



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Millstream Ventures Ltd
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MND, MNR, MNSD, MNDC, FF, O
MT, CNR, MNDC, OLC, RP

Introduction

This hearing was convened by way of conference call concerning applications made by the landlords and by the tenants. Due to the number of applications made by the parties, the hearing commenced on July 3, 2014 focusing only on the applications referring to ending the tenancy. A written decision was provided to the parties on July 4, 2014 in which the tenants were granted more time to dispute the notice to end tenancy, cancelled all notices to end the tenancy issued by the landlords up to the date of the hearing, denied the landlords' application for an Order of Possession for unpaid rent or utilities, ordered the landlords to comply with Section 29 of the *Act*. I also found that one of the named tenants is not a tenant and all applications by the landlord against her are dismissed without leave to reapply.

The balance of the applications was adjourned to this date, which include the landlords' application for a monetary order for unpaid rent, for damage to the unit, site or property; for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; and to recover the filing fee from the tenants for the cost of the application; as well as the tenants' applications for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement and for an order that the landlords make repairs to the unit, site or property.

The named landlord attended the hearing and represented the landlord company. The tenant and the tenant's mother also attended. All parties gave affirmed testimony and provided evidentiary material to the Residential Tenancy Branch and to each other prior to the commencement of the first hearing and pursuant to my order after the first hearing had concluded. The parties were given the opportunity to cross examine each other on the evidence and testimony provided, all of which has been reviewed and is considered in this Decision.

During the course of the hearing, the landlord questioned the tenant about a Declaration that the tenant had ensured that a memory stick, being digital evidence that the tenant

intended to rely on, could be viewed by the landlord. The landlord advised that he received the digital evidence but was not at first able to open it. Subsequently the landlord's wife was able to do so. No further issues with respect to service or delivery of documents or evidence were raised.

Issue(s) to be Decided

The issues remaining to be decided are:

- Have the landlords established a monetary claim as against the tenant for unpaid rent?
- Have the landlords established a monetary claim as against the tenant for damage to the unit, site or property?
- Have the landlords established a monetary claim as against the tenant for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for liquidated damages, interest on unpaid rent and aggravated damages for breach of the *Act* and the tenancy agreement?
- Should the landlords be permitted to keep the security deposit in partial satisfaction of the claim?
- Has the tenant established a monetary claim as against the landlords for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for aggravated damages for assault and loss of quiet enjoyment?
- Should the landlords be ordered to make repairs to the unit, site or property?

Background and Evidence

To re-cap some of the evidence from the July 3, 2014 hearing, the landlord testified that one of the named tenants moved into the rental unit on November 1, 2013 as a co-tenant with an existing tenant. The existing tenant moved out and the tenant and the landlord entered into a new tenancy agreement for a tenancy to begin on January 1, 2014. A copy of the agreement has been provided. Rent in the amount of \$869.00 per month is payable in advance on the last day of each month for the following month, with a \$60.00 incentive for paying rent by the due date. The landlord also collected a security deposit in the amount of \$434.50 which is still held in trust by the landlord.

The tenant's mother testified that on May 24, 2014 the landlords' employee broke into the tenant's rental unit with another person, assaulted the tenant when the tenant arrived home, and damaged several of the tenant's belongings. The police were called;

the intruder and the tenant were arrested, and the tenant spent the night in jail so he could cool off after the altercation.

The tenant has provided a list of items that were missing after the altercation and a list of items broken. The lists also contain values which the tenant's mother testified were researched on-line. The value of the items as claimed by the tenant totals \$16,344.99, and she testified that is not for aggravated damages, but for replacement costs of the items only.

The tenant's mother also testified that the person who broke in was also a tenant in the rental unit and had authority as a landlord's agent, and the tenants have provided a copy of a contract between the landlords and that person dated October 28, 2013 which reduces rent for that person on a monthly basis in the amount of \$50.00 in exchange for: "... managing the complete removal of all garbage, recyclables and compost materials..." and for cleaning of the laundry room and front entry/stairs. She further testified that he acted as landlord by re-enforcing his position as caretaker, rule enforcer, questioned her twice about her attendance on the property, and the landlord has told her constantly that he has told the landlord things as though he were manager or an employee. The individual also assaulted all of the tenant's roommates and they have all moved out leaving the tenant holding the bag.

She also testified that the electricity in the bedroom has never worked, and asks for an order that the landlord repair that as well as damage caused during the break-in. That includes a window above the door which has been boarded up but gaping space remains allowing water and cold air to go through into the rental unit and a hole in a wall. Also, there is no smoke alarm in the rental unit and none in the common areas.

She also testified that the landlord made the tenant sign over the security deposit and referred to a document provided by the landlord dated May 13, 2014 wherein the parties agreed that the full security deposit could be applied to rental arrears. However, the agreement doesn't say what month that is for. The landlord has been charging interest which is not permitted.

The tenant testified that he thought the intruder killed his cat which is why he was so upset. The intruder was a tenant in another unit, and after he moved away he still had his trailer in the carport outside the apartment which was removed around the 21st of last month so was still obviously around.

The tenant further testified that each of the tenants had an individual tenancy agreement with the landlord and each was responsible for their own share of the rent.

The tenant moved in on November 1, 2013 and transferred \$809.00 to the landlord's account on December 27, 2013. That made 2 months for his part. The tenant makes electronic transfers for his share of rent directly to the landlord's bank account so that he gets credit for paying his portion, although on one occasion tenant's grandmother made an electronic payment for the tenant in the amount of \$400.00 on May 13, 2014. The landlord gave the tenant a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities claiming that the tenant owed \$5,942.52.

The tenant further testified that his roommate moved in on February 1, 2014 and moved out on May 9, 2014.

The landlord testified that the tenant is in arrears of rent the sum of \$5,966.85 and provided a spreadsheet showing the amount and dates of rent owing and payments made. The document shows a consistent running balance, and a column is also included for interest on the outstanding amounts. The spreadsheet runs from November 1, 2013 to September 1, 2014. The landlord also testified that another \$400.00 should be credited to the amount because on April 4, 2014 the tenant's roommate paid the landlord that amount and showed the electronic transaction to the landlord. With respect to interest, the landlord testified that the parties agreed to that in the tenancy agreement which states: "5. An interest penalty at an annual rate of 15% or .04109% daily shall be applied to any outstanding rent or damage repair costs payable. The interest payable on \$100.00 for 10 days would be \$0.41."

The landlord also claims the \$100.00 filing fee; cost of photographs and photocopies in the amount of \$25.01 and \$37.10 and has provided receipts. He testified that the balance of the \$25,000.00 claim is for trespassing and general damages for the tenant's failure to vacate the rental unit.

The landlord further testified that he has never entered the rental unit without prior permission of a tenant. In April, the landlord attended to discuss the rent owed and was invited in. On May 17, 2014 the landlord again attended to evict the tenants, was invited in and at that time he took photographs and wrote down an inventory of the tenant's belongings and the tenant called his mother. The tenancy agreement permits that: "7. It is understood and I/we understand and agree - in the event of any rent payable becoming overdue in excess of 20 days, i/we agree to the immediate sale of any and all of my/our possessions to the landlord for \$1.00 at the landlord's option. I/we understand and agree that I/we can purchase these same possessions from the landlord within a further 30 days for \$1.00 when and only when all rent arrears are paid in full. In the event I/we do not pay all rent or damage arrears within the 30 day period the landlord may resell any former tenant possessions at public auction. Any sale

proceeds exceeding the amount owing for rent or damages shall be refunded to the tenant(s) without delay by the landlord.”

Analysis

In order to be successful in a claim for damages, the onus is on the claiming party to satisfy the 4-part test:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the other party's failure to comply with the *Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. What efforts the claiming party made to mitigate such damage or loss.

The tenant claims missing or broken items which he believes are a result of an intruder breaking into the tenant's rental unit. The tenant claims that the intruder was an employee of the landlord, and has provided a copy of an agreement wherein the landlord agrees to reduce rent for services provided by that person. The landlord claims that person simply got a reduction in rent by \$50.00 per month for taking out the garbage. In the circumstances, I am not satisfied that the intruder is an employee or a manager of the rental complex; he is a tenant of the landlord. I further find that the landlord has no control over the actions of another tenant in that regard. I am not satisfied of the amounts of losses suffered by the tenant, and I find that the tenant has failed to establish any of the elements in the test for damages. The tenant's application for a monetary order as against the landlord is hereby dismissed without leave to reapply.

With respect to the tenant's application for an order that the landlord make repairs to the rental unit, I am not satisfied in the circumstances that the tenant has proven that the landlord is responsible or that the tenant should make the repairs. I do find, however, that the window needs replacing, and I order the landlord to make that repair.

With respect to the landlord's application for a monetary order for unpaid rent, I have reviewed the tenancy agreement and find that paragraphs 5 and 7 are unconscionable and not enforceable. Further, the landlord cannot include interest on rent or security deposits due to the landlord. I have also reviewed the tenant ledgers provided by the landlord and compared them to the testimony of the parties.

The first tenancy agreement signed by the tenant shows a tenancy with the tenant and a co-tenant commencing November 1, 2013 and specifies that each tenant is

responsible for compliance with the terms and liability. The second tenancy agreement is for a tenancy with no co-tenants commencing January 1, 2014.

The parties agree that the tenant paid \$809.00 on December 27, 2013; \$1,000.00 on March 4, 2014; \$400.00 on April 4, 2014; \$400.00 on May 13, 2014; and \$435.00 was transferred from the security deposit. Rent is \$869.00 per month with a \$60.00 discount if paid by the due date, and from November 1, 2013 to September, 2014 the total rent payable is \$9,559.00. I find that the tenant is not entitled to a discount, and that the tenant and co-tenants have paid \$3,044.00 and the landlord is entitled to the difference, being \$6,515.00. Although the tenant testified that each co-tenant was responsible for their own share of the rent, the tenancy agreement specifies otherwise and the landlord is entitled to collect from any or all co-tenants.

With respect to the landlord's claim for damage to the unit, site or property, the *Act* requires a landlord to complete a move-in and a move-out condition inspection report with the tenant at the beginning and end of the tenancy. Since the tenancy has not yet ended, I decline to consider such damages. A tenant is required to leave a rental unit reasonably clean and undamaged at the end of a tenancy and must repair any damage caused by the tenant or the tenant's guests. Once the tenancy has ended, the landlord is at liberty to consider what damages remain and prove that claim by way of another application.

The landlord also claims aggravated damages for difficulties encountered during this tenancy, and I find that the landlord is not entitled to same. A tenant is entitled to quiet enjoyment, but a landlord is not entitled to such damages. Further, since the tenancy has not yet ended, the landlord is not entitled to liquidated damages.

I also find that paragraphs 5 and 7 of the tenancy agreements are unconscionable, and I hereby order the landlord to comply with the *Residential Tenancy Act* by avoiding any attempt to collect interest from tenants on overdue accounts.

I further order the landlord to avoid collecting or attempting to collect photographs, identification or serial numbers, or inventory on any tenant's personal belongings or otherwise enforce or attempt to enforce the provision in paragraph 7 of the tenancy agreements provided for this hearing.

Since both parties have been partially successful with the applications, I decline to order that either party recover the filing fee from the other.

Conclusion

For the reasons set out above, the tenant's application for a monetary order is hereby dismissed without leave to reapply.

I order the landlord to repair/replace the broken window above the door of the rental unit.

I hereby order the landlord to comply with the *Residential Tenancy Act* by avoiding any attempt to collect interest from tenants on overdue accounts.

I further order the landlord to avoid collecting or attempting to collect photographs, identification or serial numbers, or inventory on any tenant's personal belongings or otherwise enforce or attempt to enforce the provision in paragraph 7 of the tenancy agreements provided for this hearing.

I hereby grant a monetary order in favour of the landlords as against the tenant pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$6,515.00.

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: September 24, 2014

Residential Tenancy Branch

