



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, MNR, FF

Introduction

This hearing dealt with two related applications. File 812654 is the tenant's application for return of double the security deposit. File 813252 is the landlord's application for a monetary order. Both parties appeared and had an opportunity to be heard. As the parties and circumstances are the same for both applications one decision will be rendered for both.

Issue(s) to be Decided

- Is the tenant entitled to a monetary order and, if so, in what amount?
- Is the landlord entitled to a monetary order and, if so, in what amount?

Background and Evidence

The tenant is a Turkish trained geophysics engineer. In Canada she has worked for Costco and has recently started a new job as a teller in a credit union. In the hearing she appeared to be quite proficient in English.

The tenant had to be out of her place by August 31 because her landlord needed the space for family. The tenant said this meant she had to find a place quickly.

The landlord had advertised this one bedroom basement suite. The ad said: "Rent \$700 includes basic utilities. Internet ready for hook up." It also said the unit was close to a college.

The tenant looked at the unit on July 6 or July 8. She testified that she agreed to take the place because it "was good enough for now".

The landlord testified that on this occasion the tenant asked about cable and internet. She advised the tenant that they used to provide it but because of previous experiences their procedure was that the tenants were to make their own arrangements directly with the provider for cable and internet access. The tenant said this conversation never occurred.

The landlord also testified that the tenant asked about a lower rent to which she replied that she would not discuss rent until she had checked the tenant's references. The tenant provided the landlord with her references at this meeting.

The landlord did check the tenant's references and received good reports. She and her husband decided to offer the unit to the tenant at \$680.00 per month. The parties spoke on the telephone and made an appointment to meet on July 10.

When the tenant arrived on July 10 she asked if she could look at the unit again before she signed the tenancy agreement. The landlord agreed and the tenant had another look.

After looking at the unit the parties signed a standard Residential Tenancy Branch agreement which the landlord had prepared in advance. The agreement stated that:

- The tenancy commenced September 1, 2013.
- The monthly rent of \$680.00 was due on the first day of the month.
- The term of the tenancy was three months.
- At the end of the term the tenant had to move out of the rental unit.
- The rent included water, electricity and heat. Cablevision was not checked.

Both parties signed the agreement including putting their initials beside the clause that said the tenant had to move out at the end of the term and another clause regarding pets. The landlord gave the tenant a fully executed copy and the tenant gave the landlord a security deposit of \$340.00.

The landlord testified that she explained the rationale behind the three month term; the tenant testified there was no such discussion.

The tenant's evidence is that the landlord told her "three separate times that everything was included as the Craigslist ad stated" and that the landlord verbally agreed that cable and internet was included in the rent. The landlord's evidence is that their agreement was reflected in the written document.

The tenant testified that the landlord was in a hurry and everything had to be done urgently. She did not notice that the agreement was for a fixed term and that cablevision was not included. The landlord testified that the appointment was after work and so she was not in a rush; the tenant could take as much time as she needed.

At this time the landlord had family staying in the unit. The parties agreed that the tenant could start moving in after the family left on August 25.

The tenant testified that when she looked at the unit on July 6 she noticed a funny smell. She thought the cause was that someone was living in the unit and the refrigerator was unplugged. She testified that on July 10 she again noticed a smell.

On August 19 the parties had a telephone conversation. The tenant says she was making arrangements to move in on August 25, as previously agreed. The landlord told her she could not move in because her family would still be there. The landlord says the tenant asked to move in on August 19 which was not possible and was not what they had agreed.

The tenant's evidence is that she again asked the landlord if cable and internet were included in the rent and this time the landlord said no, they were not included. The landlord's testimony was that it was only after they had talked about the cable and internet that the tenant brought up the smell and the refrigerator. She told the tenant the smell was because they had cleaned the carpets before she saw the unit. The landlord also testified that she told the tenant that if she was not going to take the unit tell her now so she could rent it to someone else. Ultimately the parties agreed that the tenant would move in on August 28.

On the evening of August 28 the tenant contacted the landlord and asked if she could come on the 29th with a friend.

On the 29th the tenant and her friend looked around the unit again; the friend taking photographs of everything. The landlord described how the friend opened the refrigerator and remarked that it was clean and working.

The tenant was coughing and coughing. She told the landlord she had severe asthma and would not be able to move into the unit because of the smell.

The tenant asked the landlord to return the security deposit which the landlord refused to do.

The tenant handed the landlord a letter she had prepared in advance. The tenant testified that she had prepared the letter in case the place still smelled when she arrived on August 29. It was only after she ascertained that it smelled that she decided not to move in.

In her letter the tenant says she has decided not to move in because the landlord changed her mind about letting her in on August 25; the landlord reneged on the agreement to include cable and internet with the rent; the place smelled; and the refrigerator had been unplugged because it did not work. The letter concludes: "I have decided I will not move into your place because I feel I cannot depend on you to do what you say you will do, the whole place smells, the refrigerator stinks and doesn't work."

The letter also included the address to which the security deposit could be sent.

The tenant's friend testified that although the unit looked clean it did have an odor, which was not a cleaning smell. She also testified that her friend is a very careful person and does not make mistakes about important things like dates.

The landlord testified that in mid-September another person agreed to rent the unit. The new tenant had to give their existing landlord a month's notice so the new tenancy did not start until November 1.

Once her damages had been crystallized the landlord filed her application for dispute resolution on October 2, 2013.

The tenant's landlord let her stay in her old place until she found another rental unit. The tenant moved into her new place on September 10.

Analysis

I find that the written tenancy agreement is valid and its terms binding on the parties. The contract was in the recommended form; it was properly executed; and a copy of it was provided to the tenant.

The tenant is an intelligent and educated person who works in a job that requires careful attention to detail. The elements of the contract which the tenant disputes are all on the second page of the contract, which is written in clear and unambiguous language. Even if the tenant had been pressed for time, an assertion upon which I make no finding, it would not have taken the tenant very long to review this page before initialling it. I am satisfied that she would have had no difficulty understanding the contract if she had taken any time to read it.

Even if the tenant had not read the contract before signing it she had from July 10 to re-read it and discover whether it reflected her understanding of the agreement. If she had advised the landlord in July of any concerns the landlord could have attempted to rent

the unit to someone else for September 1 and had a reasonable chance of success in doing so. Instead, the tenant did not raise the issue of cable and internet connections until mid-August and she never did express any concern about the fixed term.

There was no fraud or misrepresentation by the landlord as to what services or facilities were included with the rent. The ad said cable and internet were not included; the tenancy agreement said cable and internet were not included.

Section 16 of the *Residential Tenancy Act* states that the rights and obligations of a landlord and a tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

Section 45(3) of the *Residential Tenancy Act* allows a tenant to end a term tenancy agreement early only if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant has given written notice of the failure.

A material term is a term or requirement of a tenancy agreement that is so important that the slightest breach of that term may give a party cause to end the tenancy agreement.

Basically the tenant argued that because of her asthma the lack of smell was so important to her that it constituted a material term. However, her behavior does not corroborate that assertion. The tenant testified that the unit smelled funny on both occasions when she looked at it before signing the tenancy agreement. If lack of smell was a critical factor it was only July 10 when she agreed to rent this place and she had time to look for another place that was better suited to her needs. She did not have to rent this unit but she did. The tenant only raised the issue of odor on August 19 after she and the landlord had disagreed about the cable and internet access. Even then she did not ask to have another look at the unit to make sure she could live with any smells that may exist. Instead, she let the matter slide for another ten days. Based on the evidence I cannot find that freedom from odor was a material term of the tenancy agreement and, even if it was, the tenant did not give the landlord written notice of the deficiency or give the landlord a reasonable opportunity to remedy the breach.

As this was a fixed term tenancy the tenancy continued until the end of the term or until the landlord found a new tenant, which occurred first. This has two consequences for the tenant. The first is that she is responsible for the rent for September and October, a total of \$1360.00.

The second is in relation to her claim for payment of double the security deposit.

Section 38(1) of the *Residential Tenancy Act* provides that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding

address in writing, the landlord must either repay the security deposit to the tenant or file an application for dispute resolution claiming against the deposit. Section 38(6) provides that if a landlord does not comply with section 38(1), the landlord must pay the tenant double the amount of the security deposit. In this case the landlord filed her claim for dispute resolution several weeks before the tenancy ended. Accordingly, section 38(6) does not apply to this situation and the tenant's claim for payment of double the security deposit is dismissed..

Conclusion

I find that the landlord has established a total monetary claim of \$1410.00 comprised of arrears of rent in the amount of \$1360.00 and the \$50.00 fee paid by the landlord for this application. Pursuant to section 72 I order that the landlord retain the security deposit of \$340.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$1070.00. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

The tenant's claim is dismissed in full.

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: November 20, 2013

Residential Tenancy Branch

