



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, O, FF

Introduction

In the first application, by filing number but not by date, the landlord seeks a monetary award claiming damage and loss from the breach of a fixed term tenancy agreement, utility costs and for the cost of cleaning and repair.

In the second application the tenant seeks to recover a half month's rent as a result of replacement tenants moving in early and for her security deposit.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show on a balance of probabilities that either party is entitled to any of the relief claimed?

Background and Evidence

The rental unit is a three bedroom house. The tenancy started in September 2014 under a one year fixed term lease. The monthly rent was \$1500.00 due on the first of each month. The tenant paid a \$1500.00 security deposit.

The tenant has now received her deposit money back. She acknowledged responsibility for the utility costs of \$156.12 claimed by the landlord. The bill came after she had left.

In December 2014 the tenant emailed the landlord that she would be leaving at the end of January. The email did not contain an electronic signature with the meaning of the *Electronic Transactions Act* and so did not comply with s. 52 of the *Residential Tenancy Act* (the "Act") which requires that a notice to end a tenancy be in writing and be signed and dated.

By early January the landlord found a replacement tenant for mid-month. She requested of the tenant and the tenant agreed to vacate so that the new tenants could move in by January 15th. The tenant complied.

The new tenants have signed a one year lease with the landlord at a monthly rent of \$1600.00. That is, \$100.00 more per month than the tenant was paying.

The landlord says that in consideration of the respondent tenant entering the one year fixed term lease, she had reduced the rent by \$100.00 per month and so the tenant should pay her that extra \$100.00 for each of the five months she lived in the home.

The landlord says the premises were impeccably clean at move in but were not left clean enough when the tenant left. She says she spent three hours cleaning; of a value of \$120.00. She says the tenant broke a mirror.

The landlord says that by agreement with the tenant she had left couches and tables in the rental unit for the tenant to use and had disposed of the remainder of the furnishings. Her new tenants wanted furniture and she had to replace some of it: "dressers, tables, bedroom furniture, bookcases, etc." at a cost of \$300.00.

The tenant says she has no recollection of any \$100.00 rent reduction for a fixed term lease.

She says that she and her witness Ms. P. cleaned to an acceptable standard.

The tenant says the mirror claimed by the landlord was not broken, only that a nail was missing.

She says that the landlord asked her if she wanted certain furniture to remain at the start of the tenant and she had said "no." She does not know what furniture the landlord got rid of or stored.

The tenant's witness Ms. P. testified that she had helped clean the rental unit on January 11, 2015, that she is involved in janitorial matters in her work and that the cleaning of the rental unit was to a "high standard."

Analysis

Even had the tenant's email been in compliance with the form of notice requirements of s. 52 of the Act, a tenant under a fixed term tenancy agreement is not entitled to unilaterally end it before the expiry of its term. If she does so it is a fundamental breach of the tenancy agreement. As Residential Tenancy Policy Guideline #30 "Fixed Term Tenancies" provides:

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.

Unfortunately, the parties did not turn their attention early on to Residential Tenancy Policy Guideline #3 "Claims for Rent and Damages for Loss of Rent." It provides:

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the Act or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy. For example, a tenant has agreed to rent premises for a fixed term of 12 months at rent of \$1000.00 per month abandons the premises in the middle of the second month, not paying rent for that month. The landlord is able to re-rent the premises from the first of the next month but only at \$50.00 per month less. The landlord would be able to recover the unpaid rent for the month the premises were abandoned and the \$50.00 difference over the remaining 10 months of the original term. In a month to month tenancy, if the tenancy is ended by the landlord for non-payment of rent, the landlord may recover any loss of rent suffered for the next month as a notice given by the tenant during the month would not end the tenancy until the end of the subsequent

month. If a month to month tenancy is ended for cause, even for a fundamental breach, there can be no claim for loss of rent for the subsequent month after the notice is effective, because a notice given by the tenant could have ended the tenancy at the same time.

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

Even if a landlord is successful in re-renting the premises, a claim for loss of rent may still be successful where the landlord has other vacancies and is able to establish that those other premises would have been rented had the tenancy in question continued. In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent or damages, but any remainder is not recoverable by the tenant. In a month to month tenancy the fact that the landlord may have been able to re-let the premises at a higher rent for a subsequent tenancy does not serve to reduce the liability of the previous tenant.

In this case there is no evidence that the landlord made any election or notified the tenant about how she was treating the tenant's termination of the fixed term tenancy until she filed her claim on April 13, 2015, over a month after the tenant had filed her claim.

As well, the landlord has negotiated a higher rent with the new tenants. According to foregoing Guideline, she would be expected to credit the tenant with the additional \$100.00 she would receive from the new tenants for each of the seven months remaining in this tenant's fixed term tenancy against her own claim.

Regarding the landlord's claim to recover the \$100.00 per month she said she reduced the tenant's rent by, in consideration of a one year tenancy, that is not a loss the landlord has suffered as a result of the tenancy ending early. She would have received \$100.00 less for those first five months whether or not the tenant stayed the whole year. I dismiss that item of the landlord's claim.

Regarding the landlord's claim for furniture replaced, there were no conditions imposed on the tenant for the landlord removing it at the start of the tenancy. The fact that the new tenants negotiated for furniture from the landlord and that the landlord may have expended money replacing the furniture she disposed of early, is a loss or expense too remote to be claimable from this tenant. I dismiss this item of the claim.

I must dismiss the landlord's claim for cleaning. She has failed to provide sufficient evidence to show that the tenant failed to meet the obligation imposed on her by s. 37(2) of the *Act* to leave the rental unit "reasonably clean, and undamaged except for reasonable wear and tear."

I find I must dismiss the landlord's claim for damage to a mirror. The evidence simply does not indicated more than what the tenant admitted to be a missing nail or fastener and there is no indication that any repair was done at any cost for that item.

Regarding the tenant's claim for recovery of one half month's rent, it is reasonable to assume that when the landlord requested and the tenant agreed to leave in mid-January, the parties would have discussed any compensation for the half month at that time. There is no evidence that they did. I conclude that each was agreeable to leave the legal relationship without compensation for that half month. I dismiss this item of the tenant's claim.

The tenant did not claim a doubling of the deposit under s. 38 of the *Act*, which requires a landlord to repay a security deposit or make a claim against it within 15 days after the end of the tenancy and receipt of the tenant's forwarding address in writing. The Residential Tenancy Policy Guideline #17 "Security Deposit and Set off" indicates that an arbitrator is to award double in the applicable circumstances whether or not a tenant claims it, unless specifically declined.

In this case I do not award a doubling of the deposit. The landlord attempted to return the deposit by bank transfer. There was significant confusion between the parties about the words required by the bank for the tenant to recover the funds. In all the circumstances I find that it has not been shown that the landlord breached s. 38 of the *Act*.

Conclusion

In result, the tenant's application is dismissed.

The landlord's application is dismissed but for recovery of the agreed utility bill of \$156.12. She will recover that amount from the extra \$100.00 per month in rent she has and will receive from her new tenants over the seven months that would have remained in the tenant's fixed term tenancy, in accordance with Guideline #3, above.

In light of this result, I make no order for recovery of either party's filing fee.

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: May 30, 2015

Residential Tenancy Branch

