Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD, MNR, FF

Introduction

This Dispute Resolution hearing was convened to deal with an application by the landlord for a monetary claim of $2,600.00 for rent for the months of February and March 2014 and an order to retain the tenant's $650.00 security deposit. The landlord also seeks reimbursement for the $50.00 fee paid for this application.

The hearing was also convened to deal with an application by the tenant seeking the return of double the security deposit under the Act and the cost of moving. The tenant also seeks reimbursement for the $50.00 fee paid for this application.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present oral testimony and make submissions during the hearing. I have considered all of the evidence properly served.

Although I have reviewed all testimony and other evidence, only evidence relevant to the issues and findings in this matter are referenced in this decision.

Issues to be Decided for the Tenant's Application

Is the tenant entitled to double the security deposit under section 38 of the Act?

Is the tenant entitled to compensation for costs or losses under section 67 of the Act.

Issues to be Decided for the Landlord's Application

Is the landlord entitled to compensation under section 67 of the *Act* for loss of rent?

Background and Evidence

The tenancy began July 1, 2013 with rent of $1,300.00. A security deposit of $650.00 had been paid. Submitted into evidence by the landlord was a copy of the tenancy

agreement, written testimony and a copy of a receipt dated February 7, 2014. The tenant submitted copies of communications and photos.

The parties agreed that the tenant gave written notice on January 22, 2014 ending the tenancy effective February 1, 2014. A copy of this notice is in evidence.

The tenant testified that their tenancy had been interrupted by an incident of water infusion that flooded their home on January 11, 2014. The tenant testified that after they reported this to the landlord a contractor visited the site and performed some remedial action that consisted of digging a trench along the perimeter of the house to change the grade of the yard outside the suite and actions to dry out the interior.

The tenant testified that they felt this repair work was not adequate as there was visible mould which also had to be addressed. The tenant pointed out that it was their opinion and that of a flood restoration specialist, with whom they spoke, that merely drying the floors and walls would not erase the potential risk of mould contamination. According to the tenant, the landlord never engaged a qualified mould expert to determine whether or not there was past mould infusion existing in the walls and under the carpet.

The tenant testified that, for this reason, they left their bed situated in the living room, where they had previously moved it for the drying-out of the bedroom, because they did not want to move back into the compromised space until it was properly assessed and treated for the mould contamination.

The tenant testified that they felt it necessary to vacate the unit in the interest of their health and that of their infant child and, after giving written notice on January 22, 2014, they moved out on February 1, 2014.

The tenant feels that the landlord should compensate them for the loss of use of part of the unit for January 2014 and for their moving costs of $300.00.

The landlord testified that, as soon at the incident was reported, they took immediate action and their contractor restored the rental unit to a livable condition. The landlord testified that the unit was restored to a state that was safe to live in and the tenant was only minimally disrupted during the drying-out process. The landlord testified that that they later hired a qualified home inspector who determined that no moisture was present in the walls and floors.

The landlord's position is that the tenant had no cause to terminate the tenancy on short notice and is accountable for the landlord's loss of revenue from the short notice.

The landlord testified that, in the tenancy agreement, the tenant had committed to giving the landlord 2 month’s notice to vacate. Therefore the landlord is requesting

compensation for loss of $1,300.00 rent for the month of February and $1,300.00 loss of rent for the month of March 2014.

The tenant testified that they gave the landlord a written forwarding address on January 22, 2014 at the same time as the Notice to move, but the landlord failed to refund the $650.00 security deposit within the required 15 days and they are claiming $1,300.00, double the security deposit.

Analysis: Landlord's Application

With respect to the landlord's allegation that the tenant was required to give 2 month's notice based on a term in the tenancy agreement, I find that, in this instance the landlord is not relying on the Act but seeking enforcement of a term in the agreement.

Section 62 (1) of the Act grants a Dispute Resolution Officer the authority to determine any disputes in relation to matters that arise under the Act or a tenancy agreement.

Although the term in the tenancy agreement imposes an obligation on the tenant to provide 2 month's notice to end the tenancy, I find that this term is not in compliance with a provision in the Residential Tenancy Act.

Section 45(1) of the Act states that a tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

> (a) is not earlier than **one month** after the date the landlord receives the notice, and
> (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement. (My emphasis).

Section 5(1) of the Act states that the Act cannot be avoided through contract and that any attempt to avoid or contract out of the Act or the regulations is of no effect. In addition, I find that section 6(3)(a) of the Act states that a term of a tenancy agreement is **not enforceable** if the term is inconsistent with the Act or the regulations.

Therefore, I find that the term in the tenancy agreement requiring the tenant to provide 2 month's notice to terminate the tenancy is not a compliant term, and as such the landlord cannot rely on this term. I find that the term is unenforceable. Accordingly, I find that the tenant was only required to provide one month notice to terminate this tenancy under the Act.

However, in the case before me, I find that the tenant did not provide one month Notice to terminate the tenancy as required by the Act.

Notwithstanding the above, section 45(3) of the Act also provides that, 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 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.

I find that a risk of mould contamination not investigated properly by the landlord through a qualified mould specialist may be a violation of a material term of the tenancy and may entitle the tenant to terminate the tenancy, provided they give the landlord a reasonable amount of time to comply after the written complaint of the violation.

In this instance, I find that the landlord did effectively rectify the moisture problems, but did not hire a qualified mould specialist to ensure that there was no residual health risk to the tenant from airborne or internal mould spores.

However, I find that the landlord was not given a reasonable period of time to respond to the tenant's allegation that the landlord failed to properly investigate and correct the alleged mould problem. I find that the tenant terminated the tenancy shortly after the landlord addressed the water infusion without providing the landlord a reasonable chance to properly comply with their concerns about potential mould.

For this reason, I find that the tenant's termination of the tenancy did not comply with section 45(1) by providing one month notice was in violation of the Act, nor did it comply with section 45(3), for the landlord's failure to comply with a material term after being allowed a reasonable period to correct the situation. I therefore find as a fact that the tenant ended the tenancy in violation of the Act.

With respect to whether the landlord is entitled to loss of revenue for the month of February, 2014, I find that this is a claim in damages, either founded on the tenant's violation the Act by giving inadequate Notice to vacate a month-to-month tenancy.

Section 7 of the Act states that, if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

It is important to note that, in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,

2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,

3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage,

4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the landlord, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent.

I accept that the landlord did incur a loss of one month rent for the month of February 2014 due to the tenant's failure to comply with the Act and this satisfies element 1, 2 and 3 of the above test for damages.

However, in order to meet element 4 of the test for damages, I find that the landlord is required to prove that they took steps to mitigate the loss by advertizing and showing the rental unit to prospective renters during the period from January 22, 2014 and into February 2014, to try to find a new tenant.

I find that the landlord provided inadequate evidence to meet the burden of proof that they tried to minimize their loss by marketing the unit. Therefore the landlord's claim for loss of rent for February 2014 fails to meet element 4 of the test for damages.

Given the above, I find that the landlord's claim for loss of revenue for February 2014 has not sufficiently met the test for damages to support granting a monetary order against the tenant. I find that the landlord's monetary claim must be dismissed.

Analysis: Tenant's Application

Security Deposit

The tenant made application for the return of the security deposit. Section 38(1) of the Act states that, within 15 days of the end of the tenancy and receiving the tenant's forwarding address, a landlord must either:

- repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations, OR ;

- make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I accept the tenant's testimony that their written forwarding address was provided to the landlord on January 22, 2014 in writing and the tenancy ended on February 1, 2014. I find that the landlord's application was submitted on February 19, 2014.

With respect to the return of the tenant's security deposit, I find that the Act states that the landlord can only retain a deposit if the tenant agrees to this in writing at the end of the tenancy. If the permission is not in written form and signed by the tenant, then the landlord has no right to keep the deposit.

A landlord may be able to keep the deposit to satisfy a liability or obligation of the tenant if, after the end of the tenancy, the landlord makes an application for dispute resolution and successfully obtains a monetary order to retain the amount from the deposit to compensate the landlord for proven damages or losses caused by the tenant.

The landlord must either make the application or refund the security deposit within 15 days after the tenancy had ended and the receipt of a written forwarding address.

Section 38(6) provides that if a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit, and must pay the tenant double the amount of the security deposit.

In this instance, the tenant vacated effective February 1, 2014 and the landlord did not apply to keep the tenant's security deposit until February 19, 2014. Accordingly, I find that a security deposit of $1,300.00 is being held in trust by the landlord on behalf of the tenant.

Damages

In regard to the tenant's loss of use of a portion of the rental unit and the disruption from the flooding, I find that the tenant was deprived of full use of the rental unit as of January 11, 2014. Although the bedroom was apparently dried out by February 16, 2014, I find that the landlord's inspector did not clear the area as "safe" until February 7, 2014, by which time the tenant had already moved out. Accordingly I find that the abatement in rent would run from January 11, 2014 to January 31, 2014, a period of 20 days. I set the abatement at 20% of the daily rate of $42.74 for a total abatement of $170.96.

In regard to the tenant's claim for moving costs, I find that the tenant is not entitled to be reimbursed for moving because the tenant's arbitrary termination of the tenancy was premature and not done in compliance with the Act.

Based on the testimony and evidence presented during these proceedings, I find that the landlord has not successfully justified their claim for damages and the landlord's application must be dismissed.

In regard to the tenant's application, I find that the tenant is entitled to total monetary compensation of a $1,470.96, comprised of $1,300.00 as a refund of double the security deposit, $170.96 rent abatement for the loss of quiet enjoyment of the suite and the $50.00 cost of the tenant's application.

I hereby grant a monetary order in favour of the tenant in the amount of $1,470.96. This order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The landlord is not successful in the application and the tenant is partially successful in the cross application and is granted a monetary order for the security deposit and the cost of the application.

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 07, 2014

Residential Tenancy Branch