



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, MNR, MNDC, MNSD, FF

Introduction

This hearing was scheduled to deal with a landlord's application for an Order of Possession for breach of an agreement; and, a Monetary Order for unpaid rent and damage or loss under the Act, regulations or tenancy agreement. 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.

With respect to service of the hearing documents, the landlord testified that the hearing package was given to the tenant in person at the rental unit on September 3, 2015 and his evidence was posted on the door of the rental unit on September 9 or 10, 2015. The tenant testified that she was not served in person and that all documents were taped on the door approximately 10 days prior to this hearing. Despite the disputed method of service, the tenant confirmed that had the opportunity to review the documents taped to the door and the opportunity to prepare a response. Accordingly, I deemed the tenant sufficiently served with the hearing documents pursuant to section 71 of the Act and I continued to hear from the parties.

During the hearing the landlord requested his application be amended to withdraw his claim for telephone charges as the tenant has since paid the amount owed for her telephone line. The landlord also requested his application be amended to authorize him to retain the security deposit in partial satisfaction of the amounts owed. I permitted the amendments as they are non-prejudicial to the tenant and would reduce any Monetary Order issued to the landlord.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession?
2. Has the landlord established an entitlement to recover the amounts claimed against the tenant?
3. Is the landlord authorized to retain the security deposit?

Background and Evidence

The parties were in agreement as to the terms of tenancy as recorded in the written tenancy agreement. The tenancy commenced June 1, 2015 for a fixed term of three (3) months set to expire August 31, 2015 and that at the end of the fixed term the tenancy would end and the tenant would have to vacate the rental unit. The tenancy agreement provides that the tenant is required to pay rent of \$800.00 on the 1st day of every month. It was also agreed that the tenant paid a security deposit of \$400.00 and the landlord did not require or collect the pet damage deposit from the tenant.

I also heard consistent testimony that the rental unit the upper unit of a house and that the upper unit was rented to two "tenants in common", including the tenant. In other words, two tenants occupied the upper unit under their own separate tenancy agreements with the landlord. The other "tenant in common" continues to reside in the rental unit as his tenancy has continued. The lower level of the house has a basement suite that is also tenanted.

It was undisputed that the tenant has continued to reside in the rental unit despite the fixed term tenancy agreement. The landlord seeks an Order of Possession effective as soon as possible as he had re-rented the unit effective September 1, 2015 and other tenants are waiting to move in. The tenant acknowledged that she was required to move out and that she wants to move out; however, she has had difficulty finding accommodation, in part, because she has two cats.

Below, I have summarized the landlord's monetary claims against the tenant and the tenant's responses.

Unpaid rent for August 2015 -- \$800.00

The landlord submitted that the tenant did not pay rent for August 2015. The tenant acknowledged that she did not pay rent for August 2015. The tenant stated that she had been dissatisfied with the living conditions in the rental unit and the resulting stress and lack of sleep caused her to lose her job. The tenant also pointed out that she was not provided a parking space even though one was to be provided to her which resulted in parking tickets. The tenant stated that she raised her concerns with the landlord although she acknowledged that the landlord did not authorize her to make any deduction from the rent payable. Nor has the tenant sought authorization to make a deduction from rent from an Arbitrator.

Use and Occupancy for September 1 through 24, 2015 – \$640.00

The landlord submitted that the tenant continues to occupy the rental unit and that she should pay for use and occupancy for those days. The landlord claimed compensation on a per diem basis for the day up to September 24, 2015 as that is the date of this hearing; however, he also included a request that any subsequent days of occupancy should also be awarded to him.

The tenant acknowledged that she has not paid the landlord anything for the month of September 2015 although she thought the security deposit would be used toward rent.

Compensation for incoming tenants -- \$2,100.00

The landlord submitted that the basement suite tenant had entered into a tenancy agreement to move upstairs as of September 1, 2015 for a monthly rent of \$850.00. Since the tenant has not yet moved out the basement suite tenant has remained in the basement suite. As compensation for the basement suite tenant having packed up her possessions and being inconvenienced for the month of September 2015 while waiting to move upstairs, the landlord accepted a much reduced rent of only \$600.00 from the basement suite tenant (the basement suite tenant had been paying \$1,200.00 for the basement suite). The landlord stated that assuming she is able to move to the upper unit by October 1, 2015 no further compensation will be offered to this tenant.

The landlord also submitted that that he had secured new tenants for the basement suite for the monthly rent of \$1,250.00 effective September 1, 2015. Since the basement suite tenant has not been able to move upstairs and remained in the basement suite the incoming tenants have had to delay moving in. As such, the landlord has not collected rent from the incoming basement suite tenants. The landlord submitted that the incoming basement suite tenants have been couch-surfing with friends and family and their possessions were boxed up and put in storage. Provided the incoming tenants are able to move in by October 1, 2015 the landlord has agreed to compensate them by waiving rent payable for October 2015.

In support of the above claims, the landlord provided copies of the tenancy agreement for the incoming tenants and emails purportedly written by the incoming tenants where they describe their current living situation and the inconvenience they have incurred by not being able to move in to their respective units.

The tenant did not dispute that the incoming tenants are waiting and have been inconvenienced. Rather, her response was that she has tried to find alternative accommodation and despite her efforts she has been unsuccessful thus far.

The tenant also pointed out that she believes that having two rental units in the property is illegal.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

With respect to the tenant's suggestion that having two suites at the property is illegal, I note the tenant is in the main or original living unit of the house and she did not establish that the unit that she rented was illegally constructed or rented. Regardless, as provided in Residential

Tenancy Policy Guideline 20: *Illegal Contracts* a rental unit that does meet municipal land use or zoning by-laws does not invalidate a residential tenancy agreement. As explained to the tenant, to do so would also strip the tenant of rights intended to benefit tenants living in this Province. Therefore, I did not consider this submission further and I proceed on the basis the Act applies to this tenancy.

Under section 55 of the Act, a landlord may request an Order of Possession where the tenancy agreement provides for a fixed term and that at the end of the fixed term the tenancy would end the tenant would have to vacate the rental unit. The tenancy agreement before me provides such a term and I find the tenancy ended August 31, 2015. Since the expiry date of the fixed term has passed and other tenants are currently waiting to gain possession of the rental unit, I find it appropriate to provide the landlord with an Order of Possession that is effective two days after service upon the tenant.

With respect to the landlord's monetary claims, I find the tenant was obligated to pay rent for August 2015 as stipulated in her tenancy agreement and I award the landlord \$800.00 for unpaid rent, as claimed. I make this finding pursuant to section 26 of the Act which provides that a tenant must pay rent when due, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a right to make deductions from rent payable. The Act provides for very specific and limited circumstances in which a tenant may legally withhold any part of rent payable. Those circumstances are: overpaid rent; overpaid deposit; emergency repairs paid for by the tenant; or authorization from the landlord or an Arbitrator to make deductions. Upon hearing the tenant's excuses for not paying rent for August 2015 I find the tenant did not establish a legal right under the Act to withhold rent as of August 1, 2015 when rent was due. As explained to the tenant during the hearing, while the tenant described circumstances that may warrant compensation from the landlord, before making a deduction from rent she has to either gain the landlord's agreement or file her own Application for Dispute Resolution and obtain an Arbitrator's authorization to make deductions. Since she did not obtain authorization to make deductions from rent from either the landlord or an Arbitrator, I find that rent for August 2015 remains payable in the full amount of \$800.00. The tenant does, however, remain at liberty to file her own Application for Dispute Resolution if she wishes to pursue a claim against the landlord and obtain a Monetary Order.

The remainder of the landlord's claims against the tenant pertain to the losses incurred as a result of the tenant "over-holding" the rental unit. Over-holding is where a tenant continues to occupy a rental unit after the tenancy has ended. Section 57 of the Act provides that a landlord is entitled to claim compensation from the over-holding tenant for any period in which the tenant continues to occupy the rental unit.

Upon review of the tenancy agreement for the incoming tenants and the emails they wrote to demonstrate their frustration and inconvenience, I accept that the tenant's actions have caused the landlord to violate his agreements with the incoming tenants and that he is entitled to recover from the tenant any compensation that he has paid or is payable to the incoming

tenants. I further find the landlord's testimony as to the compensation paid or payable to the incoming tenants to be credible and reasonable in the circumstances.

I find the landlord's losses that resulted from the tenant's over-holding to be calculated as: the rent receivable had the tenant moved out by August 31, 2015, as required; less, the rent received or receivable in the current situation, assuming the tenant moves out and the incoming tenants move in by October 1, 2015. For purposes of this calculation I have ignored the rent payable from the other "tenant in common" who occupying the upper unit as his rent has been unaffected by the tenant's failure to move out of the rental unit when required.

Relevant period	Rent receivable had the tenant moved out August 31, 2015 as required	Rent received/receivable in current situation assuming incoming tenant moves out and incoming tenants move in by October 1, 2015
September 2015 – Upper	\$850.00	No rent received from tenant
September 2015 – Basement	\$1,250.00	\$600.00 reduced rent received as compensation
October 2015 – Upper	\$850.00	\$850.00 receivable
October 2015 – Basement	\$1,250.00	No rent receivable as compensation
Totals	\$4,200.00	\$1,450.00
Difference		\$2,750.00 loss to landlord

In preparing his monetary claim, the landlord had broken the claim for over-holding into two components that when added together amount to a claim of \$2,740.00 (\$640.00 + \$2,100.00) up to today's date; however, since the tenant will likely be in possession of the rental unit for the next few days, I award the landlord \$2,750.00 as calculated above.

In light of the above, I find the landlord has established an entitlement to an award of \$800.00 for unpaid rent and an award of \$2,750.00 for over-holding, which amounts to \$3,550.00. As the landlord was successful in this application I further award the landlord recovery of the \$50.00 he paid for this application, bringing the total sum of his awards to \$3,600.00.

By way of this decision, I authorize the landlord to retain the tenant's \$400.00 security deposit in partial satisfaction of the amounts awarded. Accordingly, I provide the landlord with a Monetary Order for the balance remaining of \$3,200.00 to serve and enforce as necessary.

Conclusion

The landlord has been provided an Order of Possession effective two days after service upon the tenant.

The landlord has been authorized to retain the tenant's security deposit and has been provided a Monetary Order for the balance of \$3,200.00 to serve and enforce.

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 24, 2015

Residential Tenancy Branch

