



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Landlords: MNR, MNSD, FF
Tenant: MNDC, MNSD, OLC, FF

Introduction

This hearing dealt with the cross Applications for Dispute Resolution. Both parties were seeking monetary orders.

The hearing was conducted via teleconference and was attended by the landlord, the tenant and her legal counsel.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for long distance charges; for audio/video installation; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 44, 45, 67, and 72 of the *Residential Tenancy Act (Act)*.

It must also be decided if the tenant is entitled to a monetary order for returned rent; for all or part of the security deposit and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 44, 67, and 72 of the *Act*.

Background and Evidence

Both parties provided a copy of a tenancy agreement signed by the parties on July 11, 2011 for a 2 month fixed term tenancy beginning on July 11, 2011 that converted to a month to month tenancy on September 12, 2011 for a monthly rent of \$16,500.00 due on the 11th of each month with a security deposit of \$16,500.00. The parties agree there was a verbal agreement to modify the agreement to start on July 15, 2011 and have rental payments made on or before the 15th of each month.

The parties agree that their usual practice was to discuss beforehand each month to determine if the tenants were going to stay in the rental unit for the next month. The landlord asserts the tenants had last requested to stay until the end of the year and he was prepared to allow this extension.

The parties agree that on October 31, 2011 there was a flood in the rental unit. The landlord submits that as soon as he was informed he began to coordinate repairs

immediately and that he had arranged for a hotel nearby to house the tenant and her family. The landlord testified he also was prepared to assign a driver to her and her family for their use during this period.

The tenant did stay in a hotel but she had already arranged one on her own. The landlord reiterated, during the hearing, that he was willing to compensate the tenant for at least a portion of her hotel stay. The tenant declined any compensation.

On November 3, 2011 the landlord received a letter from the tenant indicating the tenancy was to terminate on November 15, 2011; that the landlord is holding a security deposit of \$16,500.00 and the premises were damaged on October 31, 2011 and the tenant had to vacate the premise due to the damage.

The landlord seeks rent for the period of November 15, 2011 to December 15, 2011 (\$16,500.00) and compensation for phone charges (\$30.91) and charges for the custom installation of audio visual equipment (\$247.50). The tenant does not dispute the phone charges or audio/visual installation charges.

The tenant submits that, as a result of the flood the tenancy agreement was frustrated and the tenant should receive the rent she had paid for the period of November 1, 2011 to November 15, 2011 (\$8,250.00) and return of the security deposit (\$16,500.00).

The tenant submits that she determined the tenancy was frustrated by speaking with the restoration contractor and insurance company who suggested the unit would not be ready to return to on or before November 15, 2011.

The tenant also asserts that the tenancy was due to terminate on November 15, 2011 and would have ended by that date anyway and as such the landlord is not entitled to rent for November 15, 2011 to December 15, 2011.

Analysis

While both parties assert that they had a 2 month fixed term tenancy that they extended on at least two occasions, from the tenancy agreement submitted into evidence by both parties, I find the parties had originally entered into a fixed term tenancy that converted to a periodic (month to month) tenancy.

Once the tenancy became a month to month tenancy there was no requirement of either party to seek for or approve an extension. Rather, I find the tenancy would have continued until such time as the tenancy would end in accordance with the provisions under Section 44 of the *Act*.

Section 44 stipulates that a tenancy will end if:

1. The tenant gives notice compliant with Section 45;
2. The landlord gives notice for the non-payment of rent;

3. The landlord gives notice for cause as outlined in Section 47
4. The landlord gives notice to end the tenancy because the tenant's employment with the landlord is ending;
5. The landlord gives notice for the landlord's own use of the property;
6. The tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
7. The landlord and tenant agree in writing to end the tenancy;
8. The tenant vacates or abandons the rental unit; or
9. The tenancy agreement is frustrated.

Section 45 stipulates that should a tenant want to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is the day before the day in the month, that rent is payable under the tenancy agreement.

As such, I find the earliest the tenant could have ended the tenancy under the verbally altered tenancy agreement and in accordance with Section 45, after the flood of October 31, 2011 would have been by giving notice no later than November 14, 2011 with an effective date of December 14, 2011.

Frustration in contracts is defined in Black's Law Dictionary, 7th Edition as the doctrine that, if the entire performance of a contract becomes fundamentally changed without any fault by either party the contract is considered terminated. I accept from the testimony of both parties that neither party was at fault for causing the flood.

As the "entire performance" of a tenancy agreement is the provision of the rental accommodation suitable for occupancy by a tenant for the duration of the tenancy, and as neither party had issued a notice to end the tenancy at the time, I find by the tenant limiting her assessment of the contract being frustrated to whether the unit would be restored by November 15, 2011 did not take into account the ongoing nature of the month to month tenancy.

I find, based on the landlord's undisputed testimony that he offered to provide alternate accommodation during the restoration and such alternate accommodation would fulfill the landlord's obligations under the tenancy agreement until such time as the restoration work had been sufficiently completed to allow the tenant to return.

For these reasons, I find the tenant has failed to establish the tenancy was frustrated and she further failed to provide the landlord with sufficient notice to end tenancy as required under Section 45.

I accept that for the tenant suffered a loss as a result of the flood, however, I find the tenant failed to mitigate these losses, as is required under Section 7(2) of the *Act*, by not accepting the landlord's offer to pay for hotel accommodation and other additional assistance. I dismiss the portion of the tenant's Application seeking compensation of \$8,250.00.

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **\$16,878.41** comprised of \$16,500.00 rent owed; \$30.91 phone charges; \$247.50 audio/visual installation and the \$100.00 fee paid by the landlord for this application.

I order the landlord may deduct the security deposit and interest held in the amount of \$16,850.00 in partial satisfaction of this claim. I grant a monetary order in the amount of **\$378.41**.

This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

For the reasons noted above, I dismiss the tenant'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: February 06, 2012.

Residential Tenancy Branch