



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, FF, O

Introduction

This hearing dealt with the landlord's application for a Monetary Order for loss of rent; liquidated damages; NSF and late fees; and, authorization to retain the security deposit and pet deposit. Both parties appeared at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation for liquidated damages; loss of rent; and NSF and late fees?
2. Is the landlord authorized to retain the tenants' security deposit and pet deposit in partial satisfaction of the amounts claimed?

Background and Evidence

The parties provided undisputed evidence as follows. The rental unit is the main level of a house that also has a tenanted basement suite. The parties initially entered into a tenancy agreement in September 2008 and the tenants paid a \$497.50 security deposit and a \$400.00 pet deposit. The parties entered into a subsequent tenancy agreement set to commence December 1, 2010 for a fixed term set to expire November 30, 2011 (herein referred to as the tenancy agreement). That tenancy agreement required the tenants to pay rent of \$1,027.00 on the 1st day of every month.

I also heard that on June 17, 2011 the tenants gave the landlord verbal notice of their intention to vacate the rental unit in early July 2011. The tenants paid the rent for July 2011 and returned possession of the rental unit to the landlord on July 23, 2011. The landlords did not return the cheque post-dated for August 1, 2011 so the tenants put a stop payment on the cheque. The landlord tried cashing the cheque and it was not honoured.

In making this application, the landlord is seeking to recover the following amounts from the tenants:

<u>Item</u>	<u>Reason</u>	<u>Amount</u>
NSF fee	Charge for August 2011 rent cheque returned.	25.00
Late fee	Rent for August 2011 not paid on time.	25.00
Early termination charge	Tenants broke lease, charge provided in tenancy agreement.	575.12
Total claim		\$ 1,652.12

The landlord submitted that the rental unit was advertised for rent shortly after receiving verbal notice from the tenants and that every reasonable effort was made to re-rent the unit. New tenants were secured starting September 1, 2011.

The tenants explained that they were frequently disturbed by the basement suite tenants and verbal complaints to the property manager did not change anything. The tenants have young children and they decided it was best to remove themselves and their children from the undesirable environment. Alternative accommodation that was willing to accept a large dog became available and the tenants took it. The tenants then gave their verbal notice to the landlord. When they initially called the landlord's office to give notice, the landlord's secretary indicated to them that it would not be difficult to get the rental unit re-rented. The landlord's agent then phoned the tenants back to inform them that they were breaking their lease and they would be responsible for any loss of rent.

The tenants submitted that the landlord's efforts to advertise and show the unit to prospective tenants were insufficient. The landlord advertised the unit as a two bedroom when it actually had three bedrooms. Further, the photograph used to advertise the unit showed a for-sale sign in the front yard which would likely deter prospective tenants. Finally, the tenants posted their own advertisement and received numerous enquiries about the unit yet the landlord did not contact those prospective tenants.

The landlord refuted the tenants' position by stating that the advertisement was changed to correctly reflect three bedrooms shortly after it was brought to their attention; the photograph of the property was an older picture from the MLS and unlikely deterred prospective tenants as prospective tenants would be told the property is not for

sale; the landlord is accountable to the owner of the property with respect to their efforts to find new tenants and the landlord was updating the owner on a daily basis.

Analysis

Having considered all of the evidence before me I make the following findings and provide the following reasons for those findings.

Loss of rent

Since the parties had a fixed term tenancy, the parties were limited in the ways the tenancy could be ended before the expiry of the fixed term. Section 45(3) of the Act provides that a tenant may end a fixed term tenancy if a landlord fails 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. The intention of this provision is to put the landlord on notice that there is breach of a material term and give the landlord a reasonable amount of time to correct the breach before the tenant ends the tenancy.

The tenants have submitted that the landlord failed to protect their right to quiet enjoyment. Quiet enjoyment of a rental unit has been found to be a material term of a tenancy agreement by the courts. Accordingly, if the landlord has breached the tenant's right to quiet enjoyment by standing idly by and allow others to significantly interfere or disturb the tenants then that may be a sufficient basis for the tenant to end the tenancy under section 45(3).

Upon reading the tenants' evidence, and in particular the email from the property manager to the property owner, I note the property manager denied having prior knowledge of the tenants being significantly disturbed by the basement suite tenants. This leaves me with the tenants' unsubstantiated submission that they verbally notified the landlord of the disturbances they endured. Hence, the requirement for a tenant to give the landlord written notice of a breach serves to avoid these situations.

Since the tenants did not put the landlord on written notice that the landlord was in breach of a material term of the tenancy agreement, I find the tenants not entitled to end the tenancy early under section 45(3) of the Act. Without the right to end the tenancy early under section 45(3) of the Act I find the tenants breached their tenancy agreement and the Act by ending the tenancy earlier than the expiry date.

Where a party has breached the Act or tenancy agreement, the other party may be entitled to recover damages or loss that resulted from the breach. Where a tenant

breaches a fixed term tenancy, they may be held accountable for loss of rent for the remainder of the fixed term, provided the landlord takes reasonable steps to mitigate the loss of rent. The tenant has made submissions that the landlord did not take sufficient action to re-rent the unit. Accordingly, it is before me to determine whether the landlord took reasonable measures to mitigate their loss of rent pursuant to the requirement of section 7 of the Act.

The landlord has provided copies of advertisements for the rental unit and I note that an advertisement posted June 21, 2011 indicates the rental unit has three bedrooms. Therefore, I find the erroneous posting reflecting only two bedrooms was temporary and insufficient to conclude the landlord did not take reasonable steps to re-rent the unit.

I find the tenants submissions that they placed their own advertisements and had numerous enquiries that were passed on to the landlord to be unsubstantiated by other evidence. Even if there were a number of enquiries, not all prospective tenants are ideal tenants the landlord will likely approve for tenancy. In other words, tenants cannot expect that any person that comes forward to rent a unit must be taken on as a tenant by the landlord.

Finally, I have insufficient evidence to conclude that a for-sale sign in the photograph of the property deterred prospective tenants. If this had been such a concern to the tenant I would expect the tenant would have contacted the landlord like he did with respect to the number of bedrooms.

In light of the above, I find the landlord has established a basis recover the loss of rent for August 2011 from the tenants.

Liquidated damages (early termination charge)

Residential Tenancy Policy Guideline 4 provides for liquidated damages. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the fixed term by the tenant. If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum unless the sum is found to be a penalty. I find the amount payable under the clause to be a reasonable pre-estimate and is not a penalty. Therefore, I grant the landlord's request to recover liquidated damages of one-half of the monthly rent which is \$513.50. I do not find the landlord entitled to collect HST on top of the liquidated damages.

NSF fee and late charge

Section 44 of the Act provides for ways a tenancy ends. Section 44(1)(d) provides that a tenancy ends when a tenant vacates the rental unit. The standard terms that are to be included in every tenancy agreement under the Residential Tenancy Regulations provide, in part, under the section **Payment of rent**:

(4) The landlord must return to the tenant on or before the last day of the tenancy any post-dated cheques for rent that remain in the possession of the landlord.

In light of the above, I find the tenancy ended July 23, 2011 when the tenants vacated and returned possession to the landlord. I find the landlord was obligated to return the post dated cheques and was not entitled to cash the August 2011 rent cheque. The landlord's remedy to recover unpaid or loss of rent for August 2011 if the tenant did not agree to pay it would have been to make an Application for Dispute Resolution. Since the tenancy ended in July 2011, I dismiss the landlord's claims for an NSF fee or late fee pertaining to the August 2011 cheque.

Filing fee, Security and Pet Deposits, and Monetary Order

In recognition of the landlord's relative success with this application, I award the landlord \$45.00 of the filing fee they paid.

I accept the tenants' confirmation that they were not paid interest on their deposits that rolled over from one tenancy agreement to the next. Therefore, I have calculated accrued interest on the deposits to be \$4.01.

I authorize the landlord to retain the tenants' security deposit and pet deposit, and accrued interest of \$4.01, in partial satisfaction of the amounts awarded to the landlord. I provide the landlord with a Monetary Order calculated as follows:

Loss of rent – August 2011	\$ 1,027.00
Liquidated damages	513.50
Filing fee	45.00
Less: security deposit, pet deposit and interest	<u>(901.51)</u>
Monetary Order for landlord	\$ 683.99

The landlord must serve the Monetary Order upon the tenants and may enforce it in Provincial Court (Small Claims) as an Order of that court.

Conclusion

The landlord has been authorized to retain the tenants' security deposit, pet deposit and accrued interest in partial satisfaction of the landlord's claims against the tenants. The landlord has been provided a Monetary Order for the balance of \$683.99 to serve upon the tenants.

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 07, 2011.

Residential Tenancy Branch