring to it as a “crop circle”. The tenants alleged that the landlord moved some of the stones. The landlord testified that she asked the tenants to move the medicine wheel because she was concerned that since it was a sacred object, it would be defiled in some way by strange dogs urinating on it or strangers removing the stones. The landlord denied having taken away any stones.

The tenants seek the equivalent of one month’s rent in compensation for loss of quiet enjoyment.

Analysis

Section 38 of the Act does not require a landlord to return a security deposit until the tenants have vacated the rental unit and provided a forwarding address in writing. As the tenancy has not yet ended, I find that it is not open to me to order the landlord to return the security deposit as her obligation to deal with it has not yet been triggered. While the landlord may have extinguished her right to claim against the security deposit, and I make no finding on that issue, she still retains the right to make a claim for damage to the rental unit and section 72(2)(b) of the Act permits a Dispute Resolution Officer to apply the security deposit to any award made as a result of that claim notwithstanding any extinguishment of the landlord's right to claim against the deposit. The claim for the return of the security deposit is therefore dismissed with leave to reapply.

Residential Tenancy Policy Guideline #1 provides that where tenants occupying different units are sharing one utility account, the tenant to whose name the account is registered may claim against the landlord for the other tenant's share of any unpaid utility bills. The landlord had an obligation to clearly define the percentage of the utility bill for which the tenants were responsible and as she directed the tenants to work that out amongst themselves, she is bound by their agreement. The tenants and M.B. originally agreed that they would equally share the cost of utilities. As M.B. acknowledged that he has not paid $117.00 of the bills up to the end of August, I find that the tenants are entitled to recover this sum from the landlord and I award them $117.00.

A plain reading of the original tenancy agreement would indicate that the attic was included as part of the tenants' rent. However, the tenants chose to initiate a revision to that agreement whereby they were obligated to pay an additional $100.00 each month for what had previously been included in their rent. I do not accept that they entered into this agreement because the landlord was harassing them about using the attic. It was abundantly clear during the hearing that the tenants are very conversant with their rights under the agreement and under the Act and I find it highly unlikely that they would have offered to pay the landlord more money for a facility to which they were already entitled. I find it more likely that the parties had originally agreed for limited use of the attic and the tenants wished to expand that use and agreed to pay more for expanded use. I find that the tenants are bound by the April 28 addendum to the agreement and accordingly I dismiss their claim to recover monies paid under that agreement.

I find that the tenants have experienced some loss of quiet enjoyment. The landlord acknowledged that she represented the house as a non-smoking house and the tenants

therefore had the right to expect that M.B. would not smoke inside the unit. I find that their quiet enjoyment has been compromised as a result of M.B. smoking inside the unit. I further find that the tenants have been somewhat inconvenienced by M.B.'s failure to regularly pick up after his dog. While this may seem a small issue, the tenants had the right to garden in the back yard and had assumed the responsibility for maintaining the yard and should not have had to pick up fecal matter before attending to their duties.

With respect to repairs, I accept that the inoperable blinds and the oven door handle which was broken for most of the tenancy were fairly significant issues, but I find insufficient evidence to show that quiet enjoyment was lost to a compensable degree as the result of the landlord's failure to perform other repairs. The tenants rented an older home which looked its age and presumably their modest rent reflected the condition of the home.

I appreciate the tenants' concern over what they characterized as harassment over the medicine wheel. I accept that the landlord asked them repeatedly to move the medicine wheel and referred to it using alternate names and I do not accept that she requested that they move it because she was concerned that it would in some way be defiled. However, I do not find that several requests to remove or relocate the wheel are so egregious as to attract compensation.

I note that while the tenants made other complaints with respect of loss of quiet enjoyment other than the complaints identified above, I found that those complaints were so minor that they did not attract compensation.

Taking the above issues into consideration, I find that an award of $800.00, which is one half of one month's rent, will adequately compensate the tenants for loss of quiet enjoyment throughout the course of the tenancy and I award them that sum.

As the tenants have enjoyed some success, I find that they should recover their filing fee and I award them $50.00.

Conclusion

The tenants are awarded $967.00 which represents $117.00 in unpaid utilities, $800.00 for loss of quiet enjoyment and $50.00 for their filing fee. The tenants have not paid rent in September and I find it appropriate to apply section 72(2)(a) of the Act and deduct this award from the $1,600.00 in rent that is due to the landlord for the month of September. The tenants' rent obligation for September is therefore reduced to $633.00.

The claim for the return of the security deposit is dismissed and the claim for an order permitting the tenants to reduce future rental payments is dismissed.

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 09, 2011

Residential Tenancy Branch