



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, FF

Introduction

This hearing was convened by way of conference call in repose to the landlords application for a Monetary Order for unpaid rent; a Monetary Order for damage to the unit, site or property; for an Order permitting the landlord to keep all or part of the tenants security and pet deposit; and to recover the filing fee from the tenants for the cost of this application.

The tenants and landlords agents attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The landlord's agents and tenants provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

Issue(s) to be Decided

- Is the landlord entitled to a Monetary Order for damage to the unit, site or property?
- Is the landlord entitled to a Monetary Order for unpaid rent?
- Is the landlord entitled to an Order to keep all or part of the security and pet deposits?

Background and Evidence

Both parties agree that this tenancy started on August 15, 2011. There is a written agreement in place which states that this is a fixed term tenancy which expires on August 31, 2012. The tenancy ended on June 01, 2012 after the tenants gave the landlords agent notice to end the tenancy. Rent for this unit was \$1,350.00 per month and was due on the 1st day of each month in advance. The tenants paid a security deposit of \$675.00 and a pet deposit of \$675.00 on July 28, 2011.

The parties agree that a move in condition inspection report was completed at the start of the tenancy however the parties disagree about the events concerning the move out inspection. The parties also disagree with the date the tenants gave their forwarding address to the landlord in writing.

The landlord KC testifies that the tenants did not attend the move out inspection and phone calls were made to the tenants' requesting time for the inspection. The landlord states the tenants have extinguished their right to the return of the deposit as they failed to attend a move out inspection. The tenants testify that there was no mention of the move out inspection and the landlord's agents' assistant KM only called the tenants on June 05, 2012 to thank the tenants for the keys and to ask how the place looked. The rest of the conversation was about the reimbursement of the pet deposit and KM explained that the pet deposit would have to be returned at the end of June as there was no money in the landlord account. The landlord has provided a copy of the condition inspection reports but the move out inspection has not been completed.

The landlord testifies that as this was a fixed term tenancy and the tenants ended the tenancy before the end date of the fixed term the tenants are responsible for any rent owed to the end of the fixed term.

The landlord testifies that the tenants gave the landlord their forwarding address in writing sometime around June 11 or June 12, 2012 when they dropped off an envelope

with the keys to the unit at the landlord office. The landlord states that he therefore filed his application to keep the security deposit within the 15 allowable days.

The tenants dispute the landlord claim and JF testifies that she dropped off the envelope with the keys and their forwarding address to the landlords office and left it with a member of staff on May 31, 2012 after JF had finished cleaning the unit and they had moved out. The tenant JF testifies that there was a telephone conversation on June 05, 2012 with the landlord assistant KM and KM confirmed that they had received the keys. The tenant JF testifies that she did drop off another key a few days later that they had found. The tenants argue that the landlord did not therefore file the application within 15 days of receiving their forwarding address on May 31, 2012.

The landlord testifies that they found very minor damage at the rental unit with just a cracked wooden transom between the kitchen and hallway. The landlord testifies that he does not have a receipt for this as he paid the flooring installer \$50.00 to replace it in his own time.

The tenants agree that this transom was cracked and state they had repaired it a few times but it continued to crack. The tenants state they do not dispute the landlords claim for \$50.00.

The landlord testifies that the tenants had explained that they could no longer live in the rental unit due to the construction noise across the street. The tenants did give the landlord written notice and the landlord states he explained to the tenants that they would be responsible for the rent if a new tenant could not be found. The landlord testifies that the tenants cancelled their last three post-dated cheques for June, July and August, 2012.

The landlord testifies that they and the tenants attempted to re-rent the unit but no suitable tenants were found until September 01, 2012. The landlord testifies that his client, the owner of the unit, is now out of pocket for three months rent and seeks to

recover this from the tenants. The landlord states that construction noise is not a sufficient reason for the tenants to break the lease.

The landlord testifies that they started to advertise the unit after they received the tenants' written notice around May 01, 2012. This was renewed each week with Castanet to ensure their advertisements went to the top of the list. Each advertisement lasts for two weeks. The landlord has provided documentary evidence of advertisements dated May 26, 2012 with Castanet and an undated advertisement with another local company. The landlord testifies that they cannot provide an advertisement for every time they renew the advert. The landlord testifies the unit was advertised at the same rent.

The landlord testifies that the tenants did send them e-mails with prospective tenants but these people did not meet the landlords requirements for example one had a poor reference, one had two large dogs when only a small dog is permitted under the building bylaws, and one was a previous tenant that was not suitable. The landlord testifies that they showed the unit a dozen times in June and some prospective tenants had issues with the amount of rent. The landlord testifies that he believes they showed the unit approximately 35 times and from one of these viewings they decided to take a student for an eight month rental simply to mitigate any further loss to the owner who was suffering financial hardship due to the loss of rent.

The landlord seeks a Monetary Order to recover the loss of rental income to the sum of \$4,050.00. The landlord seeks to keep the security deposit to offset against the loss of rent and seeks to recover the \$100.00 filing fee from the tenants.

The tenants dispute the landlord claims. The tenants agree that they did end the tenancy before the end of the term and agree they did cancel their cheques. The tenants' testify that they had made it clear to the landlord when they rented the unit that they were particular about noise as they worked from home. The tenants state that for

the first few months everything was fine but after the construction started it became unbearable living in the unit with the noise and dust from heavy machinery.

The tenants' testify that when the spoke to the landlord KC he agreed he would sublet the unit. The tenants' testify that after they gave notice to end their tenancy they could find no advertisements for the unit on the landlords agents website. By May 04, 2012 there was still no advertisement displayed so the tenants sent the landlord some pictures of the unit to help. The tenants also placed their own advertisements on two internet sites and received interest from a number of prospective tenants which they forwarded on to the landlord KC.

The tenants testify that one of these prospective tenants informed them that KC had not called them back and another prospective tenant who wanted a four month lease told them that KC had informed them that there were no short term lets. The tenants testify that by June 23 and 24 there were still no pictures on the landlord's website. The tenants have provided email correspondence from prospective tenants. One who states the landlord has not responded to them, one state they are looking for a four month lease, one states they only have a small dog.

The tenants testify that the landlord did not give them any reasons why none of these prospective tenants were suitable and the unit could have been re-rented for the reminder of the tenants lease. The tenants state the landlord would not give the tenants permission to sublet the unit for the reminder of their lease.

The tenants therefore dispute the landlords claim to recover the loss of rent for three months as they state the landlord did not act diligently to mitigate the loss by posting the advertisement sooner, by following through on prospective tenants for the remainder of the lease and by posting an advertisement on the landlord website without any pictures until June 24, 2012.

The landlord testifies that one of the prospective tenants forwarded to him by the tenants wanted a four week rental not a four month rental and short periods are not permitted in the building. The landlord testifies that the landlord's website is not one that they like to use as they find their clients cannot easily access the site so they tend to advertise on other internet sites. The landlord testifies that the tenants never asked permission from the landlord to sublet their unit for the remainder of the term.

The tenants argue that the couple who wanted to rent the unit for four months from June 01 to September 01 was a hockey player who did want the unit for four months. The tenants direct the parties to an email in evidence from that hockey player asking for four months not four weeks as suggested by the landlord.

The landlord argues that he had another younger hockey player interested for four weeks. The landlord testifies that there was another email but states he cannot remember that particular conversation but states they do their best to return all phone calls and if that other hockey player had been interested they would have considered them.

In closing, the landlord states it would be unreasonable to expect the landlord to just sit around and not attempt to re-rent the unit as quickly as possible in order to mitigate any losses to their client. If the unit sits empty then everyone loses money including the landlords. The tenants did rent a unit about 10 feet from a road and the landlords are not able to prevent construction taking place.

In closing, the tenants' state that they dispute the landlords claim as they felt there were suitable people to rent the unit and if the owner was suffering such financially hardship he could have rented the unit for the rest of the summer.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties. With regard to the landlords claim for a loss of rent for three months; I refer the parties to s. 7(1) of the *Act* which states:

- 7** (1) If a landlord or tenant does not comply with this *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

However, s. 7(2) of the *Act* states

- (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this *Act*, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Having considered the arguments and after reviewing the documentary evidence before me I find the landlord has provided evidence only for advertisements dated May 26, 2012 and no evidence to show that the unit was advertised on May 06, 2012 as stated by the landlord. The landlord has provided no corroborating evidence such as invoices showing when the unit was advertised or evidence of an advertisement starting on May 06, 2012. The tenants have provided advertisements from the landlords agents own website showing adverts for the property but no photographs of the unit; consequently, I find there is no corroborating evidence that the landlord made reasonable attempts to re-rent the unit in order to mitigate the loss to both their client and the tenants. Furthermore, I am not satisfied that the landlord made reasonable efforts to re-rent the unit for the at least the term of the tenancy. The landlords claim for unpaid rent is therefore dismissed without leave to reapply.

With regard to the landlord claim for damages; As the tenants do not dispute this claim I find that despite any further evidence showing the actual cost to repair this damage that the landlord is entitled to recover this sum of **\$50.00** from the tenants.

With regard to the landlord claim to keep the security and pet deposits; I refer the parties to s.35 of the *Act* which states a landlord's right to claim against the security or pet deposit for damages is extinguished if the landlord has failed to comply with s. 35 of the *Act* in regard to the completion of the move out condition inspection. However this does not refer to the landlords' right to file a claim to keep the security and pet deposits if the landlord is also filing for unpaid rent.

The landlord also raises the issue that the tenants did not attend a move out inspection and therefore extinguished their right to recover the security and pet despoit. S. 35(2) of the *Act* states

35 (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

The landlord's agent has provided no evidence to show that the tenants were offered at least two opportunities for inspection and no inspection was done on the unit at the end of the tenancy. Consequently, the tenants have not extinguished their right to recover the security deposit.

The tenants argue that they gave the landlord their forwarding address in writing on May 31, 2012 the landlord argues that he did not receive the tenants forwarding address until June 11 or June 12, 2012. In this matter the person making the claim must bear the burden of proof and when one party's testimony contradicts that of the other party then the person making the claim, which in this case is the tenants, must provide corroborating evidence to meet the burden of proof. When it becomes one persons word against that of the other then the burden of proof is not met. If the tenants had been able to proof that the landlord had not returned their security deposit within 15 days of receiving their forwarding address in writing then the tenants would be entitled to recover double their security deposit. However, as the tenants have not met the

burden of proof it is my decision that the landlord must return the tenants security and pet deposit less the \$50.00 awarded for damage to the transom.

As the landlord has been largely unsuccessful in this claim I find the landlord must bear the cost of filing their own application.

Conclusion

I HEREBY FIND in partial favor of the landlord's monetary claim. The landlord is ordered to keep **\$50.00** from the security deposit.

The balance of the security and pet deposits must be returned to the tenants. A Monetary Order has been issued to the tenants to the sum of **\$1,300.00**. The order must be served on the landlords and is enforceable through the Provincial Court as an order of that Court.

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 04, 2012.

Residential Tenancy Branch