



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Columbia Property Management Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

This hearing dealt with an application by the landlord for an order of possession, a monetary order and an order permitting retention of the security deposit in partial satisfaction of the claim. All parties appeared and had an opportunity to be heard.

The parties advised that the tenants had moved out of the rental unit so an order of possession was not required. The hearing proceeded on the landlord's application for a monetary order only.

The tenants advised that they had submitted written evidence to the Residential Tenancy Branch on the morning of the hearing. The material provided to respondents when they are served with an application for dispute resolution and notice of hearing sets out the procedure for serving and filing evidence. As the tenants' evidence was not filed any time near the deadline for doing so, it was not considered in the preparation of this decision.

Issue(s) to be Decided

Is the landlord entitled to a monetary order and, if so, in what amount?

Background and Evidence

This one year fixed tenancy commenced November 1, 2014. The monthly rent of \$1750.00 was due on the first day of the month. The tenants paid a security deposit of \$875.00.

The landlord testified that at the beginning of February they were informed by one of the tenants that there was a water leak in the basement. They went to the unit that day and discovered that the leak had started six days earlier but the tenants had not notified them. They had a maintenance man there that evening and a plumber there the next day.

The tenants testified that between January 26 and February 5 she left several telephone messages with the landlord about mold in the basement but it was not until February 5, after she said they were withholding the rent because of the situation in the basement, that someone came to the unit.

In rebuttal the landlord testified that they had no record of the first few calls the tenant said she made.

The tenant acknowledged that the landlord did get plumbers in on two occasions. The landlord told them the dark material was dirt; the plumber told them it was mold. The tenant says they moved out because the mold posed a health hazard, particularly for their young children.

On February 13 the tenants sent the landlord an e-mail saying they were vacating the unit at the end of the month because of the situation in the basement and the fact that the landlord took so long to respond.

The tenants did not pay the February rent.

The landlord issued a 10 Day Notice to End Tenancy for Non-Payment of Rent on February 5. All of the tenants denied ever receiving the notice or seeing it posted. The person who actually served the notice did not testify nor did she file an affidavit of service or any other proof of service.

One of the tenants moved out of the unit before the end of the month; the other two finished cleaning on March 1. The tenants never returned the keys to the landlord - they said they did not know what to do with them – nor did they advise the landlord when they had vacated the unit. The landlord said she heard from the handyman the week before the hearing that the unit was empty so she had the locks changed.

The tenants argued that the mold in the basement represented an emergency within the meaning of the legislation and this allowed them to withhold rent.

The landlord argued that in addition to unpaid rent they are also entitled to the \$300.00 “break lease fee” as provided by clause A of the Addendum to the tenancy agreement:

“If the Tenant terminates the tenancy before the end of the original term, the Landlord may, at the Landlord’s option, treat his Tenancy Agreement as being at an end. In such event, the sum of \$300.00 shall be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty, to cover the administration costs of re-renting the said premises. . . .”

Analysis

The *Residential Tenancy Act* provides remedies for tenants whose rental unit requires repairs or is substandard in some way. Tenants may apply to the Residential Tenancy Branch for relief by filing an application for dispute resolution for orders requiring the landlord to make certain repairs and reducing past or future rent by an amount equivalent to a reduction in the value of the tenancy agreement. (If part of the claim relates to mold remediation the tenant must be able to prove that mold is present, usually by presenting a test report, as not all dark matter is mold.)

The *Act* does not allow a tenant to withhold rent as a means of forcing a landlord to make repairs. A tenant may only withhold rent if they have an arbitrator's order allow them to do so, or if section 33 applies. (See section 26(1)).

Section 33 allows a tenant, in carefully described circumstances, to have emergency repairs, as those are defined in the section, made without the landlord's prior approval and then to claim reimbursement for the expenditure from the landlord. The *Act* does not allow a tenant who has not paid for emergency repairs to withhold rent.

The tenants did not have the legal right to withhold the February rent. As a result they are responsible for the February rent and the February late payment fee, a total of \$1775.00.

During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties.

A landlord may end a tenancy by serving the tenant with a notice to end tenancy. If the tenant does not dispute the notice by filing an application for dispute resolution within the required time period the Act states that they are deemed to have accepted that the tenancy ended on that date. If the tenant disputes the notice, the tenancy is only ended if an arbitrator finds, after a hearing, that the notice to end tenancy is valid.

In this case the tenants all denied receiving a 10 Day Notice to End Tenancy for Non-Payment of Rent and the person who was said to have delivered the notice did not testify or file an affidavit of service. I find that the landlord did not establish that a 10 Day Notice to End Tenancy had been properly served on the tenants. If the tenants were still in the rental unit I would not have granted an order of possession based upon the 10 Day Notice to End Tenancy.

A fixed term tenancy may be ended by a tenant 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. Establishing that a particular term of a tenancy agreement is a material term – as defined legally – is not that easy. In any event, there is no evidence that the tenants in this case gave the landlord written notice of a failure to comply with a material term of the tenancy agreement before sending the e-mail saying they were going to move out.

A tenant may not use the one month notice provisions of the legislation to end the tenancy prior to the end of the fixed term. Any one month notice will take effect not sooner than the end of the fixed term.

If a tenant moves out of a rental unit before the end of the fixed term they are responsible for the rent until the end of the term, subject to the landlord's legal obligation under section 7(2) to minimize their damages by making all reasonable efforts to re-rent the unit as soon as possible.

Section 37(1) states that unless the landlord and tenant agree, the tenant must vacate the rental unit by 1:00 pm on the day the tenancy ends. When rent is due on the first day of the month, the tenancy ends on the last day of the month. In other words, the tenants should have been out by 1:00 pm on February 28.

Section 37(2)(b) states that when a tenant vacates a rental unit they must give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property. By retaining the keys the tenants effectively maintained possession of the rental unit.

By not returning the keys and not advising the landlord when they had actually vacated the rental unit the tenants made it impossible for the landlords to minimize its' damages by attempting to re-rent the unit before the end of March. Accordingly, I find that the tenants are responsible for the March rent and March late payment fee, a total of \$1775.00.

Since the tenants terminated the tenancy before the end of the term without a legal right to do so, I find they are responsible for the "break lease fee" of \$300.00.

Finally, since the landlord was successful on its application it is entitled to reimbursement from the tenants of \$50.00 of the fee it paid to file this application.

Conclusion

In summary, I find that the landlord has established a total monetary claim of \$3900.00 comprised of unpaid rent for February and March in the amount of \$3500.00, late payment fees for February and March in the amount of \$50.00, "break lease fee" in the amount of \$300.00, and the filing fee of \$50.00. Pursuant to section 72, I order that the landlord retain the security deposit in the amount of \$875.00 and I grant the landlord an order under section 67 for the balance due of \$3025.00. If necessary, this order may be filed in Small Claims Court and enforced as an order of that court.

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 09, 2015

Residential Tenancy Branch

