



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, DRI, MNSD, MT, OLC, OPR, MNR, MNDC, FF

Introduction

In the first application the tenant seeks to cancel a ten day Notice to End Tenancy for unpaid rent dated March 10, 2014 and for relief relating to the loss of use of a basement suite in the premises.

In the second application the landlord seeks unpaid rent and an order of possession pursuant to the Notice.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show on a balance of probabilities that either party is entitled to any of the relief claimed?

Background and Evidence

The rental unit is a house. The lower portion is a self contained suite with a separate entrance. The tenant originally rented just the lower suite, while his original landlord, Ms. K.K. lived upstairs. In October 2012 Ms. K.K. moved out. She and the tenant entered into a written tenancy agreement whereunder the tenant rented the entire house at a monthly rent of \$1700.00, due on the 15th of each month. That tenancy was for a six month fixed term and then defaulted into a month to month tenancy.

The present landlord, Mr. J.S. purchased the premises in April 2013 and assumed the tenancy (and the \$850.00 security deposit).

At that time the tenant was living in the upper portion of the house. The lower suite was vacant. In June the tenant entered the lower suite to show some prospective tenants

and discovered the sewer had backed up. The premises were not rentable. The landlord was immediately informed and he began restorative measures.

It would appear to have been common ground at that time that the tenant was not going to pay the full \$1700.00 rent because the lower suite was unliveable. The tenant had paid his original landlord Ms. K.K. a rent of \$700.00 when he was living in the lower suite and the tenant suggested to the landlord he might obtain that amount of rental compensation from the insurer attending to the remediation of the lower suite.

This turned out to be the case. From June 2013 on, the tenant paid \$1000.00 per month for the upper part of the house and the landlord's workmen remediated the lower part.

By mid-January 2014 the work to remediate the lower portion was complete. On or about January 14th the landlord informed the tenant that the lower portion was not habitable and requested that the full rent of \$1700.00 be paid the next day. The tenant testified that he was not amenable to the proposition but he ended up paying the full \$1700.00 due January 15th.

The tenant began to look for tenants for the lower suite but without success. The tenant was of the view that he should no longer have to pay for the lower suite. There was some discussion about the landlord taking the suite back. Ultimately the rent for February 15th came due and the tenant declined to pay. The ten day Notice issued as a result.

Analysis

The tenant argues that because the lower suite became unusable the tenancy was "frustrated. It appears he wishes to remain in the upper part of the house, but disconnect from any tenancy over the lower suite.

There are two separate rental units in the house. The tenant and his former landlord could have drawn up two separate tenancy agreements back in October 2012 permitting the tenant to end either on reasonable notice. The fact of the matter is that he did not enter into an agreement for each rental unit. He and Ms. K.K. entered into a single contract encompassing the entire house; encompassing both rental units together. Thereafter the tenant was free to leave one or both areas unoccupied, fill either or both of them with family or other occupants, treat the house as one completed rental unit or sublet one or the other levels (with the landlord's consent).

Had there been two contracts it might have been possible to argue that the contract for the lower suite was frustrated by the loss of the use of it, entitling the tenant to walk away from the contract. However, there was only one contract here and, by the parties' own actions it is apparent that they chose their remedy. They stuck to the terms of their tenancy agreement and they treated the matter as a question of a temporary rent adjustment to that single contract. There is no evidence of any agreement to change the subject matter of the tenancy agreement: the whole house, by paring off the basement suite. Certainly there was no written amendment to the tenancy agreement. Instead, the landlord and tenant agreed on the amount for loss of use of the basement while not inhabitable and the tenant paid less rent accordingly.

I find the tenant is not entitled to rely on the doctrine of frustration. When the lower unit again became habitable the tenant was no longer entitled to the rent adjustment and was responsible to pay the full \$1700.00 rent.

At the same time, the tenant was entitled to reasonable notice that his use of the lower unit was being restored. He was not in charge of the remediation and would have no direct knowledge of how the work progressed or when it might be finished. Because of the damage to the lower suite, he had possibly lost tenants the June before; tenants that might still have been residing in the lower suite and paying rent through January and February 2014. Fairness demanded that he be given an opportunity, should he so wish, to advertise for and locate new tenants. In my view the landlord was not entitled to demand the full rent on January 15th and should properly have notified the tenant that full rent would come due on February 15th, 2014.

It follows that at the time the landlord issued the ten day Notice to End Tenancy for \$700.00 unpaid rent due February 15th, he was holding a \$700.00 credit from the tenant's rent payment of \$1700.00 for January 15th and so the tenant did not owe him any money. As the amount demanded in the ten day Notice is incorrect, it is a defective Notice and must be set aside and cancelled.

After it became apparent that there was a disagreement between them, the landlord raised the idea that he would take over responsibility for the lower portion of the house. He invited the tenant to discuss the proposal. The tenant feels the landlord made an offer, that he's accepted it and that the landlord should now be bound to take back possession of and responsibility for the lower suite. The evidence before me shows that the landlord only invited the tenant to negotiate with an end in view. His email states, "...we could work out an agreement for you to rent just the upstairs..." Offering to work out an agreement is some distance away from concluding an enforceable agreement.

Conclusion

The tenant's application to cancel the Notice is allowed, the remainder of his application is dismissed.

The landlord's application for an order of possession is dismissed. He is entitled to a monetary award of \$700.00 for the balance of rent due March 15, 2014. A monetary order in the amount of \$700.00 will issue against the tenant. The landlord is free to attempt to collect it or to recover it from the security deposit he holds.

As each party was partially successful, I offset the filing fee of each.

The tenancy continues under one tenancy agreement with the tenant renting the entire house at \$1700.00 per month.

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: April 04, 2014

Residential Tenancy Branch

