



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Wesley Place Ltd. and Pacifica First Management
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNSD, MNDC, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order authorizing them to retain the security deposit in partial satisfaction of the claim. Both parties participated in the conference call hearing.

Issue to be Decided

Is the landlord entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on May 1, 2007 at which time the tenants paid a \$700.00 security deposit and a \$100.00 fob deposit. The landlord and the tenant AN signed a tenancy agreement on May 1, 2007 which set a fixed term for the tenancy ending on April 30, 2008 and requiring the tenant to move out on that date. The agreement also provided as follows:

If the tenant ends the fixed term tenancy before the end of the original term as set out in (B) above, the landlord may, at the landlords [sic] option, treat this agreement as being at an end. In such event, the sum of \$200 shall be paid by the tenant to the landlord as liquidated damages, and not as [sic] penalty, to cover the administration costs of re-renting the said premises.

The parties agreed that AN did not move out on April 30, 2008 as provided in the tenancy agreement, but that the parties signed an addendum in 2008 and in each year thereafter confirming the original terms of the tenancy agreement but establishing a new one year fixed term and a new rental rate. For the addendum addressing the term beginning May 1, 2011, the tenant DT also signed the agreement with AN. Both tenants signed the addendums in the following years as well.

The parties agreed that on August 19, the tenants sent the landlord an email advising that they were terminating the tenancy. In that email, the tenants did not state the date on which they would be vacating the unit, but merely stated that they no longer slept in the unit. The tenants gave the landlord a handwritten letter on August 21 which stated that they were vacating the unit on August 31, 2015. The landlord responded in writing the same day to advise that the tenants were in breach of their tenancy agreement and put them on notice that should the landlord be unable to re-rent the unit, the tenants would be responsible for any loss of rental income.

The landlord seeks an award of \$200.00 in liquidated damages.

The landlord seeks an award of \$1,660.00 in lost income for the month of September 2014. The landlord testified that they advertised the rental unit immediately on Craigslist and set the first open house to occur on September 3. They stated they were unable to secure a new tenant for the month of September.

The tenants argued that they were entitled to end the tenancy during the fixed term and without notice because their unit had been infested with bedbugs. They testified that on August 5, they reported to the landlord that they had discovered bedbugs in their suite. The landlord immediately gave them an information package about how to prepare a suite before treatment for bedbugs and advised them that they must have it treated at their own expense as soon as possible. The landlord also recommended a pest control agency.

The tenants testified that they prepared their unit for treatment and on August 6, the pest control technician came to treat the unit. The tenants testified that although the information provided by the landlord stated that the tenants should not disassemble the bedframe, the technician advised that the bedframe should have been disassembled. The technician also noted that there were garbage bags covering part of the floor in one of the bedrooms. The tenants testified that they asked the technician to wait until they had disassembled the frame, but he insisted on spraying immediately because he found that the infestation was heavy. The tenants stated that they were concerned that the treatment may be ineffective and as a result, they were uncomfortable staying in the unit. The tenants testified that they did not sleep in the unit again after August 6.

On August 8, the tenants spoke with the landlord about the ineffective treatment and advised the landlord that in their opinion, the landlord should pay for the treatment. The landlord continued to advise the tenants that the tenants were responsible for the treatment until August 19 when they received the August 19 email from the tenants in which the tenants advised they were moving out of the unit. The landlords responded to that email by stating that they would pay for the "initial treatment".

The tenants argued that they were entitled to end the tenancy without notice as the landlord had breached a material term of their tenancy by not immediately offering to pay for the pest control treatment. Alternatively, they argued that the landlords were relying on an unconscionable term of the tenancy agreement (the tenants did not specify which term was unconscionable) and that the tenancy was frustrated because of the landlord's initial refusal to pay for treatment.

The tenants further argued that they should not be responsible for lost income for September because the landlord failed to act reasonably to mitigate their losses. The tenants argued that they did not see an advertisement for the unit before September 1 and stated that the landlord should have shown the suite prior to September 3. The landlord responded by saying that the advertisement very clearly stated that prospective tenants could call the landlord to schedule a specific appointment. The landlord's written statement said that "Showing the suite was held off until the current tenants moved out because of bed bug issue."

The parties agreed that the landlord was entitled to an award of \$110.25 for suite cleaning and \$94.50 for carpet cleaning.

The landlord also seeks to recover the \$50.00 filing fee paid to bring their application.

Analysis

Although the respondent tenant DT was not listed on the original tenancy agreement, there was no dispute during the hearing that DT became a tenant at some point during the tenancy and in the circumstances, I find that she is a co-tenant with AN and therefore jointly and severally liable with AN.

In order to address the landlord's claim for liquidated damages, I must rely on the terms of the provision in the tenancy agreement. The agreement very clearly states that liquidated damages are only payable where the tenant "ends the fixed term tenancy before the end of the *original term* as set out in (B) above" (emphasis added). The original fixed term expired on April 30, 2008. I find that the tenants did not breach the original term as set out in the agreement, but breached a subsequent term which had fixed the term from May 1, 2014 – April 30, 2015. I therefore find that the landlord is not entitled to liquidated damages and I dismiss that claim.

The tenants have claimed that they were entitled to end the tenancy because the landlord has breached a material term of the tenancy agreement. Section 45(3) of the Act provides as follows:

- 45(3) If a landlord has failed to comply with a material term of the Tenancy agreement or, in relation to an assisted or supported living tenancy, of the service 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.

In order for the tenants to have used this section of the Act to end their tenancy, the landlord must have breached a material term of the tenancy and the tenants must have given the landlord written notice of the failure and given reasonable opportunity for the landlord to correct the situation.

The parties were in a dispute about who was responsible for the bedbugs in the unit. The landlord believed that the tenants had introduced the bedbugs while the tenants believed that the bedbugs were either brought in when new carpet was installed in 2013 or migrated from other infested units. There is insufficient evidence before me to allow me to make a finding as to who is responsible for the advent of the bedbugs, but the nature of this application does not require me to make such a finding in any event.

Landlords are responsible to provide and maintain the residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law. Treatment for pests such as bedbugs would be included in the landlord's responsibilities. If a landlord believes that the tenants have introduced pests to the building, the landlord is welcome to treat the affected units and file a claim against the tenants who they believe should be held liable for the cost.

If the tenants had told the landlord that they would not pay for treatment and if the landlord had refused to arrange for treatment, I would have found that the landlord had breached a material term of the tenancy agreement. However, that is not what occurred in this case. The landlord told the tenants that the unit had to be treated at the tenants' expense and arrangements were made for treatment. The parties continued to discuss who should be held liable for that cost, but there was not at any time a refusal to treat the unit.

I find that the tenants have not proven that the landlord breached a material term of the tenancy agreement. If the landlord had refused to pay for treatment, it was always open to the tenants to file an application for dispute resolution to compel the landlord to pay. Instead, the tenants chose to vacate the unit as they clearly were uncomfortable living in the unit when multiple treatments would be required to defeat the infestation.

I do not accept that the tenancy has been frustrated by the landlord's unwillingness to pay for treatment. Frustration occurs when the subject matter of the contract has been fundamentally changed or no longer exists making the performance of the contract impossible. An example of a frustrating event in a residential tenancy would be when a fire destroys the rental unit. Because the rental unit no longer exists or has been so completely changed so as to make it uninhabitable, the contract cannot be performed. The landlord's failure to offer to pay for treatment is not a frustrating event.

I do not accept that the landlord is attempting to enforce an unconscionable term of the tenancy agreement. The only provisions in the tenancy agreement addressing the issue of maintenance and upkeep are found in the section under "Repairs" and reflect the provisions of the Residential Tenancy Act.

In order to establish their claim for loss of income, the landlords must prove that the tenants breached the Act, that they suffered a compensable loss as a result and that they took reasonable steps to mitigate their losses. I find that the tenants breached the Act by ending their tenancy before the end of the fixed term. I find that the tenants did not have the right to rely on section 45(3) of the Act as quoted above. I find that the landlords suffered a loss of income for the month of September as a direct result of the tenants' breach. As far as mitigation, the landlord testified that they placed the advertisement on Craigslist approximately 1 week prior to the first scheduled open house on September 3. I find that had the landlord shown the unit while it was being treated for bedbugs, it would have been very unlikely that prospective tenants would have been attracted to the unit. I find that the delay in advertising the unit was reasonable.

The landlord's advertisement clearly states that specific appointments could be scheduled with the landlord and I find that prospective tenants were not limited to attending the open house but could have scheduled a viewing for their convenience, possibly earlier than the open house if they wished to view it earlier.

I find that the landlord acted reasonably in the circumstances and I find that the landlord has met the burden of proving that the tenants should be held liable for the loss of income. I award the landlord \$1,660.00.

As the tenants agreed that the landlord was entitled to suite cleaning costs of \$110.25 and carpet cleaning costs of \$94.50, I award the landlord those amounts.

As the landlord has been substantially successful in their claim, I find they should recover their filing fee and I award them \$50.00.

The landlord has been awarded a total of \$1,914.75. I order the landlord to retain the \$700.00 security deposit and the \$100.00 fob deposit in partial satisfaction of the claim and I grant the landlord a monetary order under section 67 for the balance of \$1,114.75. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The landlord is awarded \$1,114.75 and the landlord will retain the security and fob deposits.

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 10, 2015

Residential Tenancy Branch

