



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order authorizing him to retain the security deposit and a cross-application by the tenant for a monetary order. Both parties participated in the conference call hearing.

Issues to be Decided

Is the landlord entitled to a monetary order as claimed?

Is the tenant entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on September 1, 2014 and ended on November 13, 2014. They further agreed that rent was set at \$1,950.00 per month and that at the outset of the tenancy, the tenant paid a \$975.00 security deposit.

The landlord seeks to recover \$1,950.00 in rental arrears for the month of November. The parties agreed that the tenant did not pay rent in that month. The tenant claimed that she did not do so on the advice of counsel. The tenant took the position that the landlord had breached a material term of the tenancy agreement by failing to perform certain repairs and failing to provide permission to operate a daycare on the premises.

The tenant seeks to recover loss of income from the daycare she intended to operate on the premises, recovery of the increased rent she paid at the rental unit and moving expenses. The tenant claimed that she moved into the rental unit from housing at which she was paying just \$175.00 per month in order to open a full time day care. She testified that prior to she told the landlord that she would be operating a daycare, a proposal which she claimed was met by the landlord with approval when she viewed the rental unit. The landlord claimed that he understood that the tenant would be running after school care rather than a full time daycare.

The tenant testified that on August 25, the landlord signed a document from the local health authority confirming that he was aware of the tenant's intent to operate a "care facility" on the premises. At a later date, the tenant approached the landlord with her application for a business licence which she wished to submit to the city. The landlord refused to sign the business license application. On September 23, the landlord sent to the tenant an email. On October 16, the landlord sent to the tenant an email advising that he would not give permission for the tenant to operate a day care centre, nor would he allow the tenant to operate after school care.

The tenant claimed that as a result of the landlord's refusal to permit her to operate the daycare centre, she had to secure an alternative location, incur moving expenses and she lost considerable income.

Analysis

Section 7 of the *Residential Tenancy Act* (the "Act") establishes the following test which must be met in order for a party to succeed in a monetary claim.

1. Proof that the respondent failed to comply with the Act, Regulations or tenancy agreement;
2. Proof that the applicant suffered a compensable loss as a result of the respondent's action or inaction;
3. Proof of the value of that loss; and (where applicable)
4. Proof that the applicant took reasonable steps to minimize the loss.

First addressing the landlord's claim, the parties agreed that the tenant had a contractual obligation to pay \$1,950.00 in rent in advance on the first day of each month and they further agreed that the tenant did not pay that rent in November. Section 26 of the Act provides that the tenant must pay rent when it is due regardless of whether the landlord is meeting their obligations under the Act or tenancy agreement. The tenant suggested that she had a right to end the tenancy without notice because the landlord had breached a material term of the tenancy agreement. Section 45(3) of the Act provides that when a tenant believes the landlord has breached a material term of the tenancy agreement, they must advise the landlord in writing that such a breach has taken place and give the landlord a reasonable period in which to correct the breach. Should the landlord fail to correct the situation within that period, the tenant may then end the tenancy.

In this case, the only time the tenant specifically told the landlord that she believed him to be in breach of a material term of the tenancy agreement was by way of a letter sent from her counsel on October 27, 2014 in which he listed a number of breaches which

the tenant believed the landlord had committed. The letter proposed a mutual agreement to end tenancy but did not give the landlord an opportunity to correct the breach. Rather, the letter advised the landlord that should he not agree to end the tenancy, the tenant would pursue a monetary claim against him.

I find that the tenant did not have the right to withhold her rent in the month of November and did not have the right to end the tenancy without notice absent the agreement of the landlord. I find that the tenant breached her obligation under the Act and tenancy agreement and that the landlord suffered a loss of one month's income as a result. The landlord was unable to mitigate his losses as the tenant resided in the rental unit for half of the month of November. I find that the landlord is entitled to recover unpaid rent for the month of November and I award him \$1,950.00. As the landlord has been successful in his claim, I find he should recover the \$50.00 filing fee paid to bring his application and I award him \$50.00 for a total award of \$2,000.00.

Turning to the tenant's claim, I find that the tenant has not met the first element of the test outlined above. Although the tenant claimed that the landlord's failure to perform repairs to the unit was in part responsible for the losses claimed, it is clear that even if the landlord had performed repairs, his refusal to allow her to operate the daycare centre was the direct cause of her losses. There is no evidence showing that the landlord failed to meet an obligation under the Residential Tenancy Act and I am unable to find that he failed to meet an obligation under the tenancy agreement. The parties did not submit a copy of a written tenancy agreement and did not refer to such a document during the hearing, which leads me to believe that the agreement was not reduced to writing. Although the tenant claimed that the operation of a daycare centre was a material term of the tenancy agreement, I find that in the absence of a written agreement, the operation of the business cannot be considered a material term as I find it unlikely that if this term were fundamental to the use of the property, the tenant would not have entered into the tenancy without ensuring that the ability to operate the daycare centre was contractually secured. Further, the tenant did not appear to take steps to ensure that she would have long-term use of the property by insisting on a fixed term rather than a month-to-month tenancy and one would expect that if the operation of the daycare centre was so crucial to the tenancy, she would have ensured that it could continue to operate for an extended period of time, particularly given the nature of the business.

In order for a term of a contract to be legally binding, the parties must have a meeting of the minds, which means that they must at the very least agree as to what the term means. In this case, the landlord testified that he understood that the tenant would be engaging in after school care whereas the tenant planned to run a full time business

from the home. The tenant argued that she clearly explained to the landlord that this would be a full time daycare and provided an email sent August 24 in which she attached documents related to the business which should have put the landlord on notice that the business was intended to operate full time. The landlord testified that he was unable to open the attachments to the email and advised the tenant of this fact at the time. The tenant did not dispute this at the hearing.

I find on the balance of probabilities that the parties did not have a meeting of the minds on this term and had entirely different ideas about the extent and nature of the business to be undertaken at the rental unit. I therefore find that the landlord did not breach an obligation under the tenancy agreement and therefore the tenant has not established the first element of the test outlined above.

I dismiss the tenant's claim in its entirety.

The landlord has been awarded \$2,000.00. I order the landlord to retain the \$975.00 security deposit in partial satisfaction of the claim and I grant him a monetary order under section 67 for the balance of \$1,025.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The tenant's claim is dismissed. The landlord is granted a monetary order for \$1,025.00 and will retain the security deposit.

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: September 25, 2015

Residential Tenancy Branch

