



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, MNDC, MNSD, FF, O

Introduction

This hearing was convened by way of conference call concerning an application made by the landlords for an Order of Possession for breach of an agreement; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlords to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of the application.

One of the landlords and the tenant attended the hearing, and the tenant called one witness. The parties and the witness each gave affirmed testimony and the parties were given the opportunity to question each other and the witness with respect to the evidence and testimony provided. The parties were also provided with an opportunity to give closing submissions, all of which has been reviewed and is considered in this Decision.

No issues with respect to service or delivery of documents or evidence were raised.

Issue(s) to be Decided

- Is the landlord entitled under the *Residential Tenancy Act* to an Order of Possession for breach of an agreement?
- Has the landlord established a monetary claim as against the tenant for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for loss of rental revenue?
- Should the landlords be permitted to keep all or part of the security deposit in full or partial satisfaction of the claim?

Background and Evidence

The landlord testified that this fixed-term tenancy began on January 1, 2015 and expired on December 31, 2015, however the tenant still resides in the rental unit. Rent in the amount of \$725.00 per month is payable on the 1st day of each month. At the outset of the tenancy the landlords collected a security deposit from the tenant in the amount of \$362.00 which is still held in trust by the landlords and no pet damage deposit was collected. The rental unit is a basement suite in a house purchased by the landlords after the tenant was already a tenant in the rental unit. The upper level of the house is also tenanted. A copy of the tenancy agreement has been provided which is signed by the landlords on December 11, 2014 and by the tenant on December 13, 2014. It specifies that at the end of the fixed term the tenancy ends and the tenant must move out of the rental unit. That paragraph is initialed by both parties.

The parties discussed extending the fixed term and the landlord agreed to let the tenant stay for another month. The tenant didn't want to sign another tenancy agreement for that. The landlord also told the tenant back in September or October, 2015 that if rent would be paid on time, the landlord would agree to extend the lease but payments didn't improve.

The parties met in December, 2015 and the tenant attempted to give the landlord rent cheques for January, February and March, 2016 but the landlord didn't accept any of them. Later in his testimony the landlord stated that he took the cheque for January only but hasn't cashed it.

The landlord seeks an Order of Possession and loss of rental revenue in the amount of \$1,450.00 for January and February.

The tenant testified that he was a tenant in the rental unit before the landlord purchased it. The tenant paid a security deposit to the previous landlord in June, 2014 in the amount of \$325.00. The new landlords wanted another tenancy agreement signed and demanded another \$362.00 for a security deposit. The tenant's mother paid it, and the tenant didn't realize that it didn't have to be paid again.

The parties had a verbal agreement and a handshake that the lease would be extended. Two weeks later the tenant received an email from the landlord, a copy of which has been provided, stating that the tenancy would end on December 31, 2015. The email is dated December 21, 2015 and the tenant testified that once receiving it, the tenant called the landlord and the parties met that day. The landlord had agreed to meet the tenant to get the post-dated cheques because of the hand-shake agreement. The tenant had rent cheques to give to the landlord for January, February and March,

2016. However, once the tenant got there, instead of accepting the rent cheques the landlord changed his mind and refused the February and March cheques. The landlord took the January cheque with him but has not yet cashed it.

The landlord's testimony that rent was late for October, November and December, 2015 is not true.

The tenant's witness testified that she is the tenant's mother. The tenant originally had a tenancy agreement with the previous owner. When the property sold, there was some confusion about transferring rental funds and the security deposit. Thinking that the tenancy might be at risk if the tenant didn't follow the directive of the new landlords to pay another security deposit, the witness wrote another cheque for half a month's rent payable to the new landlords.

The witness also testified that the tenant spoke with the landlord. The witness was not present, but the tenant right away told the witness that the parties shook hands and that the landlord had told the tenant that the lease would be extended and rent wouldn't be increased in 2016. The tenant was relieved that he wouldn't have to find another place to live. The tenant is on a fixed income and rentals are difficult to find.

The parties had had a good relationship and the tenant helped the landlord with repairs.

Analysis

There is no question that the tenancy agreement specifies that the tenancy will end on December 31, 2015. The question is whether or not the parties had an agreement to extend the fixed term. Although the landlord is not required under the *Act* to serve a notice to end the tenancy where a fixed term tenancy has expired, I refer to Residential Tenancy Policy Guideline #11 – Amendment and Withdrawal of Notices which deals with ending a tenancy and I find applies in this case. It states, in part:

There are two types of waiver: express waiver and implied waiver. 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 can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

In other words, a landlord may not advise a tenant that the tenancy will continue after the end of the fixed term and accept rent and then change his mind about it when the tenant pays the rent. Whether or not the landlord actually cashed the January cheque is not relevant. The tenant paid the rent in good faith and had rent cheques for the following 2 months to give to the landlord when they met in December; there's no dispute about that. The landlord testified that he told the tenant back in September or October, 2015 that if rent would be paid on time, the landlord would agree to extend the lease but payments didn't improve. The tenant disputed the landlord's testimony stating that rent for those months was not late. The landlord also testified that he had agreed to extend the fixed term for another month but the tenant didn't want to sign another agreement for that short of a period. The tenant testified that the parties had a handshake agreement two weeks before they met on December 21, 2015 and the landlord changed his mind when they met, and the landlord did not dispute that. The landlord had no other explanation for why he met with the tenant, nor is there any supporting evidence from the landlord with respect to late rent.

The landlord took the January cheque and refused the others. Then, on January 6, 2016 the landlord made an application for dispute resolution seeking an Order of Possession and monetary compensation for loss of rental revenue. I find that there has not been any loss of rental revenue; the tenant paid it and the landlord admits to refusing it.

The only evidentiary materials I have received are a copy of the tenancy agreement and a copy of the December 21, 2015 email. I am not entirely satisfied that the landlord has provided all pertinent information with respect to the agreements between the parties, and I find that the landlord agreed to extend the tenancy on at least 2, if not on 3 occasions.

The onus is on the landlord to establish that the landlord is entitled under the *Act* to an Order of Possession, and I am not satisfied that the landlord has met the test.

The landlord is owed rent money for February and has a rent cheque in his possession for January. The landlord's application is dismissed and if rent for February remains unpaid, the landlord will be at liberty to enforce that.

The *Residential Tenancy Act* also permits me to make any order necessary to give effect to the rights, obligations and prohibitions under the *Act*, including an order that a landlord or a tenant comply with the *Act* or the regulations or the tenancy agreement. A landlord may not collect more than 1 security deposit, and the tenant and the tenant's witness both testified that 2 security deposits were paid. I order the landlords to comply with the *Act* by obtaining the original security deposit from the previous owner if not

already shown on the Statement of Adjustments when the property was purchased by the landlords, and to reimburse the tenants any over-payment of a security deposit.

Conclusion

For the reasons set out above, the landlords' application is hereby dismissed.

I hereby order the landlords to comply with the *Residential Tenancy Act* by ensuring that no more than 1 security deposit has been collected for this rental unit by the tenant or the tenant's witness, and that any over-payment is returned to the tenant.

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: February 12, 2016

Residential Tenancy Branch

