



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: MNDC, FF

Introduction

The hearing was convened to deal with an application by the tenant for a monetary order. The tenant's claim is based on an alleged agreement with the landlord to vacate the rental unit early in exchange for a refund of the rent already paid for the month of March 2013. The tenant is claiming \$1,200.00 plus the cost of the application.

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.

Issues to be Decided for the Tenant's Application

Is the tenant entitled to a rent refund for rent paid for the month of March 2013?

Background

The tenancy started on February 23, 2013, with rent set at \$1,200.00. The tenants occupied the lower suite, with the landlord living in the suite above. The tenant testified that, at the time the rental agreement was made, the landlord was aware that the tenants had a toddler and the landlord verbally assured the tenants that the suite was soundproof.

The tenant testified that, just after they moved in on March 2, 2013, the landlord suddenly came to the tenant's door and complained about the fact that the frequent and loud crying of the tenant's baby was disturbing the landlord's family above and this was not acceptable. The tenant stated that the landlord's demeanor was perceived as confrontational and intimidating.

The tenant testified that they could not determine any tangible way to avoid bothering the landlord, particularly with a baby and they felt that this would not be possible to

keep everything quiet under the circumstances. The tenant testified that they realized that the rental unit was not as sound-proof as they were led to believe by the landlord and this was clearly going to become an insurmountable problem, for both parties.

The tenant testified that, approximately 30 minutes after the landlord left, the tenant phoned the landlord and offered to vacate the unit immediately on the condition that they be refunded both their security deposit and the rent they had already paid for March. According to the tenant, the landlord consented to this proposal and on that basis, the tenant immediately repacked their furnishings and possessions and moved out.

The tenant testified that they thoroughly cleaned out the unit and were given back their security deposit. However, when they requested the promised rent refund, they were told they had to wait for the rent rebate. The tenant testified that they later met with the landlord to return the keys and received a post-dated cheque from the landlord for a partial refund of the \$1,200.00 they paid for March 2013, in the amount of \$900.00. The tenant testified that they had to wait to cash the cheque as it was post dated. The tenant testified that they were disappointed to find out that the landlord had placed a stop-pay on the cheque after giving it to them.

The tenant is claiming monetary compensation of \$1,200.00 as a rent abatement for March 2013 based on the agreement that was relied upon by the tenant.

The landlord disputed the tenant's allegation that the landlord acted in a confrontational way by cautioning them about the crying baby. The landlord testified that the child was apparently left to cry for extended periods of time and the landlord could hear the crying clear enough that they were actually awakened by the noise.

The landlord denied that they had ever told the tenant that they had to vacate the unit and also denied that they had made a promise or entered into an agreement to refund the tenant's March 2013 rent in exchange for the tenant vacating on March 2, 2013. According to the landlord, the tenant merely announced that they were moving out and vacated immediately thereafter, despite having paid to live in the unit for the entire month of March.

The landlord acknowledged that they did issue a rent refund cheque to the tenant for \$900.00. The landlord testified that the funds were paid because the tenant demanded the refund in exchange for surrendering the key and they felt that they had no choice but to issue a refund cheque. The landlord testified that they wrongly believed that they had a legal obligation under the Act to refund the rent. The landlord testified that they later received information about the Residential Tenancy Act and realized that they did not have to refund the tenant's rent. The landlord feels that they are entitled to keep

the rent payment because the tenant gave insufficient notice to move out. The landlord testified that they then decided to place a stop-pay on the \$900.00 cheque that had already been issued to the tenant.

Analysis

Tenant's Notice to End Tenancy

Section 45 of the Act permits a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice, and

(b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Given the above, I agree with the landlord and find that the tenant did not comply with section 45 of the Act and agreement, because adequate Notice was not provided pursuant to this section of the Act.

Mutual Agreement to End Tenancy

With respect to the tenant's position that there was a mutual agreement to end the tenancy, I find that section 44(1)(c) of the Act provides that a tenancy may be legally ended by mutual agreement. However, the Act requires that the mutual agreement to end the tenancy must be in writing and signed by both parties. For this reason, I do not find that these parties had ever entered into an enforceable mutual agreement to terminate the tenancy under the Act.

Breach of Material Term of Contract

In regard to the tenant's allegation that the rental unit was falsely presented by the landlord, prior to signing the agreement, and that the landlord assured the tenant that it was being sufficiently sound-proofed to house the family, I accept the tenant's testimony that such an assurance was made by the landlord.

I find as a fact that the sound-proofing issue was considered by the tenant to be a material term of the tenancy, without which the tenant would never have agreed to enter into this agreement. I find that, if the unit was subsequently discovered not to be adequately sound-proofed after the move-in, this fact would support a conclusion that the tenancy agreement was likely flawed from the outset.

I find that, after having presented the unit as being adequately sound-proofed, early in the tenancy, the tenant was suddenly confronted by an upset landlord complaining that their baby's cries were creating an unreasonable disturbance.

I find that the reciprocal rights of multiple residents in a complex must be balanced against one another. Section 28 of the Act protects every tenant's right to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29; and
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Based on the Act, a tenant is entitled to expect, at the very least, to be permitted to engage in normal living activities without being unduly restricted. I find that, even without an overt assurance from the landlord, there is still a fundamental expectation that their living space will be buffered from receiving or transferring excessive sounds between the rental units.

When the tenancy happens to include infants or toddlers, I find that there is a reasonable expectation that babies will inevitably cry, often at inopportune times of the day. Unless the rental accommodation has been *sufficiently sound-proofed*, it follows that this could disturb adjacent suites.

I find that the fact that the baby's crying caused a significant disturbance, appears to verify that the landlord's assurance of adequate soundproofing was not entirely accurate.

I further find that the landlord's requirement that the tenants must find a way to control the volume or frequency of their baby's cries, was not a reasonable, nor feasible, demand. I agree with the tenant's conclusion that accommodating the landlord's expectation in this regard would likely be impossible to accomplish and would certainly impinge on the tenant's right to function normally in a family setting within their own home.

With respect to the landlord's failure to comply with a material term, I find that section 45(3) of the Act does permit a tenant to terminate the tenancy when there has been a breach of a material term.

However, I find that, before ending the tenancy, the Act requires that the tenant must first give the landlord written notice of the breach and the tenant must also afford the landlord a reasonable opportunity to correct the breach.

That being said, in this instance, I find that the landlord was already aware of the lack of soundproofing, by virtue of the fact that it was the landlord who felt disturbed by audible sound transmission between the units.

In any case, granting this landlord adequate time to fully sound-proof the suite, even if this was possible to do, would not be a practical solution to the problem for either party and furthermore this remedy would require the unit to be vacant to accomplish.

In addition, I find that, if this tenancy had continued for any period, the tenant's private family activities would continue to cause an intolerable disturbance for the landlord and the landlord would likely continue to unfairly violate the tenant's statutory right to engage in normal family activities in their own suite.

I find it is clear that, despite the fact that this tenancy agreement was entered into by in good faith, the circumstances are such that this tenancy would need to end without delay. I reach this conclusion because it is evident that these premises were not appropriate for occupation by minor children, due to sound transfer deficiencies that may be due to infrastructure issues in this converted home.

Section 44(1)(f) of the Act states that a tenancy can be terminated on a date that the arbitrator orders it to be ended. Based on a course of events caused by the failure of both parties to comply with the Act and the tenancy agreement, as described above, I have therefore determined that the tenancy officially ended on March 3, 2013.

Accordingly, I find that the tenant is required to pay rent to the landlord for the three days that they held physical possession of the unit in March 2013 in the amount of \$118.35.

As the landlord has previously received \$1,200.00 from the tenant for the month of March 2013, I hereby grant the tenant a Monetary Order in the amount of \$1,131.65, comprised of a rent abatement of \$1,081.65 and the \$50.00 cost of the application.

Conclusion

The tenant is successful in the application and is granted a monetary order for a rent abatement.

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 28, 2013

Residential Tenancy Branch

