



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlords: MNR, FF
 Tenants: MNDC, FF

Introduction

This hearing dealt with the cross Applications for Dispute Resolution with both parties seeking a monetary order.

The hearing was conducted via teleconference and was attended by the landlords; the tenants and their legal counsel.

While this hearing was originally scheduled to hear only the landlords' Application and the tenants' Application had been scheduled to be heard on June 11, 2013 the tenants submitted that the evidence they intended to rely upon for their Application was submitted as evidence for response to the landlords' evidence and they would like to proceed with their Application at this hearing.

The landlords agreed that they were prepared to respond to the tenants' Application at this time. As such, I have heard both Applications and address them both in this decision.

The landlords also noted at the start of the hearing that the tenants have not yet paid in full the liquidated damages they had agreed to at the end of the tenancy. The landlord sought to amend their Application to include the \$50.00 outstanding liquidated damages. I amend their Application to include this matter.

Issue(s) to be Decided

The issues to be decided are whether the landlords are entitled to a monetary order for unpaid rent; a portion of liquidated damages and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 45, 67, and 72 of the *Residential Tenancy Act (Act)*.

It must also be decided if the tenants are entitled to a monetary order for compensation for damage or loss and to recover the filing fee from the landlords for the cost of the Application for Dispute Resolution, pursuant to Sections 28, 32, 67, and 72 of the *Act*.

Background and Evidence

Both parties provided a copy of a tenancy agreement signed by the parties on August 26, 2012 for a 7 month and 6 day fixed term tenancy beginning on August 25, 2012 for a monthly rent of \$3,895.00 due on the 1st of each month with a security deposit of \$1,950.00 paid.

The tenancy agreement included a liquidated damages clause written as follows:

“If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the landlord to end the tenancy before the end of the term as set out in B above, or any subsequent fixed term, the tenant will pay the landlord the sum of \$2,000.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.”

The tenants submit that they actually had signed two tenancy agreements, one they had been sent by the landlords' agent while they were still in England and then one after they arrived. They submit that the agent informed them that the \$2,000.00 liquidated damages clause would cover any and all charges to the tenants should they end their tenancy prior to the end of the fixed term.

The tenants state their position is supported by the wording of the liquidated damages clause in that it specifies unpaid rent or damage to the rental unit as additional monies that the landlords may pursue in addition to liquidated damages and that the reference is to rent that had previously been unpaid and that this would not cover the future rent that might be owed for the balance of the term of the tenancy. The tenants also submit that in the alternative, the clause itself is worded so ambiguously it is unenforceable.

The parties agree the tenancy ended after the tenants provided the landlord with a notice of their intention to end the tenancy in an email dated November 28, 2012 stating that they would be ending the tenancy on December 28, 2012 so they can have their shipped belongings and so they may move for reasons related to the children's schooling.

The parties agree the tenants agreed to have the landlords retain the security deposit of \$1,950.00 as partial payment for the liquidated damages but the balance of \$50.00 has not yet been paid.

The landlords submit that as a result of the tenants ending the tenancy prior to the end date of the fixed term and their inability to re-rent the unit until April 1, 2013 they have suffered a loss of the equivalent of \$11,685.00 for rent for the months of January, February, and March 2013.

The landlords testified that they immediately (November 30, 2012) had the rental unit posted on Craigslist and that by December 13, 2012 they had retained an agent and after reducing the rent several times eventually re-rented the unit for \$3,200.00 (\$695.00 less the rent for this tenancy).

The tenants seek compensation in the amount of a 75% abatement or \$2,217.64 for a gas leak related to the fireplace for the period of between August 25, 2012 and September 16, 2012 that significantly disturbed the tenants' quiet enjoyment. The tenants also seek compensation for the inability to use the fireplace during the 4 months the tenant lived in the rental unit in the amount of \$250.00 per month.

The tenants submit that on the 2nd day after moving into the rental unit they began to notice a gas smell and that on the 5th or 6th of September 2012 they tried to call the landlords' agent but that she did not respond. The tenants stated they then sent the agent an email on September 9, 2012 that specifically outlined they were concerned with a gas leak.

The agent responded the following day stating that she was no longer the landlords' agent and that the tenants should contact the landlords directly. In her response, the former agent indicated that if the landlords did not arrange for a service person to attend within 24 hours the tenants should contact a service provider for which she provided contact information and that it was their right to have the problem corrected without permission from the landlords.

The landlords provided a copy of the email they received from the tenants on September 11, 2013 asking them to send someone over to show them how to use the fireplace and central heating. The landlords also provided an email from their agent who had been sent to start up the fireplace dated September 16, 2012 stating that he could not get the fireplace started and because the tenants had mentioned to him that they were smelling gas, particularly at night he turned off the gas using the shut off from the source outside.

The parties agree that later, in October 2012 the landlords had a gas service provider examine the fireplace and determine that it should not be used due to high levels of carbon monoxide and that the fireplace should be replaced. The tenants did not use the fireplace for the duration of the tenancy. The landlords had the fireplace replaced in January 2013.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the Act, regulation or tenancy agreement;

3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 45(2) of the *Act* stipulates that a tenant may end a fixed term tenancy by giving the landlord a notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy and is the day before the day in the month that rent is payable under the tenancy agreement.

As such, and based on the tenancy agreements before me, I find the earliest the tenants could have ended the tenancy was March 31, 2013 and that the tenants remain responsible for the payment of rent for the months of January, February, and March 2013.

I find that the landlords took reasonable steps to mitigate losses by posting the rental unit online almost immediately after receiving notice and securing a new agent by mid December 2012. I also find that it was reasonable for the landlords to reduce the amount of rent sought as further mitigation.

In the case of verbal agreements, I find that where terms are clear and both the landlord and tenant agree on the interpretation, there is no reason why such terms cannot be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes.

In the case before me, as the tenants submitted the landlord's agent confirmed for them that the liquidated damages clause would cover all costs for ending the tenancy prior to the fixed term it is incumbent upon them to provide evidence to establish this position. The tenants have not provided any documentary evidence, such as emails to confirm the agent informed them the liquidated damages would cover all costs for ending the tenancy early or any written statements or testimony from the former agent.

As such, I find the tenants have failed to provide sufficient evidence to establish any promises made by the landlord's agent prior to signing the agreement, in relation to any term in the tenancy agreement, including liquidated damages.

I am not persuaded by the tenants' position that the wording is sufficiently ambiguous to render it unenforceable for the following reasons:

1. The tenants submit that the lost rental costs should be included in the "landlord's costs of re-renting the rental unit." I find that this statement clearly outlines costs specific to costs *normally* incurred while attempting to re-rent a rental unit such as the hiring of a property manager; advertising; the administration of assessing a tenant's suitability and showing the rental unit. A landlord does not normally incur lost revenue or rental payments if they were trying to re-rent the unit for the end of the fixed term tenancy; and

2. The tenants' position is that future rent payments are specifically precluded from the liquidated damages clause because of the stipulation that liquidated damages "must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property." I find that use of the phrase "such as" in this context introduces the idea of examples of amounts owed that the landlords may pursue but that it is not specifically limiting the landlords' ability to pursue only the two named examples.

For these reasons, I find the landlords are entitled to the full compensation of lost rent for the months of January, February, and March 2013 in the amount of

Section 32 of the *Act* requires a landlord to provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard for the age, character and location of the rental unit make it suitable for occupation by a tenant.

I accept that the tenants identified a gas leak problem almost immediately after moving in to the rental unit and that while they have testified they attempted to contact the landlord's agent nearly two weeks later by phone they were only successful in contacting her by email on September 9, 2012.

While I also recognize that the tenants specifically identified a gas leak to the agent in their email to her, when she informed the tenants they must deal directly with the landlords as she no longer represented them, and I note that in the email to the landlords dated September 11, 2013 the tenants only asked to have someone come by and show them how to use the fireplace.

Because of the time of year and the lack of need for the use of the fireplace as a heat source at the time, and the lack of any indication from the tenants of any urgency in dealing with the fireplace I find the landlords arranging to have someone attend the property and show the tenants how to use the fireplace was completed within a reasonable time.

I also note that during the time that the landlord's agent was trying to start the fireplace the tenants informed him that they smelled gas, particularly at night. As such, I find this was the first time the landlords' had been informed that there was a gas leak problem. As such, and because the landlord's agent immediately turned off the gas from the source, I find the landlords fulfilled their obligations under Section 32 without delay.

Section 28 of the *Act* states a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with Section 29; and use of common areas for reasonable and lawful purposes, free from significant interference.

While the tenants submit that as a result of the gas leak their quiet enjoyment was significantly disturbed. I find, that other than the inability to use the fireplace (which will be dealt with later in this decision) and their testimony that they had headaches and nausea during this time the tenants have provided no evidence of any health related problems or a direct link of any health problems to leaking gas.

As such, I find the tenants have failed to provide sufficient evidence to establish that the landlord violated the *Act*, regulation, or tenancy agreement or that they suffered any damage or loss result from such a violation, in relation to their claim for compensation for a rental abatement and I dismiss this portion of their claim.

In regard to the tenants' claim for compensation for the landlord's failure to provide a working fireplace, I accept, based on the testimony of both parties that for the period from September to December 2012 the fireplace did not work. As such, I find the value of the tenancy should be reduced for this period and that the amount of \$250.00 per month or a total of \$1,000.00 is reasonable compensation for this value reduction in relation to the total amount of rent for the residential property.

As the landlords were successful in their claim I find they are entitled to recover the filing of \$100.00 for their Application and as the tenants were only partially successful I find they are entitled to recover \$25.00 of the \$50.00 filing fee for their Application.

Conclusion

I find the landlords are entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **\$10,810.00** comprised of \$11,685.00 rent owed; \$50.00 liquidated damages owed; \$100.00 fee paid by the landlords for their application; less \$1,000.00 rent reduction and \$25.00 of the \$50.00 fee paid by the tenants for their application. .

This order must be served on the tenants. If the tenants fail to comply with this order the landlords may file the order in the Provincial Court (Small Claims) and be enforced 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: April 16, 2013

Residential Tenancy Branch