



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, CNL, CNR, OLC, RR, FF

Introduction

This hearing dealt with two related applications. File 810908 is the tenants' application for orders setting aside a notice to end tenancy for landlord's use; setting aside a notice to end tenancy for non-payment of rent; compelling the landlord to comply with the Act, regulation or tenancy agreement; and allowing the tenants to reduce the rent for repairs, services or facilities agreed upon but not promised. File 811117 is the landlord's application for an order of possession and a monetary order. Both parties appeared and had an opportunity to be heard. As the parties and circumstances are the same on both applications, one decision will be rendered for both.

Issue(s) to be Decided

- Should an order of possession be granted and, if so, upon what terms?
- Is the landlord entitled to a monetary order and, if so, in what amount?
- Are the tenants entitled to a monetary order and, if so, in what amount?

Background and Evidence

This 12.5 month fixed term tenancy commenced June 15, 2013. The monthly rent of \$1550.00 was due on the first day of the month. The tenants paid a security deposit of \$775.00 and a pet damage deposit of \$25.00. The parties signed a standard Residential Tenancy Branch tenancy agreement. There were no addendums to the agreement.

The rental unit is the upper level of a house. There is a second rental unit in the lower level. The lower level was already occupied when the tenants looked at and subsequently rented the lower level.

The tenants testified that the most attractive feature of this rental unit was the large yard, which they understood from their conversation with the landlord, would be exclusively for their own use. The tenants wanted to plant a garden and to have a dog. The landlord told them that cats were okay but if they got a dog it would have to be an outside dog. The tenants testified that they showed the landlord where they wanted to put the garden and she told them that would be okay. The tenants acknowledge that there is nothing in writing about them having exclusive use of a portion of the yard.

The landlord testified that the little patio was the only space for the exclusive use of the tenants and the yard was to be shared by both rental units. She said the tenants did talk about having a garden and she told them it would be okay.

By the beginning of July the downstairs tenants, who had small children, had set up a swimming pool on the very spot the tenants had taped off for their garden. They also installed a wood burning stove and arranged the lawn furniture to suit themselves. The yard and pool was well used by the neighbourhood children all summer.

The tenants discovered that the landlord had given the downstairs tenants permission to do all of these things. At the same time the relationship between the upstairs tenants and the downstairs tenants soured to outright hostility. The tenants described an incident that included physical violence towards them. The landlord testified that she did not know anything about this.

The tenants paid the July rent on July 6. The tenants say they had a long discussion with the landlord, her husband, and the downstairs tenants on that date about their inability to use the yard in the manner they had planned and a possible reduction in the rent to compensate them for the lack of access to the yard. The tenants say no agreement was reached. The landlord says the conversation never took place.

The tenants say that on July 10 they again spoke to the landlord. They told her they had found a new place for July 15 and if she would return the security deposit to them a few days early so they could secure the new place, they could be out by the 15th. The landlord did not agree to this proposal. They did not move because they did not have the money for the security deposit at the new place. The landlord testified that in mid-July the tenants told her they wanted to move out.

The tenants did not pay the August rent. They say that on August 2 they spoke to the landlord and there was an agreement that the security deposit would be applied to the August rent and they would move out by August 15. The landlord testified that she never agreed to this.

Both parties agree that on August 2 the landlord served the tenants with a 10 Day Notice to End Tenancy for Non-Payment of Rent.

The tenants testified that this did not give them enough time to find another place so they filed this application for dispute resolution to get extra time. They both testified that they thought they could stay in the rental unit until the hearing date.

The tenants did not pay any rent for August nor did they pay any rent on September 1.

The tenant, TL, moved out of the rental unit on September 1 without giving the landlord any written notice of his intention to do so. The tenants say they had a conversation with the landlord on September 3 and advised her that the tenant, JC, would be moving out of the unit the next day. The landlord testified that she does not remember any such conversation.

JC moved out of the unit on September 4. He left the keys under the mat. The landlord testified that they did not know until after the fact that the tenants intended to move out at the beginning of September.

The landlord claims the August rent and loss of rental income for September.

The tenants say that as a result of the downstairs tenants' action, together with the very difficult relationship between the two sets of tenants, they were not able to use the yard all summer and they suffered a loss as a result.

Analysis

Notice to End Tenancy

Although the tenants asked for an order setting aside a 2 Month Notice for Landlord's Use there is no evidence that one was ever served on the tenants. The tenants have moved out of the rental unit thereby rendering the issues of whether the 10 Day Notice to End Tenancy for Non-Payment of Rent was valid and whether an order of possession should be granted or denied moot.

Landlord's Claim for Rent

Section 26(1) of the *Residential Tenancy Act* provides that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulation or the tenancy agreement, unless the tenant has an order from the Residential Tenancy Branch allowing the tenant to withhold payment of all or any portion of the rent.

While a tenant who has filed an application for dispute resolution disputing the validity of a notice to end tenancy may stay in the rental unit until the hearing the tenant is still obligated to pay the rent during that time. Accordingly, I find that the tenants are responsible for the August rent.

Section 7 of the *Residential Tenancy Act* provides that a landlord or a tenant who claims compensation for damage or loss that results from the others' non-compliance with the Act, Regulation or tenancy agreement must do whatever is reasonable to minimize the damage or loss. For a landlord, this usually means by advertising as quickly and widely as possible.

If the tenants had given the landlord written notice to end tenancy, as required by section 52 of the Act, for August 31 and had, in fact, moved out by that date the landlord would have had an opportunity to minimize the loss by attempting to re-rent the unit for some time in September, even though she had received short notice. However, by filing their application for dispute resolution, not giving the landlord advance written notice of their intention to move, and not moving until after the beginning of the next rental cycle, the tenants made it almost impossible the landlord to re-rent the unit in September. Accordingly, I find the tenants are responsible for the September rent.

Tenants' Claim for a Rent Reduction

Section 65 allows an arbitrator who finds that a landlord has not complied with the Act, regulation or tenancy agreement may order that past or future rent be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement.

The only evidence as to whether or not the tenants were promised the exclusive use of a portion of the yard is the conflicting oral testimony of the parties. There is nothing in the written tenancy agreement that stated the tenants are entitled to exclusive use of any portion of the yard and there is no other evidence that tips the balance of probabilities in the tenants' favour.

The evidence does show that the landlord knew the tenants wanted to make use of a portion of the yard for a garden and maybe a dog, and that she gave permission for both of those activities. However, the effect of the downstairs tenants' actions and the landlord's acquiescence to those actions, was to give the downstairs' tenants exclusive use of the yard. This is contrary to what the landlord said was the terms of the tenancy agreement.

I find that the upstairs tenants were denied any use of the yard to which they should have had some access and that the value of the tenancy agreement was reduced as a result. I find that the tenancy was devalued by \$200.00 a month and I award the tenants a monetary order in the amount of \$500.00 for the period June 15 to August 31. I have not made any award for September because the tenants had moved out of the unit by September 4.

Set Off

I have found that the tenants are liable to the landlord for the August rent and the loss of rental income for September in the total amount of \$3100.00. I have found that the landlord is liable to the tenants in the amount of \$500.00. Setting one amount off against the other I find that the tenants owe the landlord the sum of \$2600.00. Pursuant to section 72, I order that the landlord may retain the security deposit of \$775.00 and the pet damage deposit of \$25.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$1800.00.

Filing Fees

As both parties were only partially successful on their applications, both parties will bear their own costs of filing their respective applications.

Conclusion

A monetary order in favour of the landlord has been made. If necessary, this order may be filed in the Small Claims Court and 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: October 01, 2013

Residential Tenancy Branch

