



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNR, MNSD & FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing filed by each party was sufficiently served on the other by mailing, by registered mail to where the other party resides. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the landlord is entitled to A Monetary Order and if so how much?
- b. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- c. Whether the landlord is entitled to recover the cost of the filing fee?
- d. Whether the tenant is entitled to a monetary order and if so how much?
- e. Whether the tenants are entitled to recover the cost of the filing fee?

Background and Evidence

The tenants resided out of the province. Around the middle of August the parties entered into an oral agreement to rent the rental unit. The tenants paid a security deposit of \$600 on August 16, 2013. The tenants arrived in the evening on August 31, 2013 and began to move their belongings in on September 1, 2013.

On September 4, 2013 this agreement was confirmed in writing and the parties entered into a one year fixed term tenancy agreement that provided that the tenancy would commence on September 1, 2013 and end on August 31, 2014 and become month to month after that. The rent was \$1200 per month payable in advance on the first day of each month.

In early September 2013 the tenants expressed concern about a leaking toilet on the main floor and the mould surrounding it. The landlord replaced the seal of the toilet and stated he would bring in a contractor to replace any boards surrounding the toilet that needed to be replaced. The landlord's wife had training in Occupational Health and Safety and she recommended a bleach solution to deal with the mould. The landlord testified he cleaned the mould with a bleach solution and an industrial solution. The contractor arrived on September 7, 2013 and began replacing the single pane windows.

On September 11, 2013 the tenants orally advised the landlord that they were vacating the rental unit and they demanded the returned of rent for the last two weeks of September as well as the return of the security deposit. The landlord refused and suggested that the tenants should contact the Residential Tenancy Branch. The tenants initially stated they were moving out on September 12, 2013. However, there was a delay in obtaining a moving truck and the tenants started their move on September 14, 2013 and completed the move on September 16, 2013. The tenant provided the landlords with their forwarding address in writing on or about September 15, 2013. The landlord testified the tenants refused to permit his contractor to gain access to fix the toilet.

The landlord testified the contractor replaced some of the boards around the toilet and charged \$100 for two hours work.

The tenants submit the landlords failed to provide a safe and healthy environment for the tenants and as a consequence he had the right to end the tenancy and move out. He provided a number of photographs and submits the breaches includes the following:

- The faulty toilet and mould surrounding the toilet.
- Leaky sink
- Faulty front door
- Scratched interior doors
- Linoleum upraised and broken in the kitchen
- Rental property was not properly cleaned
- Faulty electrical box
- Leaky skylight.
- Smell from previous tenant's dogs

The landlord responded to the tenant's allegations as follows:

- The tenant failed to give the landlord written notice of his complaints and failed to give him a reasonable opportunity to fix the problems.
- The only complaints the tenant made was about the toilet. He responded immediately by replacing the seal. He then advised the tenant he would hire a contractor to replace any boards that needed to be replaced. The contractor began work by replacing the single pane windows. When the contractor returned to fix the boards around the toilet the tenant refused to give the contractor access and he advised the landlord he was ending the tenancy and vacating.
- The leaky sink is not significant.
- He dealt with the mould problem through the use of a bleach solution and another industrial product.

- The landlord submitted the scratched doors do not amount to a material breach of the tenancy agreement.
- The landlord blamed the tenant for the linoleum and alleged the tenant had taken off the covers for the electrical boxes.
- The landlord denied the smell was significant and added the tenant had cats which left their urine in the rental unit.
- He is in the process of repairing the skylight.
- He denied there was a problem with the electrical box.

The tenant strongly disputes the veracity of the landlord's testimony.

Law:

The tenant submits the landlord has breach the requirements under the Residential Tenancy Act as set out in section 32 below.

Landlord and tenant obligations to repair and maintain

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The Residential Tenancy Act provides that a tenant is responsible to pay the rent for the unexpired fixed term of the tenancy subject to the landlord's obligation to mitigate their loss and the tenants' right to end the tenancy under section 45(3) if a landlord has breached a material term of the tenancy agreement.

Tenant's notice

45 (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Analysis:

Not every breach of a tenancy agreement or Residential Tenancy Act gives the tenant the right to end a fixed term tenancy without being responsible to pay the rent for the remaining unexpired term. In order to end the tenancy without having to pay the rent for the remaining unexpired term the tenant must comply with section 45(3) of the Residential Tenancy Act. That section provides that the breach is a breach of material term and the tenant has given the landlord written notice of the breach and given the landlord a reasonable opportunity to correct the breach. The tenant failed to give the landlord written notice of any alleged breach and failed to give the landlord a reasonable opportunity to rectify the breach. On that basis alone the tenant failed to comply with the requirements of section 45(3) of the Residential Tenancy Act.

I note this is not a situation where the landlord has ignored his responsibilities. The landlord replaced the seal to the toilet shortly after being orally advised of the problem. He further advised the tenant that a contractor would be replacing any necessary boards. However, the tenant failed to permit the contractor to gain access to replace the boards. Once the tenants vacated the contractor was able to replace the boards after spending on 2 hours of labour.

Further, after considering all of the evidence I determined the tenants have failed to prove the landlords have breached a material term of the tenancy agreement. In my view the tenants have failed to prove that the problems were so serious as to amount to a breach of a material term in the tenancy agreement. The landlord responded appropriately to the mould issues. Had the tenants given the landlords' contractors access the boards around the toilet would have been replaced and the mould issues in this area resolved. The leak in the sink, the skylight, the linoleum, the presence of pet odours is not sufficient enough to amount to the breach of a material term. Similarly, the tenants failed to prove that there is a problem with the front door and the electrical panel.

Obligation to mitigate

Section 7(2) of the Residential Tenancy Act provides as follows:

Liability for not complying with this Act or a tenancy agreement

- 7 (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

The landlord testified he advertised on-line on a weekly basis but the rental unit remains unrented. However, the landlord failed to present any evidence of the advertisements he placed and precisely when they were placed.. The landlord claims for loss of rent in the sum of \$1200 per month for October, November, December and January.

I determined the landlord is entitled to retain the full rent paid for September 2013. In addition I determine the landlord is entitled to loss of rent for October and November in the sum of \$2400. However, I determined the tenants are not responsible for the rent for the period from December 1, 2013 and remaining unexpired term of the fixed term tenancy agreement as I am not satisfied the landlord made sufficient efforts to mitigate or reduce their loss of rental income. It is not reasonable to expect that a landlord could find a new tenant for October 1, 2013 or for November 1, 2013 as the tenants vacated without giving proper notice. However, the landlords failed to provide documentary evidence to support their testimony of advertising on the internet. It is not possible to assess when the advertisements were placed and what was contained in the advertisements. Further, I determined that where advertising on the internet was not successful in finding a new tenant it was incumbent on the landlords to take other reasonable steps to find a prospective tenant.

I dismissed the landlords' claim of \$100 for the cost of cleaning as the landlords failed to present sufficient evidence to prove this claim.

Monetary Order and Cost of Filing fee

I granted the landlord a monetary order in the sum of \$2400 plus the sum of \$50 (reduced to reflect the limited success of the landlord) in respect of the filing fee for a total of \$2450.

Security Deposit

I determined the security deposit plus interest totals the sum of \$600. I ordered the landlord may retain this sum thus reducing the amount outstanding under this monetary order to the sum of \$1850.

Tenants' Claim:

With respect to each of the tenants' claims I find as follows:

- a. I dismissed the tenants claim for the reimbursement of the rent for the last two weeks of September as the tenants breached the tenancy agreement and they failed to prove they have a legal right to reimbursement of the rent.
- b. I dismissed the tenants claim for the return of their deposit. The initial Application for Dispute Resolution filed by the landlord was filed on October 1, 2013 and was within 15 days of the end of the tenancy. The rent was paid to the end of September. The tenants finally vacated on September 16, 2013. For the reasons set out above I determined the landlords had a legal right to claim against the deposit.

Conclusion:

In summary I ordered that the tenants' claims be dismissed. I ordered that the tenants pay to the landlord the sum of \$2450 including the cost of the filing fee. I ordered the landlords may retain the security deposit in the sum of \$600 thus reducing the amount outstanding under this monetary order to the sum of \$1850.

It is further Ordered that this sum be paid forthwith. The landlords are given a formal Order in the above terms and the Tenants must be served with a copy of this Order as soon as possible. Should the Tenants fail to comply with this Order, the Order may be

filed in the Small Claims division of the Provincial 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: January 13, 2014

Residential Tenancy Branch

