Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, O, FF

Introduction

In the first application, the landlord seeks to recovery unpaid February 2015 rent of $7995.00.

In the second application the tenants seek to recover their $3997.50 security deposit and $2000.00 pet damage deposit as well as compensation for sixteen days in January 2015 when they say they were without proper heating in the home.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show on a balance of probabilities that either the landlord or the tenants are entitled to the relief claimed?

Background and Evidence

The rental unit is a furnished home. The tenancy started in October 2014. In December 2014 a new fixed term tenancy agreement was made for a three month term ending March 31, 2015. The tenancy agreement indicated that the tenants were to vacate at the end of the fixed term, though I note that only the landlord initialed that particular box on the standard form tenancy agreement.

The monthly rent was $7995.00. The landlord holds a $3997.50 security deposit and a $2000.00 pet damage deposit.

In December 2014 the tenants bought their own house. The arranged for a possession date of February 1, 2015, operating under the mistaken belief that they could end their fixed term tenancy before the expiry of the fixed term by giving the landlord thirty days notice. On December 31st the tenant Mr. D. emailed the landlord to say they'd be moving out on February 1st.

The landlord responded saying he would try to find new tenants for the remainder of the fixed term but that the tenants would be responsible for the rent if he was unsuccessful. He placed ads for tenants to rent the home for the two months February and March.

My mid-January the parties had reached a settlement. On January 14th a Mutual Agreement to End a Tenancy form was filled out and signed by the parties to indicate that the tenants would move out on February 28, 2015.

In the meantime the tenants looked for a replacement tenant to occupy the premises. It is unclear whether the tenants sought replacement tenants for the two months remaining under the tenancy agreement for the one month period remaining under the parties' mutual agreement to end the tenancy on February 28th.

On January 16th the tenant Mr. D. emailed the landlord that he and Ms. D. still intended to vacate on February 1st and advising the landlord that the landlord was under an obligation to re-rent the premises now that he had been informed of the February 1st, departure date.

The landlord responded by email saying that he had sold the house and arranged the purchasers' possession date to coincide with the end of the tenancy. He reminded Mr. D. that they'd just signed a mutual agreement for the tenancy to end February 28th. The landlord indicated that the tenants' "proposal of unknown persons staying in the house is unacceptable to me."

The next day, January 17th, the tenant Mr. D. responded by email saying that the landlord's delay in responding to the tenants' request to sublet the property may have caused a loss of that prospect and cost the tenants' a month's rent.

Mr. D.'s email goes on to cite various aspects of the rental accommodation that were below the standards that he thought one would expect in a rental of this price level. At the end of that email Mr. D. wrote the following:

I'll use this letter to also inform you that the heat in the house is a problem. I need you to have this repaired as soon as possible and not later than the 21st of January, but earlier if possible. The heat is excessive and makes it difficult to sleep. It is particularly bad in the bedroom nearest the kitchen. However, the entire house has an issue with the heat and the thermostats do not appear to have much control over the heating. If I turn it off completely, the house is too cold.

It appears the landlord did not immediately respond or send a workman to check the tenants' complaint about defective heating.

On January 22, Mr. D. emailed the landlord again saying that the email "is notice that you are in material breach of the lease …There are a variety of issues which you have failed to address as landlord." The email goes on to raise issues regarding security, a bathroom sink, floor coverings, window "treatments," a broken vacuum, lack of furniture and light bulbs. Mr. D.'s email reported that the heat is so irregular that his family was unable to sleep through the night as it is at times excessively warm, up to "78 C" (I assume Mr. D meant 78 F) and other times excessively cold, despite adjustments to the thermostat.

The email says that in Mr. D.'s view the heat problem alone is a breach of the lease. It also provides the tenants' forwarding address.

The landlord, who was out of province, arranged for a repairman to attend on January 25th and inspect the heating problem. The plumber reported that there was "irregular heat." He did not repair the problem that day.

The landlord emailed the tenants that the repairman would return. He noted that

> … it is not an emergency situation, as per you [*sic*] description no pipes are broken, there is no water leaking anywhere, the heat is working but it is just irregular. I have checked the weather in [*location of premises redacted*] it is presently 14 c. With a similar forecast for the rest of the week.

The tenant Mr. D. responded by email the same day indicating that is was not an emergency but it was preventing his family form sleeping comfortably and "[t]his is a material breach of the lease as you are required to provide heat …."

On January 28th the landlord emailed Mr. D. to inform him that the heating problem had been diagnosed and the repairman was trying to locate the necessary part. The email also noted that the landlord had been looking into the idea of subletting and had advertised the home for the month of February, however, given the short time to advertise since the tenants January 17th email it made it difficult to find an acceptable tenant. The landlord reminded the tenants they were, in his view, bound by the mutual agreement to end the tenancy February 28th. He indicated he would be prepared to conduct a move-out inspection on February 28th, but not before.

On January 29th the tenant Mr. D. emailed the landlord that the heating problem occurs each time hot water is used for washing, showering, *et cetera*. Mr. D. notes that he needs the landlord's permission to sublet and adds; "Of course, I cannot sublet until the heat is fixed."

On January 31, the tenant Mr. D. again emailed the landlord stating that he'd just returned from travelling and that it continues to be difficult to sleep in the house and the

heat continues to be erratic. He again stated that the erratic heat problem was a material breach of the lease. He requested that the landlord reimburse him for rent during the period from January 17th when the heat problem was first reported.

The tenant Mr. D. once again emailed the landlord on February 1st, setting out his view that the landlord was in material breach of the lease and that the landlord's uncooperativeness in entertaining the prospect of a subletting of the home had cause the tenants loss as well.

A repair was conducted on February 5th. The repairman's invoice indicates that there was a "3 – 5 degrees F fluctuating thermostat settings." He changed a sensor, noted that all the thermostats in the house were signalling a low battery charge, and reported that the system was "working ok."

The parties met at the home on February 19th and conducted a walk through inspection. All was well with the condition of the premises. The tenants returned the key.

Analysis

Given that the parties agreed in January to a mutual end of the tenancy effective February 28, 2015, the first question is whether or not the tenants were entitled to end the tenancy earlier as the result of a "material breach" of the tenancy agreement.

Residential Tenancy Police Guideline 8 "Unconscionable and Material Terms" provides a convenient synopsis of what a "material term" is:

> **Material Terms**
> A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
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> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
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> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
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> that there is a problem;
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> that they believe the problem is a breach of a material term of the tenancy agreement;
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> that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
>
> that if the problem is not fixed by the deadline, the party will end the tenancy.
>
> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

The breach alleged here is that the heating system, a radiant hot water system, was "erratic." In my view, a fluctuating or erratic heating system does not give rise to the claim that a material term of the tenancy has been breached. While a landlord's total failure to provide heat in the winter months might arguably be seem as a breach of a material term of the tenancy, it cannot be said that even a minor or "trivial" fluctuation in heat would give cause for a tenant to end a tenancy. As can be seen by the Guideline, the material term must be one so fundamental to the tenancy agreement that even a trivial breach would justify ending the tenancy.

I find that the tenants were not entitled to repudiate the tenancy based on a material breach of the tenancy agreement by the landlord.

The tenants argue that the landlord should have co-operated in their effort to find short term replacement tenants who would have covered the February rent the tenants would otherwise have had to pay.

In that regard, s.34 of the *Residential Tenancy Act* (the "*Act*") provides:

> **34** (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.
> (2) If a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).
> (3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

Policy Guideline 19 "Assignment and Sublet" provides further direction. It says, in part,

> A landlord is not required to give consent if not asked to do so. Once the request is made, the landlord's consent cannot be unreasonably or arbitrarily withheld if the tenancy agreement:
> - has a fixed term of 6 months or more, or

- is in respect of a manufactured home site where the manufactured home and the site are not rented from the same landlord (although a landlord may require the request to be in the form set out in the Manufactured Home Park Tenancy Regulation).

A landlord is not required to give consent to an assignment or sublet other than those specified.

In this case, there is no evidence that the tenants every provided the landlord with the particulars of any individual coupled with a request that the tenancy be assigned to that person. In any event, this tenancy was originally for a three month fixed term. The landlord was not obliged to given his consent to a subletting.

The question remains as to whether the tenants are entitled to recover damages for the erratic heating system they suffered. Their claim does not directly address this aspect but I find such a claim to be inherent in their application and that the issue was fairly addressed by all parties at the hearing.

According to the tenant Ms. D., the heating malfunction began around Christmas time in 2014. There is no dispute but that the problem was not relayed to the landlord until January 16, 2015 (received January 17th in the landlord's part of the world) in Mr. D.'s email.

It cannot be ignored that the tenants' heating complaint and demand for repair followed immediately upon the landlord's email refusing to further shorten the tenancy from February 28th to February 1st and refusing the idea of the tenants subletting. I find it likely that had the circumstances of the erratic heat been as serious as they claimed, the tenants, who at Christmas 2014 would have expected to be living in the home another three months, would have raised the issue with the landlord. Equally, I find that had the problem been of concern, they would have raised such an issue before pursuing the landlord for his permission to allow them to sublet the premises.

The tenants say their sleep was disturbed by the erratic heat; up to 78 F and then cold.

I consider the best evidence of temperature variance to be that of the repairman, who examined the system and reported a variance of three to five degrees Fahrenheit from the thermostat settings. Such a variance is significant but very far from what could be considered to cause a significant discomfort in a home.

The tenants have proved that the landlord's heating system was malfunctioning but on the totality of the evidence they have failed to prove their damages. In such a circumstance I award the tenants nominal damages of $50.00.

Conclusion

The landlord is entitled to recover the February 2015 rent of $7995.00 plus the $100.00 filing fee for his application, less the $50.00 nominal damages award to the tenants.

As the tenants' application has been largely unsuccessful, I decline to allow for recovery of their filing fee.

I authorize the landlord to retain the $3997.50 security deposit and the $2000.00 pet damage deposit in reduction of the amount awarded. The landlord will have a monetary order against the tenants jointly and severally for the remainder of $2047.50

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 21, 2015

Residential Tenancy Branch