



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, MNR, MNSD, MNDC, FF, O

Introduction

This hearing was scheduled to deal with cross applications. The tenants applied to cancel a Notice to End Tenancy for Unpaid Rent. The landlords applied for an Order of Possession for unpaid rent; a Monetary Order for unpaid rent and loss of rent; and, authorization to retain the tenant's security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

At the commencement of the hearing, the parties confirmed that the tenants have since vacated the rental unit.

The landlords' agent submitted that the tenants failed to serve all pages of their Application upon the landlords within the three day time limit required under the Act. The tenants were of the position they had served all pages of their Application. Having heard the tenants have already vacated the rental unit, I did not explore this matter further as it was no longer necessary to determine whether the Notice to End Tenancy for Unpaid Rent should be upheld or cancelled given the tenants had already vacated the rental unit. Similarly, the landlord's request for an Order of Possession was also moot. I dismissed the tenants' Application and the landlords' request for an Order of Possession. Accordingly, the only remaining issues for me to determine were the landlord's monetary claims against the tenants.

The landlords' agent pointed out that an error was made on the landlords' Monetary Order worksheet and the claim for unpaid rent for March 2015 should be reduced to \$300.00. The landlord's agent also withdrew the landlords' claims for loss of rent for May and June 2015. These requests for amendment were granted as they were non-prejudicial to the tenants.

The landlord's agent also requested the landlords' monetary claim be increased to include claims for cleaning and repairs made after the tenancy ended. The landlords had not amended their Application in accordance with the Rules of Procedure but had submitted documentary evidence in support of this request for amendment. The landlords' agent submitted that the additional submissions were sent to the tenants at their forwarding address via registered mail on May 24, 2015. The tenants stated they had not received any submissions from the landlords at their forwarding address and were unaware of the landlords' claims for cleaning and damage. The landlord's agent was unable to provide a registered mail tracking number as proof of service and I was unsatisfied that the tenants were served with the landlords' additional submissions. Of further note, documents that are mailed are deemed to be received five days later pursuant to section 90 of the Act, meaning the landlords would have an expectation that the tenants would receive the additional submissions on May 29, 2015 and that would not meet the 14 day deadline for serving an amended Application, as provided under the Rules of Procedure. The Act and the Rules of Procedure provide that documentation is to be served by certain deadlines so that the other party has an opportunity to review the submissions, prepare a response, and submit their own evidence. For all of these reasons, I did not permit the landlords to amend their application to deal with repairs and cleaning costs and they are at liberty to file another Application if they wish to pursue the tenants for such losses.

Issue(s) to be Decided

1. Are the landlords entitled to compensation from the tenants for unpaid rent for March and April 2015?
2. Are the landlord authorized to retain the tenants' security deposit?

Background and Evidence

As neither party provided a copy of the written tenancy agreement in their respective evidence packages, I have recorded the terms of tenancy as submitted orally by the parties during the hearing.

It was undisputed that the tenants were provided possession of the rental unit on April 15, 2014 and paid a \$600.00 security deposit. The tenants were required to pay rent of \$1,200.00 on the 1st day of every month. The tenancy was for a fixed term of one year with an expiry date of April 30, 2015. The parties provided conflicting testimony as to what the tenancy agreement indicates as to what was to happen at the end of the fixed term. The tenants testified that their tenancy was to continue on a month-to-month

basis after the fixed term expired. The landlord's agent submitted that the tenants were required to vacate the unit at the end of the fixed term although the landlord's agent acknowledged that she had not been provided a copy of the tenancy agreement and had not personally reviewed the tenancy agreement in making this submission.

The date the tenants vacated the rental unit was also inconsistent but not a material matter to this dispute. The tenants stated that they vacated the rental unit on May 1, 2015 and the landlords' submitted that it was on May 3, 2015.

It was undisputed that the landlords explored the idea of listing the property for sale and in January 2015 communicated this to the tenants via email and by way of a letter sent to the tenants. The landlords indicated in their communications to the tenants that while the property was for sale they would accept reduced rent of \$900.00 per month in recognition of the inconvenience to the tenants. Although the house was not for sale in the month of February 2015, the tenants paid and the landlords accepted the lesser amount \$900.00 in full satisfaction of the rent due for that month in recognition of the multiple realtors that viewed the rental unit during that month.

Three realtors were provided access to the property in February 2015 so as to provide a market evaluation to the landlords. Upon receiving feedback from the realtors, the landlords decided to wait until after the tenancy ended to list the property for sale as they were of the view it was not in a suitable condition to show to prospective purchasers. On February 6, 2015 the landlord notified the tenants of this decision and informed the tenants that their rent obligation of \$1,200.00 would resume effective March 2015.

On March 11, 2015 the tenants only paid \$900.00 in rent for March 2015. The landlord issued a receipt dated March 11, 2015 to reflect the payment with a notation on the bottom that reads "rent to [be] paid before end of March 20, 2015." Also on March 11, 2015 the female tenant and the landlord signed a Mutual Agreement to End Tenancy with an effective date of April 30, 2015.

The tenants did not pay the remainder of the rent due for March 2015. Nor, did they pay rent for April 2015. On April 8, 2015 the landlords personally served a Notice to End Tenancy (the Notice) upon the tenants.

The Notice served upon the tenants is an old version of a Notice to End Tenancy published by the Residential Tenancy Branch in 2003. This old version of a Notice to End Tenancy provides for multiple reasons for ending a tenancy by a landlord and the landlord is required to indicate which reason applies on the Notice. Page 2 of the

Notice served upon the tenants indicates the reason for ending the tenancy is due to unpaid rent. The amount of the outstanding rent is described as being \$300.00 for March 2015 and \$1,200.00 for April 2015 for a total of \$1,500.00 that was due as of April 1, 2015. The Notice has a stated effective date of April 18, 2015.

The tenants did not pay the outstanding rent but filed an Application for Dispute Resolution with the Residential Tenancy Branch on April 13, 2015 seeking to dispute the Notice. As noted earlier in this decision the issue as to whether they properly served the landlord with this Application is moot since the tenants have since vacated the rental unit. However, I heard the tenants' reasons for not paying rent during the hearing and I have considered their reasons.

Below, I have summarized the parties' respective positions with respect to the tenants' obligation to pay rent for March and April 2015

March 2015 rent

The landlords' agent pointed out that the email and written communication mailed to the tenants in January 2015 clearly outlined that the reduced rent would be applicable only while the house was up for sale. The house never went up for sale during the tenancy although the tenants were provided reduced rent for February 2015 in recognition of the realtors coming through to inspect the house. Further, the receipt issued on March 11, 2015 clearly showed that the balance of \$300.00 was to be paid by the tenants albeit on the later date of March 20, 2015. Therefore, the landlords were entitled to receive the full amount of rent of \$1,200.00 for the month of March 2015.

The tenants' reasons for not paying the full amount of rent for March 2015 were rather unclear and convoluted. From their details of dispute included in their Application, the tenants submitted that a reduced rent of \$900.00 was "negotiated" in January 2015 and during the hearing the tenants submitted that the February 6, 2015 email, whereby the landlords informed them that the house would not be put up for sale and return would return to \$1,200.00, was not official notice to return the rent to \$1,200.0 per month.

I noted that in their Application for Dispute Resolution and in the photographs submitted by the tenant the tenants raised an issue with respect to mould in the unit. During the hearing the tenants indicated that mould was not the reason for paying reduced rent in March 2015 and I did not hear further submissions with respect to mould.

April 2015 rent

The landlords seek to recover the rent that was due under the tenancy agreement. The house was not up for sale and the tenants were residing in the rental unit in April 2015. Therefore, the landlords seek recovery of unpaid rent in the amount of \$1,200.00 for the month of April 2015.

The tenants submitted that they were advised by laypersons and an Information Officer with the Branch that a tenant in receipt of a 2 Month Notice to End Tenancy for Landlord's Use is entitled to withhold their last month's rent. The tenants submitted that that they took the February 6, 2015 email as a 2 Month Notice to End Tenancy for Landlord's Use of Property. The tenants also pointed to the third page of the Notice to End Tenancy they received on April 8, 2015 which includes information that tenants in receipt of a 2 Month Notice are entitled to compensation of one month's rent. I noted that the third page of the Notice does not indicate the landlord was ending the tenancy for landlord's use. Rather, the second page of the Notice indicates the landlord is ending the tenancy for unpaid rent in two places.

The landlord's agent submitted that the February 6, 2015 email was not given in an attempt to end the tenancy for landlord's use. Rather, its purpose, among other things, was to communicate to the tenants that the tenants were to vacate the rental unit at the end of the fixed term.

Although the email indicates the end of the tenancy was April 15, 2015 both parties provided consistent testimony that the tenants had pointed out to the landlord that their tenancy agreement indicated the end of the fixed term was April 30, 2015 and the landlord recognized an error was made and the tenancy agreement does indicate the end of the fixed term as being April 30, 2015.

I noted that the female tenant had signed a Mutual Agreement to End Tenancy on March 11, 2015 with an effective date of April 30, 2015 and I enquired as to the reason this was signed if the tenants were relying upon the email of February 6, 2015 as a notice to end tenancy. The tenants submitted that they were coerced into signing the Mutual Agreement. The tenants explained that the landlord was crying about their financial problems and that not signing the Mutual Agreement would make the tenants "look like jerks".

Analysis

Under section 26 of the Act, a tenant must pay rent pursuant to their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent. Where a tenant withholds all or part

of the rent due under the tenancy agreement the tenant bears the burden to provide a legal basis for doing so.

It was undisputed that the tenancy agreement requires the tenants to pay rent of \$1,200.00 per month and the landlord relies upon the tenancy agreement in seeking compensation for the unpaid rent.

The tenants make two arguments for withholding rent: waiver and tenant's compensation that is provided under section 51 of the Act. Below, I analyze each of these arguments.

Waiver

Although the tenants state in their Application that the parties "negotiated" a reduced rent of \$900.00 the parties did not amend the tenancy agreement in writing. As such, I find the rent payable is \$1,200.00 per month as provided under the tenancy agreement unless the tenants can establish that the landlords waived entitlement to receive that amount.

There are two types of waiver: express and implied. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver may be demonstrated by the actions or conduct of the parties.

In this case, I find the landlords expressly waived \$300.00 of the monthly rent by way of their communications sent to the tenants via email and by way of letter in January 2015 in certain circumstances. I find their communications to the tenants were sufficiently clear that the waiver of \$300.00 applied "for the months it [the rental unit] is up for sale". From what I heard, the house was never listed for sale during the tenancy; however, the landlords agreed to waive \$300.00 for the month of February 2015 pursuant to a request of the tenant via email on January 22, 2015 when she asked the landlord "And does the reduced rent apply for February, as this is when the realtors will start visiting?" to which the landlord replied the following day "...I would be more than happy to reduce the rent by \$300.00 for Feb." The tenants deducted \$300.00 from their February 2015 rent and the landlord accepted the lesser amount pursuant to their waiver. Therefore, I find it clear that the landlords expressly waived \$300.00 of the rent for February 2015 but that there was no express waiver for March 2015 as this would require the house to be listed for sale and it was not.

I also considered the actions of the parties in March 2015 to consider whether there was implied waiver of rent for March 2015. On March 11, 2015 the tenant pays only \$900.00 in rent and on the receipt issued by the landlord on March 11, 2015 the landlord indicates that a balance remains outstanding and payment was expected by March 20, 2015. I find the actions of the landlord do not imply waiver of rent for March 2015.

In light of the above, the only evidence of waiver that I see is that for the month of February 2015 and I find that the full amount of rent for March 2015, as provided by the tenancy agreement was payable.

With respect to the tenant's argument that the email of February 6, 2015 is insufficient official communication to return the monthly rent obligation to \$1,200.00 I find his argument is without basis since the obligation to pay rent of \$1,200.00 is provided for by the tenancy agreement and section 26 of the Act. The monthly rent of \$1,200.00 is the amount of rent due unless the tenant has a legal right to pay less and I have found that the tenants did not establish the legal right to pay less rent for March 2015. Therefore, the tenancy agreement is the document that sets the amount of the rent and the landlord was not obligated to give the tenants an official notice to inform them of their obligation to pay rent in accordance with the tenancy agreement.

Tenant's compensation under section 51 of the Act

Section 51 of the Act provides that a tenant is entitled to compensation equivalent to one month's rent where the tenant is served with a 2 Month Notice to End Tenancy for Landlord's Use of Property under section 49 of the Act. Where a landlord serves a notice to end tenancy upon a tenant it must be in the approved form to be effective. At no time were the tenants served with a 2 Month Notice to End Tenancy for Landlord's Use of Property in the approved form. Although, not in the approved form, the Notice to End Tenancy served by the landlord's on April 8, 2015 provides space for a landlord to end the tenancy for landlord's use of property but the only reason for ending the tenancy on that Notice was due to unpaid rent.

The tenants submitted that they relied upon the email of February 6, 2015 in lieu of a 2 Month Notice to End Tenancy for Landlord's Use. Aside from not being in the approved form and not served in a manner required by section 88 of the Act, upon review of the email, I find the email is otherwise inconsistent with a 2 Month Notice. The email indicates the landlords will wait to list the house for sale until after the tenants vacate the rental unit and that the landlord seeks to have the tenants vacate by April 15, 2015. I find the content of this email does not meet any of the characteristics of a 2 Month Notice issued under section 49 of the Act. For instance: less than 2 months of notice

was given and the reason for ending the tenancy is not one of the reasons provided under section 49.

Further, I find the tenants actions inconsistent with reliance on the February 6, 2015 email. For instance, the email indicates the landlords seek to end the tenancy April 15, 2015 yet the tenants did not vacate the rental unit by April 15, 2015. Rather, they engaged with the landlord to point out that the end of their fixed term was April 30, 2015 and the female tenant signed a Mutual Agreement to End Tenancy effective April 30, 2015. If the tenants were of the position they relied upon the email of February 6, 2015 in lieu of a 2 Month Notice to End Tenancy for Landlord's Use of Property as the reason for the end of their tenancy there would be no need to sign a Mutual Agreement to End Tenancy. Nor, were they so naïve as to just accept the email as a notice to end tenancy as they were sophisticated enough to consult their tenancy agreement and communicate with the landlord that their fixed term had an expiry date of April 30, 2015.

Considering everything before me, I find this tenancy came to an end pursuant to the Mutual Agreement to End Tenancy signed by the female tenant and the landlord on March 11, 2015 as this is the only duly executed and legally binding document that ended the tenancy. Certainly the tenants were at liberty to negotiate compensation in exchange for their agreement to end the tenancy at that time. Yet, as acknowledged by the female tenant no such compensation was discussed or agreed upon.

The tenants argued that the Mutual Agreement was signed by coercion. Coercion is where one party is deprived of free choice, usually upon threat or fear inflicted by the other party. I find the tenants' submission that the landlord was crying when the female tenant went to meet the landlord on March 11, 2015 does not meet the criteria for me to conclude the tenants were subject to coercion. Rather, it was their own "free choice" to agree to end the tenancy so as to not "look like jerks".

Ultimately, it is upon both landlords and tenants to understand their respective rights and obligations under the Act and understand the documents that they sign. Landlords and tenants may obtain information by consulting the Act and/or Guidebook, the Regulations, Fact Sheets and Policy Guidelines published by the Residential Tenancy Branch on its website and/or contacting an Information Officer with the Branch.

In light of the above, I find the tenants did not establish that they were entitled to withhold rent for April 2015 pursuant to section 51 of the Act. Accordingly, I find the landlords entitled to recover unpaid rent of \$1,200.00 for the month of April 2015 as established by the tenancy agreement and the Act.

As the landlords were successful in their request to recover unpaid rent from the tenants, I further award the landlords recovery of the \$50.00 filing fee they paid for their Application.

I authorize the landlords to retain the tenants' security deposit in partial satisfaction of the unpaid rent as requested by way of their Application.

Given the above awards, the landlords are provided a Monetary Order in the net amount calculated as follows:

Unpaid rent: March 2015	\$ 300.00
Unpaid rent: April 2015	1,200.00
Filing fee	50.00
Less: security deposit	<u>(600.00)</u>
Monetary Order	\$ 950.00

To enforce the Monetary Order it must be served upon the tenants and it may be filed in Provincial Court (small Claims) to enforce as an order of the court.

Conclusion

The landlords were provided authorization to retain the tenant's security deposit and a Monetary Order for the balance of \$950.00 to serve and enforce as necessary.

The tenants' Application was dismissed, as was the landlords' request for an Order of Possession.

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: June 05, 2015

Residential Tenancy Branch

