



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

OPR, MNR, MNDC, MNSD, MND, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord seeking an Order of Possession and monetary order based on a Ten Day Notice to End Tenancy for Unpaid Rent and Utilities dated April 2, 2013. The landlord is also seeking payment of liquidated damages pursuant to a term in the fixed term tenancy agreement, and loss of revenue for May 2012.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

At the outset of the hearing the landlord advised that, although the 10-Day Notice to End Tenancy for Unpaid Rent terminated the tenancy as of April 12, 2013, the tenants had vacated on April 30, 2013. Therefore no Order of Possession is necessary. However, the landlord is still pursuing the monetary portion of the application.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence are:

- Is the landlord entitled to a Monetary Order for rent based on the Ten Day Notice to End Tenancy for Unpaid Rent?
- Is the landlord entitled to loss of revenue and liquidated damages under the fixed term tenancy agreement?

Background and Evidence

The tenancy began on January 1, 2013 as a fixed term ending on February 28, 2014. According to the landlord, at the end of March 2013, the tenants gave one-month written notice to terminate the tenancy prior to the end of the fixed term, effective April 30, 2013. The landlord testified that she immediately began to seek replacement renters to take possession on May 1, 2013. The landlord testified that when the tenants failed to pay rent due on April 1, 2013, she issued a the 10-Day Notice to End Tenancy terminating the tenancy as of April 12, 2013.

Submitted into evidence was a copy of the April 2, 2013, Ten Day Notice to End Tenancy for Unpaid Rent and Utilities, indicating that, as of April 2, 2013, the tenant owed \$1,525.00 in overdue rent and \$250.00 in unpaid utilities. The landlord testified that the tenant later paid \$1,200.00 toward the rental arrears, leaving \$300.00 rent and a late payment fee of \$25.00 still outstanding and the landlord is claiming compensation for \$325.00.

According to the landlord, under the tenancy agreement, the tenant agreed to pay 75% of the costs for oil, water, hydro and sewer charges for the building. The landlord pointed out that this was a clear term in the tenancy agreement, which was in evidence. The landlord testified that the percentage is founded on the fact that the tenant's suite has an area of 1,450 square feet, while the bachelor suite below is only 350 square feet.

In regard to the tenant's outstanding utility balance, the landlord stated that the amount of the total arrears owed for utilities has increased from the \$250.00 shown in the April 2, 2013 Notice to \$737.45. The landlord testified that this is based on invoices that have arrived since she issued the 10-Day Notice.

The landlord had supplied a copy of an invoice from the oil company with her calculations showing that the tenant's outstanding balance was \$214.00. Also in evidence was a copy of the water and sewer service invoice from the municipality, based upon which the landlord had calculated the tenant's portion to be \$33.60. The current invoice from the hydro company showed total charges of \$356.86, for the 57-day period from January 23, 2013 to March 22, 2013, and the tenant's portion was calculated to be \$258.45. Based on the most current bill, the landlord is also claiming a pro-rated amount for the 38-day period from March 22, 2013 to the end of the tenancy which ended on April 30, 2013, estimated to be an additional \$232.45. The tenant's portion of all utilities claimed by the landlord totals \$738.05.

In addition to the above, the landlord is claiming liquidated damages pursuant a term in the tenancy agreement in the amount of \$400.00. The tenancy agreement in evidence contains the following provision:

“LIQUIDATED DAMAGES: If the tenant ends the fixed term tenancy before the end of the original term set out in (B) above, the landlord may treat the agreement at an end. In such event, the sum of \$400 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty. Liquidated damages covers 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 monetary claim by the landlord totals \$1,513.05, comprised of \$325.00 for rent and late fee, \$738.05 for the tenant’s share of utilities, \$400.00 liquidated damages and the \$50.00 cost of the application.

The tenants disagreed with the above claims put forth by the landlord.

With respect to the remaining rent owed and the liquidated damages, the tenants testified that their ability to pay was affected by excessive utility charges imposed by the landlord.

The tenants acknowledged that they had not paid the rent due on April 1, 2013 and that they then received a 10-Day Notice to End Tenancy from the landlord for \$1,525.00 owed for rent and \$250.00 for utilities. The tenants pointed out that they paid the landlord \$1,200.00 towards the debt and tried to reinstate their tenancy to continue to the end of the fixed term, but the landlord refused and insisted that the agreement be terminated.

The tenant testified that the reason the landlord wanted them to move out was apparently because the landlord already had a new renter scheduled to move in on May 1, 2013. The tenant’s position is that the landlord had ended their tenancy.

The tenants stated that after receiving the 10-Day Notice to End Tenancy for Unpaid Rent, they accepted the end of the tenancy, but they did admit to over-holding the unit beyond the April 12, 2013 termination date shown on the landlord’s notice and not surrendering possession of the unit until the end of April 2013. The tenant testified that the landlord was continually bothering them and urging them to vacate.

In regard to the utility charges, the tenants took issue with the fact that, despite having the oil tank filled with over \$400.00 worth of oil to heat for the winter, this only lasted

less than a month. The tenants stated that, when entering into the tenancy agreement, they were led by the landlord to expect that a full tank of oil would likely last three months. The tenants stated that they suspect that there may be a leak or other malfunction of the tank or equipment. This was denied by the landlord, who pointed out that the tank was newer and had been inspected.

The tenants stated that they also have concerns about the calculations made by the landlord with respect to their portion of the hydro costs and the water charges.

Analysis

With respect to the rent claimed in the amount of \$300.00, I find that section 26 of the Act states that rent must be paid when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement. Through testimony from both parties it has been established that the tenants did not pay the rent when it was due. I find that the landlord is entitled to be paid \$300.00.

With respect to the \$25.00 charge for the late fee, I find that this is pursuant to a clear term in the tenancy agreement and the landlord is entitled to be compensated \$25.00.

With respect to the dispute over utilities, I find that the tenancy agreement clearly states that the tenant must pay 75% of the costs, but there is no way for a tenant to know in advance how high these costs may actually end up being.

In regard to the cost of the oil, I find it likely that a tenant would rely on verbal representations made by the landlord when deciding whether or not to take the tenancy. At the same time, I do not find that this landlord had purposely misled the tenants with respect to the estimated usage, based on the experience of her past tenants. I find that the invoice from the oil company verifies the cost and both parties confirmed that the tank was empty long before the expected three-month period. However, I find that this is cost for which the tenants must bear the agreed-upon 75%, despite their understandable alarm at the extraordinary expenditure incurred to heat their rental unit. I find that the landlord is entitled to \$214.00 owed for the outstanding cost of the oil.

In regard to the hydro bill, again verified by the company invoice, I find no reason to doubt that it is the genuine cost of usage for the period from January 21 to March 23, 2013. Despite the tenant's stated suspicions, I find that the landlord is entitled to payment of \$258.45 by the tenants.

With respect to the landlord's pro-rated claim for the 38-day period from March 22, 2013 until the end of the tenancy on April 30, 2013, I was not able to verify the calculations

that the landlord based the claim on. For this reason, I find that this portion of the claim cannot be adequately proven and must be dismissed.

With respect to the \$33.60 costs for water and sewage services, I find that the calculations are confusing, but they are genuinely based on a per-diem cost broken down by number of occupants using the services. I find that the tenancy agreement clearly provides that the tenants must pay their share. Therefore, I find that the landlord is entitled to be paid the \$33.60 owed for the water and sewer costs.

I accept that the contract between the landlord and the tenants contained a clearly-worded liquidated damage clause which provides that, should the tenant terminate the agreement prior to the end of the fixed term, the tenant must pay \$400.00.

Although the landlord's position was that the tenants had already given written notice to end the agreement earlier than the fixed term, effective April 30, 2013, I find that the tenancy was actually terminated by the landlord prior to that date. I find that the landlord's termination of the tenancy was effective on April 12, 2013 pursuant to the 10-Day Notice to End Tenancy for Unpaid Rent.

While there is no argument that the tenants did over-hold possession past the termination date, I find as a fact that the agreement was validly terminated by the landlord under section 46 of the Act.

For this reason, I find that the liquidated damages clause would not strictly apply against the tenant in the case before me. Accordingly, I find that the landlord's claim for \$400.00 in liquidated damages and the claim for loss of revenue for May 2013 must be dismissed.

I find that the landlord is entitled to monetary compensation in the total amount of \$881.05, comprised of \$300.00 rental arrears, \$25.00 in late fees, \$214.00 owed for the tenants' portion of the oil fill, \$258.45 for the verified hydro costs, \$33.60 for the tenants' share of the water bill and the \$50.00 cost of the application.

I order that the landlord retain the tenant's \$750.00 security deposit in partial satisfaction of the claim leaving a remainder of \$131.05 still owed to the landlord.

Given the above, I hereby grant a monetary order in the amount of \$131.05 in favour of the landlord. This order must be served on the tenants. It is final and binding and if unpaid may be enforced by Small Claims Court.

The remainder of the landlord's monetary claims are dismissed without leave. The request for the Order of Possession is moot

Conclusion

The landlord is partially successful in the application and was granted a monetary order for a portion of the claim and it is found that the request for an Order of Possession is moot.

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: May 08, 2013

Residential Tenancy Branch