Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid and/or loss of rent. The landlord and the female tenant appeared 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.

Preliminary and Procedural Matters

The landlord testified that each of the named tenants was sent the hearing documents, including evidence, by registered mail on December 16, 2015. The female tenant confirmed that the co-tenant, her spouse, was unable to attend the hearing today because he is in the Navy and is currently at sea.

The tenant requested an adjournment until such time her spouse returns. The landlord was not agreeable to adjourning the hearing given the number of months that have already passed while awaiting this hearing. The tenant also requested an adjournment on the basis she was in the process of writing an exam required for her employment; however, the tenant also stated that her instructor has given her an hour of grace time in order to write the exam. Accordingly, I denied the request for adjournment with the view to concluding the hearing within one hour so that the tenant may write her exam. The hearing was ended within the hour.

The tenant had submitted evidence to the Residential Tenancy Branch on June 30, 2016; however, the evidence was sent to the landlord on July 4, 2016 via registered mail. The landlord confirmed receipt of the registered mail the day before this hearing on July 6, 2016. A respondent is required to serve their evidence at least seven days before the scheduled hearing date. The tenants failed to meet this obligation and the tenant was asked to provide reasons for the delay. The tenant explained that the photographs were on an old cellular phone and that she has been busy with school and caring for her children. The landlord sought to have the evidence excluded on the basis

he would be prejudiced by its inclusion given its late receipt; the omission of certain content and unclear photographs. I excluded the tenant's documentary and photographic evidence as I was of the view that the tenants could have submitted evidence by exercising due diligence since it had been over six months since the landlord served the application. The tenant was informed that she would be provided the opportunity to submit her position orally and that I may consider ordering service of evidence as appropriate. I found it unnecessary to adjourn the hearing and order service of evidence. Accordingly, this decision is based upon the parties' oral testimony and documentary evidence provided by the landlord.

Issue(s) to be Decided

Is the landlord entitled to recover the unpaid and/or loss of rent from the tenants for the months of December 2015 and January 2016 in the amounts claimed?

Background and Evidence

The parties executed a written tenancy agreement for a tenancy set to commence January 29, 2015 for a one year fixed term set to expire January 31, 2016. The tenants paid a security deposit of $600.00 and a pet damage deposit of $300.00. The tenants were required to pay rent of $1,200.00 on the first day of every month. The tenants vacated the rental unit December 1, 2015. The tenants did not pay any rent for December 2015 or January 2016. The landlord refunded the deposits to the tenants, in full, on December 13, 2015. By way of this application, the landlord seeks to recover unpaid and/or loss of rent from the tenants for the months of December 2015 and January 2016 in the amount of $2.400.00.

The rental unit is described as a two level side-by-side duplex unit. The lower floor consists of the entry; a recreation room; a bedroom; a den; and, a bathroom and laundry room. The upper floor has two bedrooms; a kitchen; a full bathroom; and, a living room/dining room area. The rental unit was occupied by the tenants, their two children, and two dogs during the tenancy.

It was undisputed that in mid-November 2015 there were two incidents of water ingress into the rental unit. The cause of the water ingress was attributable to periods of very heavy rain that caused the ground to be saturated and a drain that did not accommodate the large volume of water. A pump was provided by the landlord in an attempt to deal with the water ingress; however, the second flood was especially problematic since there was a power outage during the rainstorm.

Water entered the lower level of the rental unit because of the inadequate drain and seepage through the foundation. The landlord contacted his insurance carrier and a restoration company was brought in to deal with the water damage and restoration of the property. The flooring and the bottom portion of drywall had to be removed on the lower level of the rental unit. After the structure was dried and anti-fungal agents applied, the flooring and drywall had to be replaced. At the time, the restoration indicated that the restoration would take approximately two months to complete.

The landlord stated that his insurance policy covered the property damage, with the exception of the deductible; however, the policy he purchased did not include coverage for loss of revenue. The landlord confirmed that he insured the rental unit as a rental property. The landlord did not include a copy of his insurance coverage but stated it was available for review if so required.

The parties were in agreement that on November 24, 2015 the tenant sent and the landlord received a text message to the landlord to inform the landlord of their intention to vacate the rental unit on December 1, 2015. The tenant followed up with an email on November 25, 2015 to give the same information. The tenant also stated there were telephone conversations on or about these dates. The landlord could not recall whether there were telephone conversations. If there were telephone conversations around this time, neither party could recall the nature of the conversations.

The landlord responded to the tenant via email on November 29, 2015 asking the tenant whether they could do the walk though inspection at 5:00 p.m. on November 30, 2015. The parties exchanged a few more emails as to the date and time the tenants would be moved out and completion of the move-out inspection. The text and email messages were provided as evidence by the landlord.

As to the landlord's claims against the tenants, the landlord submitted that the rental unit remained inhabitable during the period of restoration although he acknowledged it would have been inconvenient. The landlord testified that the restoration crew was willing to work around the tenant and their possessions should the rental unit remained tenanted or if the landlord had to re-rent the unit.

The tenant submitted that the rental unit was not inhabitable considering their bedroom was on the lower floor and having to remove their furniture would have left them without a bedroom. Also, the furniture in the recreation room would have had to be moved upstairs leaving little space upstairs. Further, the only heat source on the lower level was a wood stove which would have required the tenant to enter a construction zone regularly to keep the fire going.

Also of consideration to the tenant was that she had two young children and their restoration work was expected to be noisy and dusty. Further, the tenant submitted that it would have been problematic keeping her young children and two dogs out of the construction zone.

The tenant pointed out that her possessions would have had to be moved around to accommodate the restoration efforts and she could not do this herself while her spouse was away and the restoration company was not permitted to move her belongings.

The landlord pointed out that had the tenants activated their tenants' insurance policy that their moving and storage costs could have been covered and temporary housing paid for.

The tenant responded by stating that they did not want to move to a hotel with two young children and two dogs throughout Christmas and the tenants were highly concerned about the possible recurrence of another flood given two floods happened in a matter of days. The tenant explained how she was required to monitor the California drain and watch the pump during periods of heavy rain causing her to miss some of her own personal engagements. The tenant submitted that a long term solution to water drainage issues did not appear to be addressed. Nor, did the landlords offer a rent reduction despite the expected loss of living space.

The landlord responded by stating that he and his wife were discussing a rent reduction between themselves when they received notification that the tenant were about to move out. As such, they considered the tenants' minds to be made up and found it pointless to offer a rent reduction.

The landlord stated that after the tenants moved out he turned the unit over to the restoration crew. The landlord testified that the restoration crew indicated that the restoration would be easier without tenants in place but that if necessary they would work around tenants. The landlord acknowledged that the restoration took longer than expected and was not completed until April 2016. The landlord testified that he started advertising for new tenants in April 2016 and secured new tenants starting May 1, 2016.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove an entitlement to the amount claimed. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove all of the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the applicant to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the applicant took reasonable action to minimize the damage or loss.

The landlord argued that the rental unit remained liveable while the restoration work was underway and that the restoration crew could work around tenants and their possessions if the unit was tenanted; yet, the landlord did not try to re-rent the unit until the restoration work was completed or near completed several months later. At its face, this inconsistency raises the question as to whether the landlord took reasonable action to minimize the loss of rent.

The only indication I heard from the landlord as to the reason the rental unit was not re-rented during the period of restoration is that it would be easier for the restoration crew to finish the work if the unit was not tenanted. While the restoration crew may appreciate the landlord's decision to leave the rental unit vacant while the restoration work was underway, if I were to grant the landlord's claim the landlord's decision to leave the unit vacant would be at the expense of the tenants.

Also of consideration is that when the tenants informed the landlord of their intention to end the tenancy early, the landlord did not put the tenants on notice that he did not accept the early end of tenancy and intended to hold them responsible for paying rent for the remainder of the fixed term. Residential Tenancy Policy Guideline 3: *Claims for Rent and Damages for Loss of Rent* provides policy statements with respect to claims for unpaid and/or loss of rent. Where a tenant puts a landlord on notice of their intention to end a tenancy early, the policy guideline provides, in part:

> If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the*

> *tenant remains in possession of the premises* is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances.
>
> [My emphasis underlined]

Upon review of the text and email exchanges between the parties, after the tenants gave notice of their intention to vacate the landlord's response was to inform the tenants that they should be moving out by November 30, 2015 and he proceeded to set up a move-out inspection time. I see no indication that the landlord put the tenant's on notice that he would hold them responsible for unpaid and/or loss of rent for the remainder of the fixed term. Putting a tenant on notice that the landlord intends to sue the tenant for any loss of rent may result in the tenant deciding to continue the tenancy; thus, minimizing loss of rent.

Considering the landlord did not put the tenants on notice that he intended to hold the tenants responsible for paying rent for the remainder of the rental unit upon receiving their notice; and, the landlord did not attempt to re-rent the unit while it was undergoing restoration work despite his contention that the unit was liveable and could be restored whilst tenants were in occupation, I find the landlord failed to demonstrate that he made reasonable attempts to mitigate the loss of rent as required under section 7 by every claimant. Therefore, I deny the landlord's request for compensation of $2,400.00.

Having heard the tenants remained in possession of the rental unit until December 1, 2015 and did not pay any rent for December 2015; and, considering the landlord put them on notice that they should vacate by November 30, 2015, I find the tenants should be held responsible for paying for their occupation of the unit on December 1, 2015. Therefore, I find the landlord entitled to compensation equivalent to one day of rent or $38.71 [$1,200.00 x 1/31 days].

Given the landlord's very limited success in this application, I award a portion of the filing fee to the landlord by rounding up the landlord's award to $40.00 including recovery of a portion of the filing fee.

Provided to the landlord with this decision is a Monetary Order in the amount of $40.00 to serve and enforce upon the tenants.

Conclusion

The landlord had very limited success in this application and has been provided a Monetary Order in the amount of $40.00 to serve and enforce upon the tenants.

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: July 08, 2016

Residential Tenancy Branch