



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid rent; loss of rent; and, authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary Issue – Service of evidence

Although the landlords filed this Application on January 21, 2014 the landlords did not send their evidence to the tenants until April 29, 2014. The registered mail sent to the male tenant was received on or about May 6, 2014; however, the evidence sent to the female tenant was ineffective as she had moved on March 18, 2014.

The tenants requested the landlord's documentary evidence be excluded given it was not served upon them in accordance with the Rules of Procedure. The landlord stated he was unaware of the service deadlines and had been out of town prior to April 29, 2014.

Information concerning service of evidence is contained on the Notice of Hearing itself and in the Fact Sheets provided with the hearing package provided by the Residential Tenancy Branch. Information concerning service of evidence is also provided in the Rules of Procedure, Fact Sheets and Policy Guidelines available from the Residential Tenancy Branch and its website.

I found the landlords' delay in serving their evidence resulted in the insufficient and ineffective service of their evidence upon the tenants and I granted the tenants' request to exclude it from further consideration. The parties were informed that the landlord would be permitted the opportunity to present oral testimony in support of his claims against the tenants.

The tenant's evidence was served upon the landlord in person on April 28, 2014 and since service of the tenant's evidence met the service requirements I have accepted and considered their evidence.

Issue(s) to be Decided

1. Are the landlords entitled to compensation from the tenants for unpaid and/or loss of rent?
2. Disposition of the security deposit.

Background and Evidence

The parties provided undisputed testimony that a fixed term tenancy commenced September 1, 2013 and was set to expire August 31, 2014. The tenants were required to pay rent of \$1,200.00 on the 1st day of every month. The tenants paid a security deposit of \$600.00.

The rental unit is a basement suite located in an area where secondary suites are not permitted. The landlords had constructed the basement suite shortly after acquiring the property in 2010 and did not obtain building permits for the alterations to the dwelling; however, the landlord was of the position the alterations to the dwelling otherwise comply with applicable building codes.

On January 8, 2014 the tenants notified the landlord of their intention to end the tenancy. The tenants vacated the rental unit early on January 15, 2014 and both parties participated in a move-out inspection together. The tenants did not authorize the landlord to retain the security deposit. Later that same day a municipal by-law officer attended the property and inspected it from the exterior only.

The landlord began advertising for replacement tenants shortly after the tenants communicated their intent to end the tenancy; however, on January 20, 2014 the landlord was advised by a municipal by-law officer that renting the suite was not a permitted use of the property and that rental of the suite would be subject the landlords to a fine of \$150.00 per day. The landlords withdrew their advertisements and have not re-rented the suite.

The tenant acknowledged contacting the municipality to enquire as to the legality of the basement suite and in particular the adequacy of the bedroom window and lack of inter-

connected smoke detectors. The municipal staff person asked for the property address and advised the tenant that it was illegal to have a secondary suite at that address.

The landlord acknowledged the basement suite is not permitted on the property until such time the municipality changes its by-laws; however, the landlord submitted that the rights and obligations of landlords and tenants under the Act are still enforceable since municipal by-laws do not supercede a provincial statute such as the Residential Tenancy Act. As such, the landlords seek to hold the tenants responsible for loss of rent for the remainder of the fixed term which is eight months at \$1,200.00 for a total claim of \$8,400.00. Alternatively, the landlords seek to hold the tenants responsible for loss of rent for the month of February 2014 on the basis the tenants gave the landlords less than one full month of notice to end the tenancy. The landlord confirmed that the landlords continue to hold the tenant's security deposit.

The tenants argued they are not liable for loss of rent as claimed by the landlords for the following reasons:

1. The tenancy agreement is not enforceable since renting the unit violates the municipal by-laws.
2. The landlord did not attempt to mitigate losses and has chosen not to re-rent the unit due to the by-law and potential for fines.
3. The rental unit does not comply with fire safety requirements.
4. The landlord was physically aggressive and threatening toward the tenants on January 9, 2014 when the parties met to discuss the end of the tenancy.

The landlord disagreed with the tenant's assertion that the unit does not comply with fire safety requirements. The landlord acknowledged raising his voice to the tenants on January 9, 2014 but denied his actions would be seen as threatening to the tenants.

The tenants provided a copy of municipal bylaw that deals with secondary suites. For the subject property the applicable portion of the bylaw reads:

- a) No person shall use nor permit or suffer others to use any area in a building in an A or RS zone for a secondary suite.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of that violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Although the renting of the basement suite violates municipal land use by-laws, I find the tenancy agreement is not an illegal contract for purposes of establishing the rights and obligations of the parties under the Act. I make this determination in keeping with the policy statements contained in Residential Tenancy Policy Guideline 20: *Illegal contracts*. The policy guideline provides the following, in part:

This guideline deals with situations where a landlord rents premises in a circumstance where the rental is not permitted under a statute. Most commonly this issue is raised where municipal zoning by-laws do not permit secondary suites and rental of the suite is a breach of the zoning by-law. However municipal by-laws are not statutes for the purposes of determining whether or not a contract is legal, therefore a rental in breach of a municipal by-law does not make the contract illegal.

Having found the tenancy agreement enforceable, I find the tenants breached the tenancy agreement by ending the tenancy before the expiry date of the fixed term. Therefore, I find that part 1. of the above-described test for damages has been satisfied.

Based upon the circumstances of this case, I find the landlords have not demonstrated that they have suffered a loss as a result of the tenants ending the fixed term tenancy early. I make this finding based upon the landlord's undisputed submission that renting the unit subjects the landlords to a by-law fine of \$150.00 per day and the landlords want to avoid paying the fine. I find it reasonable that the landlords would choose to not rent the unit since renting the unit exposes them to a net loss of \$110.00 per day [calculated as \$150.00 fine - \$40.00 per diem rent]. I also find it just as likely that had the tenants remained in occupancy of the rental unit the landlords would have been subject to the fine and by ending the subject tenancy the risk of paying the fine was eliminated.

In light of the above, I find the landlords did not establish that they have suffered a loss as a result of the tenants ending the fixed term early when the by-law fine is taken into consideration. Therefore, I find that part 2. of the above-described test for damages has not been satisfied.

I make no award for loss of rent for the month of February 2014 that was claimed on the basis the tenants did not give one full month of notice as tenants are only required to give a landlord one month of written notice in order to end a periodic tenancy. The parties did not have a period tenancy in this case.

Based upon all of the above, I dismiss the landlords' claims against the tenants. Since the landlords continue to hold the tenants' security deposit, in keeping with Residential Tenancy Policy Guideline 17: *Security Deposit and Set-Off*, I order the landlords to return the security deposit to the tenants without further delay.

Provided to the tenants is a Monetary Order in the amount of \$600.00 to serve upon the landlords and enforce as necessary. A Monetary Order may be filed in Provincial Court (Small Claims) to enforce as an Order of the court. As the security deposit was paid by co-tenants it remains upon the co-tenants to apportion the award among themselves. It shall be up to the tenants to decide upon the logistics of serving and enforcing the Monetary Order.

Conclusion

The landlords' claims against the tenants have been dismissed and the landlords are ordered to return the security deposit to the tenants without further delay. The tenants are provided a Monetary Order in the sum of \$600.00 to ensure the security deposit is returned to them.

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 20, 2014

Residential Tenancy Branch

