



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with applications by both the landlord and the tenants. The landlord applied for a monetary order for unpaid rent, to retain all or part of the security deposit, and to recover the RTB filing fee. The tenants applied for the return of their security deposit, for a monetary order for money owed or compensation for loss or damage under the Act, Regulation, or tenancy agreement, and to recover the RTB filing fee.

Both the landlord and tenants attended the teleconference hearing and gave affirmed evidence. The tenants were assisted by an advocate.

The tenants say they received the landlord's Notice of a Dispute Resolution Hearing but did not receive the Landlord's Application for Dispute Resolution with it.

Issue(s) to be Decided

Did the tenants receive the landlord's Application for Dispute Resolution and, if not, what is the impact on the landlord's claim?

Is the landlord entitled to a monetary order for unpaid rent?

Are the tenants entitled to the return of their security deposit?

Are the tenants entitled to a monetary order for money owed or compensation for loss or damage under the Act, Regulation, or tenancy agreement?

Background and Evidence

The landlord gave evidence that he received the Notices of a Dispute Resolution Hearing from the RTB, and those notices explain what documents must be served on the respondents. He says he printed off the Landlord's Application for Dispute Resolution and enclosed it with the notices. He states he is positive all documents were in the package sent by registered mail to the tenants on March 19, 2014.

The tenants agree they received the landlord's package postmarked March 19, 2014 which contained the Notices of a Dispute Resolution Hearing, but say the Landlord's Application for Dispute Resolution was not there. They say they did not have notice of the landlord's claim.

The parties agree the tenants entered into a tenancy agreement for a tenancy to start March 1, 2014. The tenants paid a security deposit of \$875.00. The tenants did not move into the rental unit and did not pay rent for March 2014 or any subsequent period.

The landlord gave evidence that the tenants viewed rental unit #605 on about February 12, 2014. They liked the unit, and arranged to meet the landlord the next day to sign a tenancy agreement. The landlord gave evidence that he met with the male tenant the next day. At that time, the landlord told him there was another option. Rental unit #1705 had come available and it has the same layout but is on a higher floor with views for the same price. The landlord provided copies of floor plans which confirm the units have the same layout and are both 480 square feet in size. The landlord says he told the male tenant the only difference was the furniture, and said he could show them #1705. The male tenant agreed to take #1705, and so the landlord filled in unit #1705 on the tenancy agreement and the male tenant signed it. The landlord says they obtained the female tenant's signature later; he thinks it was the next day. The landlord says he had to leave the country the next day, but he made an arrangement with the current tenant to hand over the keys to the tenants.

The tenancy agreement put into evidence by the landlord was signed by the male tenant on February 12, 2014 and by the female tenant on February 13, 2014. It is not signed by the landlord or his agent. The tenancy agreement indicates the tenancy was to start on March 1, 2014 and was for a fixed term of three months. The tenants would have been obligated to pay rent of \$1,750.00 monthly on the first day of the month, and paid a security deposit of \$875.00.

The landlord says the tenants contacted him on February 20th asking to see #1705. He gave them the phone number of the current tenants. He says the tenants went to see the rental unit and did not like it, citing damage, an oxidized sink, old TV, and the rental unit needed paint. The landlord says the previous tenants had been there 2.5 years. The landlord says he told the tenants not to worry, that he would arrange to have the rental unit fixed. He says the tenants took the keys to the rental unit on March 1, 2014.

The landlord gave evidence that he last saw the rental unit just after the previous tenants gave notice, on about February 2 or 3, 2014. His evidence is that the rental unit was fine. There were some issues like the closet door being off track, minor scratches, need for paint. He says anyone would live there, and it was in livable condition.

The landlord gave evidence that he met with the tenants on March 2, 2014 and offered them #605, the rental unit they originally viewed, however the tenants said no because they had already found another place. The landlord says the tenants did not pay rent for the month of March 2014 and did not return the keys to the unit until March 4, 2014.

The landlord claims unpaid rent for March 2014 of \$1,750.00. His evidence is that he found new tenants for April 1, 2014. He says he started advertising the unit in the last week of

February 2014, while still in China, because he knew the tenants did not like the place. However, he says he was unable to show the unit until March 4, 2014 since he did not have keys. He therefore missed potential tenants who might have rented the rental unit for March 15, 2014.

The tenants gave evidence that they saw a rental unit advertised by the landlord on Craigslist on February 11, 2014 and made arrangements to view it the same day. The tenants provided a colour copy of the Craigslist advertisement. The advertisement reads, in part: "Nicely fully furnished condo with City views includes, internet, cable, hot water, heat, all the furniture, just like a hotel, ready to move in March 1, 2014." The photos accompanying the ad show a clean bedroom, kitchen, and bathroom apparently in good repair.

The tenants' evidence is that they viewed rental unit #605 and it was "very nice, clean" and in perfect repair. They say they called the landlord back that evening to tell him they wanted to take it, and made arrangements to give him the deposit the next day. The male tenant gave evidence he met with the landlord the next day and the landlord told him another suite was available on the 17th floor that was the same but with a view. He says the landlord told him it was exactly the same, and so the tenant signed a tenancy agreement for #1705.

The female tenant gave evidence she met with the landlord on February 13, 2014 and he told her the same thing. The landlord told her that #1705 was the same as #605, except it had carpet instead of wood flooring. The female tenant said she then signed the tenancy agreement for #1705. The female tenant gave evidence that the landlord did not offer them an opportunity to see #1705 before they signed the tenancy agreement. She says she called the landlord a few days later to arrange to see #1705. She said he told her it was difficult because he was not in Canada but she asked him for the number of the current tenants. She says she had to be very persistent to get the current tenants' phone number.

The tenants gave evidence they viewed unit #1705 on February 20, 2014 and it was very different from #605; it was very dirty, things were broken, and it was a mess. The tenants' evidence is that #1705 "was not like he said." A series of text messages between the parties was put into evidence, which read in part:

February 20 text exchange:

Tenants: ... We are very upset. We just saw the place and it is not how you said. You gave your word it was going to be exactly like the one you showed us, and this place looks extremely careless. And I wonder when is this place going to be professionally clean? We are just move in when the guys are going out and giving us the keys. And as I know is him his going to paint the walls. And who is going to certify that the place is being giving to us in good conditions. We strongly do not want to take this place in this conditions because is not what you told us, we want the one that you showed to us.

Landlord: These guys were in the condo for a very long time. I know the condo probably needs an upgrade. I will do that when I come back. Please don't worry, I will do everything the condo needs to look very good for you. Hope you will be ok with that.
Thanks

Tenants: You are not understanding. We want the one that you showed to us, because you lied.

Landlord: Changing would've been easy if I was there. What's the problem with the apartment?

Tenants: The furniture is in bad conditions, some are falling apart. The closet in the bedroom has no door. The doors in general are flaking off, the sink in the washroom is oxidated. The dishwasher is getting out of its place. The t.v. is very old, even if some part of the walls are restored, seriously they need to be painted, and the corners of the walls are dented, the bed is smaller and no bed in the solarium, the floor in the living room is stained in the edge. That is what we saw with all the stuff, I don't know if there is something else, we just had a brief look at it.

Landlord: It wasn't a good time to see the place. Tenant called me and said he doesn't want us to show because the place is not in good shape, also there were 4 ppl living there in the last month. So as I said, I will try my best to make that place better for you, and if that doesn't work for you then I could find you a different place next month.
Thanks

Tenants: So why you tried to put us in there with the knowledge of the condition of the apartment. You was not honest with us [Landlord name], and I feel you are not taking us seriously. Now We expect you find a solution for this ASAP. Thanks.

Landlord: That's not true. Any ways, The options are, I could fix that unit in a condition acceptable to you or you could move out at the end of the month and I will give you your deposit back

The next text message is from the landlord on March 2nd at 5:20 p.m. to say he is back in town.

The tenants gave evidence that after the February 20th text message exchange, they thought the unit might be OK for one month. They also assumed a representative of the landlord would be present to deliver the rental unit to them. However, when they arrived at the rental unit on March 1st, they discovered there was a leak in the bedroom ceiling and buckets on the floor to catch the water. There was no representative of the landlord there. The tenants say that at that moment they decided they could not take the rental unit in that condition. The tenants took a series of photos of the rental unit which were provided in evidence. The photos indicate staining on the ceiling from a leak, walls with repaired areas that require repainting, a closet door off

track, scraped paint and gouges the walls, gouges and adhesive on the wood floor, mildew in the bathtub grout, and rust in the bathroom sink.

The tenants gave evidence that they could not go back to their old place, since new tenants were moving in that day. They therefore took the keys to the rental unit from the previous tenant, in case they had nowhere else to go. Later that day, they found a room to rent in shared accommodation for the month of March, and so did not move into the rental unit. The tenants later rented another apartment for April 1st.

The tenants gave evidence that the landlord contacted them on March 2nd and met with them on March 3rd. On March 3rd, the landlord offered them the rental unit they viewed, #605, but at that point they had already found a room to rent for March. The tenants seek the return of their \$875.00 security deposit.

The tenants also seek compensation of \$1,000.00 for “inconvenience, loss of use of premises promised to be rented, having to stay in a cramped room for one month and undergoing two moves as a direct result of inaction of [landlord’s] Agent.” Their evidence is that they suffered inconvenience and expense. They also had to pay a \$50.00 elevator fee as a result of moving twice.

The landlord says there is no basis for the tenants’ \$1,000.00 claim, since they moved to a friend’s place and since they provided no supporting documents. The landlord says the tenants were not forced to sign the tenancy agreement without seeing rental unit #1705.

The tenants’ position is that the landlord must provide vacant, habitable possession of the rental unit and the landlord failed to do so. They say the ceiling leak rendered the unit uninhabitable. Since the landlord failed to provide vacant, habitable possession, the contract is frustrated. They say they wished to return the keys to the landlord on March 1st but were not able to since he was not in town.

Analysis

I find it is likely the tenants received the landlord’s Application for Dispute Resolution dated March 13, 2014 (the “Landlord’s Application”), because the landlord was able to describe enclosing it with the Notices for Dispute Resolution. Even if the tenants did not receive the Landlord’s Application, they had ample time to discover what claim the landlord was making. The landlord mailed the package to the tenants on March 19, 2014 and this was about 3.5 months before the July 7, 2014 hearing date. Also, the tenants filed their own Application at the RTB on June 19, 2014 and could have inquired at that point if they did not know what the landlord was seeking. Also, the nature of landlord’s claim was foreseeable based on the landlord’s earlier text messages demanding rent. Further, the landlord and tenants largely agree on the facts, and the tenants did not indicate that there was any other preparation for the hearing that they would have done if they had known the exact nature of the landlord’s claim. I

conclude that, even if the tenants did not receive the Landlord's Application, the tenants were not prejudiced in their ability to respond to the claim. For that reason, I find it is not necessary to adjourn to allow the tenants additional time to prepare a response to the Landlord's Application.

The tenants agree they entered into a tenancy agreement to rent unit #1705 for a fixed term of three months, without viewing the rental unit. Normally, the tenants would be bound by their contractual obligations. However, in this case I find the landlord misrepresented the condition of #1705 by describing it as the "same" as the unit they viewed.

When viewed by the tenants, rental unit #605 was clean, in good repair, and ready for move in. Rental unit #1705 by contrast was dirty, damaged, and required repair, cleaning, and painting. For that reason, it cannot be said to be "the same" as #605. I find the tenants contracted to rent a clean rental unit in good repair, and the landlord did not provide that. Since the landlord had been in unit #1705 in early February, he was aware of its condition and the work required. Also, the landlord admitted in his text message of February 20th "I know the condo probably needs an upgrade." Since the landlord was aware of the differences between unit #605 and unit #1705, I find his statement that #1705 was "the same" as #605 constitutes a fraudulent misrepresentation.

Based on the landlord's misrepresentation of unit #1705, I find the tenants are entitled to a rescission of the tenancy agreement. Because the tenancy agreement is rescinded, it is a nullity. The landlord therefore has no basis for seeking unpaid rent and his application is dismissed. The tenants are entitled to the return of their security deposit of \$875.00 since there is no basis for paying a security deposit. They are also entitled to recover their RTB filing fee of \$50.00.

The tenants also seek compensation of \$1,000.00 for "inconvenience, loss of use of premises promised to be rented, having to stay in a cramped room for one month and undergoing two moves as a direct result of inaction of [landlord's] Agent." Since a rescission is intended to put the parties back in their original positions, the tenants are entitled to compensation for any losses they incurred as a result of the tenancy agreement. In this case, the tenants gave evidence they incurred a \$50.00 elevator charge. I accept the tenants' evidence that they moved twice and therefore incurred the charge. The tenants are entitled to be compensated for the \$50.00 charge. I decline to award nominal damages to the tenants. Despite the landlord's misrepresentation, the tenants might have avoided the inconvenience of moving twice had they exercised more diligence prior to entering into the tenancy agreement.

The total amount due the tenants is \$975.00. I grant the tenants a monetary order for that amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the tenants a monetary order for \$975.00. The landlords' application is dismissed.

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: July 24, 2014

Residential Tenancy Branch

