



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlords' application for dispute resolution under the Residential Tenancy Act (the "Act") seeking an order of possession due to unpaid rent, a monetary order for unpaid rent, for money owed or compensation for damage or loss, for authority to retain the tenants' security deposit and to recover the cost of the filing fee from the tenants.

The landlord and his agent appeared and gave affirmed testimony.

The landlord testified that each tenant was served with the application for dispute resolution and notice of hearing by registered mail on May 18, 2012. The landlord supplied evidence of the tracking numbers of the registered mail.

I find the tenants were served in a manner complying with section 89 of the Act and the hearing proceeded in the tenants' absence.

The landlord and his agent were provided the opportunity to present their evidence orally and in documentary form.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Preliminary Issue-The landlord's agent stated that the tenants have now vacated the rental unit, as of June 1, 2012. As a result, I have excluded the landlords' request for an order of possession for the rental unit.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for unpaid rent and for money owed or compensation for damage or loss, for authority to retain the tenants' security deposit and for recovery of the filing fee?

Background and Evidence

This one year, fixed term tenancy began on August 1, 2011, through July 31, 2012, actually ended on June 1, 2012, when the tenants vacated the rental unit, monthly rent

was \$2500.00 and the tenants paid a security deposit and pet damage deposit of \$1250.00 each at the beginning of the tenancy, on or about July 28, 2011.

The tenancy agreement, which was entered into evidence by the landlords, also indicated that the tenants were to reimburse the hydro and gas costs to the landlords, as the accounts remained in their name.

The landlords gave affirmed testimony and supplied evidence that the tenants were served with a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice") on May 3, 2012, via posting on the door. The Notice stated the amount of unpaid rent was \$2500.00 as of May 12, 2012. The Notice also stated the tenants failed to pay the amount of \$1710.87 for utilities after written demand on April 20, 2012.

The Notice informed the tenants that the Notice would be cancelled if the rent and unpaid utilities were paid within five days. The Notice also explained the tenants had five days to dispute the Notice.

The landlords testified that the tenants failed to pay any rent after receiving the Notice.

Despite the statement on the Notice, the landlords acknowledged that written demand for utilities had not been given to the tenants.

In addition to the unpaid rent of \$2500.00 for May 2012, the landlords have additionally made a monetary claim for loss of revenue for June and July, in the amount of \$5000.00, unpaid rent for January in the amount of \$100.00, late payment and NSF fees of \$225.00, hydro costs of \$435.00, gas costs of \$285.00 and liquidated damages of \$1250.00.

The landlord stated that the rental unit has been sold, with a closing date of July 1, 2012; therefore the landlords are no longer seeking compensation for loss of revenue for July.

As loss of revenue for June, the landlord stated that the tenants left the rental unit in a condition that required cleaning and therefore they would not be able to rent out the rental unit for June.

The landlord stated that he "believed" the tenants owed a balance of \$100.00 for January, as the payment was late and not in the full amount.

As to the claim of \$225.00 for late payments of rent and NSF charges, the landlord claimed an entitlement to this amount due to the several late payments of rent by the tenants. The landlord pointed out that the tenancy agreement, which provided for a fee to be charged against the tenants for these amounts.

As to the utility bills, the landlord stated they agreed to keep the utility bills in their name, due to the tenants being new to the country and not having any credit established. The

landlord further submitted that the tenants have always been late in reimbursing the landlords for their costs and owe a balance of \$435.00 for the hydro and \$285.00 for the gas bill.

When questioned, the landlord stated that they made demands of the tenants through email correspondence to pay the utilities.

The landlord stated that the tenants obligated themselves to pay liquidated damages in the amount of \$1250.00, by their tenancy agreement. When questioned the landlord stated how this amount was a genuine pre-estimate of their costs, the landlord stated that in case the house wasn't sold, as planned all along, they may be forced to hire a real estate agent to lease the property.

When questioned further, the landlord submitted that this tenancy was as the result of free, online advertising, not through the services of a real estate agent.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

In monetary claims, awards for compensation for damage or loss are provided under sections 7 and 67 of the Residential Tenancy Act (the "Act"). A successful applicant, the landlord in this case, cannot simply allege a violation of the Act, regulations or tenancy agreement by the other party, but rather, the applicant must establish all of the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation of the other party has caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Where the claiming party has not met all four elements, the burden of proof has not been met and the claim fails.

Unpaid rent for May 2012-Under section 26 of the Act, a tenant is required to pay rent in accordance with the terms of the tenancy agreement and is not permitted to withhold rent without the legal right to do so.

Where a tenant fails to pay rent when due, the landlord may serve the tenant with a 10 Day Notice for Unpaid Rent. Upon receipt of the 10 Day Notice, the tenant must pay the outstanding rent or dispute the Notice within five days. In this case, I find that the tenants did not dispute the Notice within five days, submit evidence that they did not owe the landlord rent or had some other legal right to withhold rent.

I therefore find the landlords have established a monetary claim of \$2500.00, for unpaid rent for May 2012.

Loss of revenue for June 2012-The landlord testified that the tenants left the rental unit in an unclean condition which did not allow them to make an attempt to re-rent the rental unit. However, this contradicts the landlord's written submission, which stated it would be a "difficult task, nearly impossible" to find a tenant for a short term of two months as the house was being sold.

I find that the landlords submitted insufficient evidence that the rental unit was so unclean that an attempt could not be made to re-rent; for instance, the landlords submitted no move-out condition inspection report or photos of the rental unit at the end of the tenancy.

I therefore find that the landlords submitted insufficient evidence of taking reasonable measures to mitigate their loss. I find a reasonable measure to include taking steps to find new tenants for the rental unit. I therefore **dismiss** their claim for loss of revenue for June 2012, for **\$2500.00**.

Unpaid rent for January 2012-The landlord said that he "believed" the tenants owed \$100.00 for January, which I find is insufficient evidence to prove the amount of rent actually paid, such as with a receipt or demand for payment. I therefore find the landlord submitted insufficient evidence and I dismiss their claim for \$100.00.

Unpaid utilities-Section 46 (6) of the Act states that a landlord may serve a Notice to End Tenancy and treat unpaid utility charges as unpaid rent if

- (a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and
- (b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

I find that the landlords have not made written demand on the tenants for unpaid utility charges as email correspondence is not an acceptable method of service of documents under the Act. Additionally, the landlords did not submit proof of a written demand or copies of the utility bills that I could view to verify the alleged amount owed.

I therefore find that the landlords have submitted insufficient evidence of unpaid utilities and I dismiss their claim for \$435.00 for hydro costs and \$285.00 for gas costs.

Liquidated damages- Residential Tenancy Branch Policy Guideline #4 states that in order to be enforceable, a liquidated damages clause in a tenancy agreement (clause 3 of the addendum in this case) must be a genuine pre-estimate of loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable.

In this case, I find the landlord was not able to explain how the liquidated damages were a genuine pre-estimate on the day the tenancy agreement was signed or were intended to compensate him for his time and expense in re-renting the rental unit as a result of the early end to tenancy by the tenant. In reaching this conclusion, I relied on the landlord's statement that this tenancy began as the result of free, online advertising by the landlord. The landlord said that he called around to a few different real estate agents to see how much they would charge as a fee, but no evidence of the cost or when the calls were made was submitted. The landlord also did not provide a sufficient explanation as to why an agent would be needed when the online advertising had been used in the past.

Therefore I find the landlords submitted insufficient evidence that the liquidated damages clause was a genuine pre-estimate of costs and I there find the clause to be a penalty and unenforceable. Due to this I dismiss their claim for \$1250.00.

Filing fee-I find the landlords' application had merit and that they are entitled to recover the filing fee of \$100.00.

Conclusion

I find that the landlords have established a total monetary claim of **\$2600.00** comprised of unpaid rent of **\$2500.00** for May and the **\$100.00** fee paid by the landlords for this application.

At the landlords' request, I allow the landlords to retain the security deposit of \$1250.00 and the pet damage deposit of \$1250.00 in partial satisfaction of the claim and I grant the landlords a monetary order under section 67 for the balance due of **\$100.00**.

I am enclosing the monetary order for **\$100.00** with the landlords' Decision. This order is a **final, legally binding order**, and may be filed in the Provincial Court (Small Claims) should the tenants fail to comply with this monetary order.

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: June 08, 2012.

Residential Tenancy Branch