Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF MNDC MNSD MNR

Introduction

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* for orders as follows:

1. A monetary order for unpaid rent pursuant to section 67.
2. An Order to be allowed to keep all or part of the security deposit pursuant to section 38.
3. To recover the filing fee from the tenants for the cost of this application pursuant to section 72.

This hearing also dealt with an application by the tenants for orders as follows:

1. A monetary order for rent paid and return of security deposit pursuant to section 67.
2. To recover the filing fee from the landlord for the cost of this application pursuant to section 72.

Both parties attended the hearing and had an opportunity to be heard.

Issues to be Decided

Are the parties entitled to the requested orders?

Background and Evidence

This tenancy was supposed to begin on February 15, 2015 pursuant to a written tenancy agreement which was executed on February 8, 2015. I note that two of the tenants signed the tenancy agreement namely, Tiffany Roy and Candice Roy, while all three of the above-named tenants signed the Move-in Condition Inspection Report and

were subsequently signatories and copied on email correspondence. There was no suggestion at the hearing by either party that all three of the named tenants were NOT parties to the tenancy agreement.

The rent was $1600.00 per month due in advance on the last day of the previous month. The tenants paid a security deposit of $800.00 at the start of the tenancy. Rent of $800.00 was paid by the tenants for the period from February 15 to February 28.

The upshot of this whole story is that the tenants never moved into the rental unit after discovering on the move-in date that the downstairs tenants were smoking and that the smoke was permeating their rental unit. The tenants then advised the landlord by email on the evening of February 15th that they had put some things into the unit and then moved them out again and that they would not be moving into the rental unit. The tenants requested that the landlord refund their $800 in rent paid for the February 15 to 28 period and also return their security deposit of $800. The landlord refused. The tenants then filed an application for dispute resolution requesting return of their security deposit but their application was dismissed with leave to reapply because the tenants had not yet provided the landlord with their forwarding address in writing. Subsequently, the landlord filed an application for dispute resolution claiming unpaid rent for March 2015. The tenants then filed their second application for return of their security deposit and the February rent. These cross-claims are the subject matter of this decision.

The relevant details of this case are as follows:

February 5, 2015 – The tenants viewed the apartment. According to the tenant's written evidence *"the place was in rough shape, smelled of cigarette smoke and had evidence of being a smoking unit in the past with things like burn holes in the carpets and bathtub."* The tenants' evidence then goes on to say that they *"asked Gary if it was a smoking unit to which he replied that it was not a smoking unit but the previous tenants must have smoked. He also mentioned that the tenants living downstairs smoke in their unit from time to time and that he would talk with them about not smoking in their unit as it was in breach of their contract. We had discussed getting the carpets steam-cleaned which Gary said he would do for us…"*

February 10, 2015 – After the carpets had been cleaned the tenants did a walk-through with the landlord and stated in their written evidence that they "*found the place to be acceptable*." The parties then finalized the paperwork.

February 12, 2015 – The tenants had two couches delivered to the rental unit. When the tenants arrived at the rental unit they found that it *"reeked of fresh and heavy cigarette smoke"* and that the smell *"was unbearable*". The tenants also apparently had a discussion with one of the downstairs tenants who was smoking outside the open door to the house. The conversation was apparently not amiable.

February 13, 2015 - The tenants had a professional cleaning company come in to clean the unit. The tenants paid for this. The tenants stated in their written evidence that *"they did a great job with the cleaning considering the filthy state the unit was in to start, but the smell of cigarette smoke was still there and fresh cigarette smoke continued to permeate through the vents and into our apartment."*

February 15, 2015 – The tenants state in their written evidence as follows: *"we started to move our stuff into the unit…in the evening with plans of staying there that night and taking full possession on that date. We were quite concerned at this point considering the experiences we had had to this point with the cigarette smoke. We had agreed to rent the unit on the condition that it was a non-smoking unit and that the past smell of cigarette smoke could be eradicated; however, with the tenants downstairs smoking in their unit so continuously, it made us think that perhaps they only stopped smoking inside knowing the landlord was going to be showing the unit and maybe they didn't want to get caught. As soon as things were finalized with us, they started smoking inside on a regular basis…* One of the tenants then sent an e-mail to the landlord at 11:06 a.m. stating, amongst other things not related to the smoke, as follows

> *"….The tenants in the unit downstairs have been smoking, and continue to smoke, inside of their unit and, because both units share a ventilation system, the cigarette smoke is entering our suite…We are concerned as we chose to rent this unit under the notion that it is a non-smoking unit and it is very discouraging to have spent money on professionally cleaning it and to eventually paint it, only to have the smoke continue to permeate throughout the house. I am very sensitive to cigarette smoke and it is also a health hazard for us. I am not sure if you have spoken with the tenants downstairs yet or not, but if ...could do so, that would be greatly appreciated."*

Later in the evening that same day, the tenants decided to remove all of their belongings from the unit.

In the meantime at 8:19 p.m. the landlord emailed back to the tenants saying as follows:

> *"I'll be stopping by in the morning to see them. Once again I am sorry for any inconvenience. I will be giving them a written warning. And I will send you a copy.*

February 16, 2015 – The landlord delivers the following written warning to the downstairs tenants:

> *Attention Heather and Dwain.*
> *Please refrain from smoking in your apartment. It is a non- smoking*
> *Suite, and it is effecting the tenants above you. As the venting is connected between both apartments, your smoke is entering their suite. I have asked you on several occasions including last week. This will be your written warning, should we have to ask you again, we will ask you to move. Thank you.*

A copy of this warning letter was provided to the upstairs tenants. However, at 1:50 p.m. the upstairs tenants sent another email to the landlord, the relevant parts of which state as follows:

> *We went to the suite last night…and we literally had to leave because we felt sick from the cigarette smoke and smell…I feel like the predicament we are in is stressful for both sides and …we won't be able to live there with the situation as it is. We felt like the carpet cleaning and professional cleaning we paid for would make a difference, but because they continued to smoke, it was actually worse than it was when we looked at the place initially. We fear now that the problem may also lie within the vents and walls and would be unable to wait for the situation to be resolved. We would like to discuss termination of the agreement due to these reasons…Please call when you have time to discuss the matter further.*

Then at 4:06 p.m. the landlord sent the following email to the upstairs tenants:

> *Hi Tiffany – I went in and seen Heather and Blondi today, and I walked right into their entire suite. And I did not smell any smoke in their suite. So I'm not sure if it's in the walls. I'm going to stop by tonight and check on them again. I think if we continue with the plan of getting Pam's Dad to paint, I'm sure that will resolve that problem I'm really hoping you will give it a try. Let me know. Thanks, Gary*

February 17, 2015 – The tenants sent the following email to the landlord at 6:53 p.m.

> *Hello again Gary so we are going to be taking steps to terminate the agreement after taking some stuff out and placing it in the home we have now. It is very obvious that there is a distinct smell as we now have the that were in the unit on the porch airing out because of our severe reactions to the smell from the cigarettes. We won't be staying in the unit. We hope that this can be handled diplomatically from both sides as it's just a very unfortunate circumstance. We hope to receive our money back and just call the cleaning a write off, sorry for the inconveniencing time on both parties.*

February 18, 2015 – The tenants sent another email to the landlord essentially repeating the email from the previous date but adding the following:

> *We do appreciate your efforts in sending the letter to the downstairs tenants and we are sorry for the inconveniences, but we will not be able to live in the house for all of the reasons stated…Please feel free to call us or reply by email with the details you need from us to terminate the agreement, but this email and Tiffany's email yesterday can serve as our formal written notice.*

And thus was the course of dealings between the parties over 14 days from February 5th to February 18th.

According to the landlord the rental unit was vacant for March but was rented to new tenants as of April 1st.

Analysis

To my mind, the central question in this case is whether the notice that was given by the tenants to the landlord in the email of February 16th was adequate notice under the Act. Section 45 of the Act deals with tenant's notice:

> **Tenant's Notice**
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> **45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
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> (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice,
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> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
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> (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
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> (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.
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> (4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

Clearly, the tenants are not claiming to have given one month's notice pursuant to Section 45(1) but rather are submitting that they gave notice to the landlord in accordance with Section 45(3) – the provision that is often referred to as 'short notice'.

Section 45(3) essentially allows a tenant to get out of a tenancy agreement with less than one month's notice when the landlord has failed to comply with a material term of the tenancy. In the present case, the tenants argue that the landlord breached a material term by renting them a suite that had been smoked in before and was polluted by the cigarette smoke from the downstairs unit. The addendum to the tenants' tenancy agreement stated that the rental unit was non-smoking and the landlord had assured the tenants that the other unit in the house was also a non-smoking unit. The fact that the rental unit had been smoked in before was known to the tenants from the time of their first viewing but the tenants did not become aware that the downstairs tenants were actively smoking and that it permeated their unit until February 12th.

On February 15th the tenants advised the landlord in writing that they were unhappy about the downstairs tenants smoking and asked the landlord to speak to them. Later that same day, the landlord wrote back to the tenants, apologized, and said that he would stop by the residential property in the morning and give the downstairs tenants a written warning. On February 16th the landlord delivered the warning to the downstairs tenants. However, the upstairs tenants had already decided that the rental unit was not for them. They sent an email to the landlord stating that they were *"unable to wait for the situation to be resolved"* and that they wished to terminate the agreement.

It is at this point that the tenants fell afoul of Section 45(3). Section 45(3) requires that a landlord be given a reasonable period after delivery of the written notice to correct the situation. In the present case, the landlord was not given any time to correct the situation at all. No sooner had the landlord delivered written warning to the downstairs tenants than the applicants herein advised him that they were terminating the lease. To my mind, this did not constitute a "reasonable period". Accordingly, I find that the tenants did not give proper notice pursuant to Section 45(3).

The tenants raised the issue of misrepresentation by the landlord at the hearing. The tenants believe that the landlord misrepresented to them that the unit was a non-smoking unit when, they argue, it clearly was not. However, I am not satisfied that there was any misrepresentation by the landlord at all when I review the evidence set forth under the heading "February 5, 2015" above. It seems to me that all parties knew that the unit had been smoked in before and that the downstairs parties smoked sometimes right from the outset. Furthermore, the landlord never backed away from his commitment to provide the tenants with a non-smoking environment and had

immediately put the downstairs tenants on notice that any further smoking would result in their eviction.

Given the above analysis, I turn to the claims of the parties.

Landlord's Claim

The landlord has claimed unpaid rent for March in the amount of $1600.00. The landlord has also requested an order permitting him to retain the security deposit in partial satisfaction of the claim.

The landlord makes this claim on the ground that the tenants failed to give proper 'short notice' under Section 45(3) and therefore were required under Section 45(1) to give one months' notice of termination and therefore still liable for rent for March. In point of fact, it is my understanding from the landlord's testimony that he did not believe the tenants even had grounds for short notice because he did not accept their argument that he had breached a material term of the tenancy agreement. But that is neither here nor there. I find that the tenants did not give valid notice under Section 45(3) and that they therefore remained liable for the March rent. I also find that the landlord is entitled to retain the security deposit in partial satisfaction of his established claim.

Tenants' Claim

The tenants have claimed return of the rent they paid for February and their security deposit for a total claim of $1600.00.

For the reasons outlined in detail above, I find that the tenants have not established their claim. I make this finding while also feeling some sympathy for their plight in thinking that the rental unit could be cleaned up to meet with their hopes. Further, had the tenants complied with Section 45(3) and given the landlord a reasonable time to correct the situation with the downstairs tenants the result in this case might have been different.

I wish to put on the record that near the end of the hearing I was repeatedly challenged by one of the tenants. Disrespect was shown to the proceedings and to me as the decision maker. In this regard and for the parties' future reference, I draw attention to Section 6.10 of the Rules of Procedure.

> **6.10 Interruptions and inappropriate behaviour at the dispute resolution hearing** Disrupting the hearing will not be permitted. The arbitrator may give directions to any person in attendance at a hearing who is rude or hostile or acts inappropriately. A person who does not comply with the arbitrator's direction may be

excluded from the dispute resolution hearing and the arbitrator may proceed in the absence of that excluded party.

Conclusion

I find that the landlord has established a total monetary claim of $1600.00 for the outstanding rent for March. I find that the landlord is entitled to recover the $50.00 filing fee for this application for a total award of $1650.00. I order that the landlord retain the deposit and interest ($0.00) of $800.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of $850.00. This order may be filed in the Small Claims Court and enforced as an order of that Court.

The tenants' application is dismissed.

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: November 10, 2015

Residential Tenancy Branch