



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CAPREIT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, FF

Introduction

This hearing dealt with an application by the landlord for an order authorizing him to retain the security deposit. Both parties participated in the conference call hearing and had opportunity to be heard.

Issue to be Decided

Should the landlord be authorized to retain the security deposit?

Background and Evidence

Most of the facts are not in dispute. The tenancy began on December 1, 2014 at which time the tenant paid a \$445.00 security deposit. The tenancy was set to run for a fixed term of 1 year ending on November 30, 2015. The rental unit is located immediately above a commercial store in which renovations were underway throughout the month of April and possibly into May. The tenant claimed and the landlord did not dispute that for several weeks, there were loud noises throughout the night and that he experienced an extreme disturbance as a result of that noise which prevented him from sleeping.

The tenancy agreement contains the following provision:

LIQUIDATED DAMAGES: If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the Landlord to end the tenancy before the end of the term as set out in (B) above, or any subsequent fixed term, the tenant will pay to the Landlord the sum of \$350.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the Landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or Residential Property. *[reproduced as written]*

On April 30, the tenant gave the landlord written notice that he would be vacating the rental unit on May 31, 2015 due to the disturbance generated by the renovations. The tenant vacated the unit on May 31 pursuant to his written notice.

The landlord seeks an award for the liquidated damages as well as recovery of the filing fee paid to bring his application. The parties agreed that the landlord was entitled to retain \$45.00 of the security deposit for cleaning of the rental unit and the landlord has retained the balance of \$400.00 while awaiting the outcome of this decision.

The tenant claimed that he texted and emailed the landlord about the noise issue several times during the month of April and that in each email he advised the landlord that if the problem was not resolved, he would have to end his tenancy. The landlord acknowledged having received texts and emails complaining about the noise, but could not recall the tenant threatening to end his tenancy. The landlord took the position that the renovation and cleanup took place over the course of one month, a defined period of time, and that nighttime noise was no longer an issue by mid-May.

Analysis

Pursuant to the terms of his tenancy agreement, the tenant was obligated to pay liquidated damages if he ended his tenancy earlier than the end of the fixed term. The only way in which the tenant can avoid payment of liquidated damages is if he had valid grounds to end the tenancy prior to the end of the fixed term. Section 45(3) provides the only means under the Act whereby a tenant can end a tenancy prior to the end of a fixed term without the landlord's consent. It states that if the landlord has breached a material term of the tenancy agreement, the tenant can give the landlord written notice that such a breach has occurred and give the landlord notice that if the breach is not corrected within a reasonable amount of time, the tenant will end the tenancy.

The tenant claimed that he sent the landlord texts and emails complaining about the noise and threatening to end his tenancy, but did not enter into evidence written copies of those communications. The landlord could not recall having received a warning that the tenant intended to end his tenancy prior to the time he received the tenant's notice. Without a copy of those texts and emails, it is not possible for me to determine whether the tenant informed the landlord that (a) he considered the noise to be a breach of a material term of his tenancy agreement; (b) he gave the landlord a reasonable period in which to correct the breach; and (c) he advised the landlord that if the breach were not corrected he would end his tenancy. In the absence of such evidence, I find that the tenant did not have valid reason to end his tenancy and I therefore find that the tenant is liable for liquidated damages. I award the landlord \$350.00.

As the landlord has been successful in his claim, I find he should also recover the \$50.00 filing fee and I award him that sum for a total award of \$400.00. I order the landlord to retain the \$400.00 balance of the security deposit in full satisfaction of his claim.

Conclusion

The landlord is awarded \$400.00 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: November 06, 2015

Residential Tenancy Branch

