Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Remax Management Solutions
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by two agents for the landlord and both tenants.

At the outset of the hearing I confirmed the landlord had originally submitted, on August 15, 2016, an Application for Dispute Resolution indicating they were seeking a monetary order for unpaid rent and that they clarified in the details of dispute that they were also seeking the payment of liquidated damages,

I also confirmed, at the same time, that the landlord had submitted an Amendment to an Application for Dispute Resolution on January 19, 2017 providing a change of address for their office and adding a request for compensation for repairing a kitchen cabinet.

I confirmed with the landlord that in support of the Amendment they included a Monetary Order Worksheet increasing their original claim from $3,425.00 to $3,872.11 based on the new claim for damage to the kitchen cabinet.

However, the landlord later stated that they no longer wished to pursue the claim for the kitchen cabinet damage compensation and reduced their claim back to the original amount of $3,425.00. I so amended the landlord's Application and note the landlord remains at liberty to file a future claim for any damage within the limitations set forth under the *Residential Tenancy Act (Act)*.

Also at the outset of the hearing I confirmed with the tenants that despite their submission of a Monetary Order Worksheet outlining claims they have against the landlord that this hearing was solely based on the landlord's Application and that they remained at liberty to file an Application for Dispute Resolution for the items they had noted on their Worksheet, including return of the security deposit, within the limitations of the *Act*.

I also confirmed with the landlord that they had not applied to retain the security deposit in this Application. I therefore advised both parties that matters related to the security deposit were not before me and that I would not be making any decisions or orders in relation to the deposit's disposition.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for liquidated damages and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 45, 67, and 72 of the *Act.*

Background and Evidence

The landlord submitted into evidence a copy of a tenancy agreement signed by the parties on June 30, 2016 for a 1 year fixed term tenancy beginning on July 1, 2016 for a monthly rent of $2,800.00 due on the 1st of each month with a security deposit of $1,400.00 paid. The parties agreed the tenants vacated the rental unit on July 31, 2016.

The agreement contained Clause 5 which reads:

> "If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term or if the tenant provides the landlord with notice, whether written, oral or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term the tenant will pay to the landlord the sum of $625.00 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated."

The landlord submitted that the owner of the property and the male tenant had been in touch with each other before the agents were hired to represent the owner. The landlord acknowledges that the owner had intended to complete some work to the residential property but did not complete it all prior to the start of the tenancy.

The landlord submitted that some of the deficiencies were noted in the Condition Inspection Report and the list that the tenants had provided to the landlord shortly after the start of the tenancy.

The landlord submitted that the female tenant had been difficult to deal with since the day the tenants took possession of the rental unit, specifically during the move in inspection. The landlord submitted that despite repeated attempts to arrange to deal solely with the male tenant the tenants insisted on the female tenant dealing with the landlords.

The tenants submit that the landlord's agent himself was the difficult party in their interactions. They testified the landlord threatened to tear up the tenancy agreement and they wouldn't have to move into the residential property.

The parties agreed the landlord had repaired a hot water tank leak (July 6, 2016) and replaced the washing machine (July 10, 2016).

The male tenant confirmed in his testimony that he had met with the owner of the property prior to the agents' involvement in the property and that during a walk through the property the landlord and he made a verbal agreement for a number of things to be completed prior to the start of the tenancy.

The tenants submit that these items were not completed and that they found a number of additional deficiencies after taking possession. The tenants' position is that the deficiencies identified rendered the landlord in breach of a material term of the tenancy agreement because they had not provided the accommodation in a reasonable state of decoration and repair, suitable for occupation by a tenant and that the landlord had not complied with the health, safety and housing standards required by law.

The tenants did not provide documentary copies of any specific laws or bylaws related to health, safety or housing standards, other than references to the *Residential Tenancy Act* and Residential Tenancy Regulation; nor did they provide any testimony regarding any specific laws or bylaws to which the landlord was not complying.

The tenants provided that the unit was not suitable for occupation because of the following deficiencies:

- A hot water tank leak;
- Exposed wiring in a linen closed and under the stairs storage;
- Exposed wiring and plumbing in a basement bedroom;
- Exposed joists in the basement bedroom instead of ceiling tiles;
- An unusable washing machine;
- Access to hot water in the master bathroom;
- Shelves in a closet in the basement and in both basement closets;
- Access to water from an outdoor faucet;
- Major effort to close 3 upstairs doors;
- Repairs to 2 window screens;
- Closet handles missing;
- Removal of a dead tree in the back yard;
- Defective locks on "2 main doors";
- Replacement of a the front door handle; and
- Cleaning of furnace ducts (as the tenants determined they had not been cleaned for a long time).

Both parties submitted into evidence a letter from the tenants to the landlord dated July 7, 2016. This letter states:

> "This letter serves as written notice of your failure to comply with a Material Term of our Tenancy Agreement and more, like.
>
> - Landlord and tenant did not inspect the conditions of the rental together, as is proven via text or email by you kevin or any party of the RE/MAX Management Solutions Group.
> - The Landlord (RE/MAX Management solutions Group) has not to this date provide or maintain a reasonable state of decoration and repair, suitable for occupation by a tenant. Has not complied as of yet to the health and safety and housing standards required by law, as follows." [reproduced as written]

The letter goes on to state the material breach that occurred was on July 3, 2016 when they made the landlord aware of a leaking pipe from the hot water tank and that under "Section 33(1) a, b, & c (3) a, b, & c of the regulation" required attention with 24 hours. The tenant goes on to

state in the letter that the complaints were ignored by the landlord and after 3 attempts to contact the landlord and/or owner they were flooded and left without hot water.

The tenants further provided the above noted list of deficiencies and stated that due to the landlord's failure to deal with that list "we have been unable to enjoy our home, under Section 28, **Lose of Quiet and Enjoyment** of our home has occurred, since June 30, 2016" [reproduced as written]

The letter then references Section 45(3) of the *Act* which allows the tenant to end a tenancy if the landlord has failed to comply a material term of the tenancy and failed to correct the situation within a reasonable time after being provided with notice to do so.

The letter further states that;

> "This breach of Material Term and lose of quiet and enjoyment occurred as of July 1, 2016 or at very least July3, 2016, when a list and request was made and sent to you landlord Kevin and owner Mike, via email and text due to the urgency of the matter. We feel that a reasonable amount of time to correct the leak was 24 hours from July 3, 2016, which would be July 4, 2016. It was not repaired until July 6, 2016." [reproduced as written]

The letter also advised the landlord that the tenants feel that a reasonable time to correct the other requests is one week from the date of the request on July 3, 2016. The tenants wrote that they would be immediately filing an Application for Dispute Resolution for compensation.

The letter closes with:

> "Therefore, we will be ending our tenancy agreement for a one year lease, due to the need to find another home, in which we will provide proof that we were/are diligently looking for a new home to rent. We need to remain in this home on a month to month basis, require compensation for all necessary repairs to make the home livable by deducting from our monthly rent." [reproduced as written]

The tenants testified that the condition of the rental unit was so terrible that they could not live in it so they went camping for two weeks. The tenants confirmed they left the home on July 10, 2016 and returned later in the month.

The landlord acknowledged receipt of the letter but testified that despite these requests the tenants were difficult to work with to arrange time to complete these repairs. The landlord submitted that the tenants refused to allow the landlord to complete the repairs while they were away during part of the month of July 2016 because they were concerned about their possessions being unsecured with trades and other people entering the rental unit without them there.

The tenants referenced their text messaging communications regarding this specific issue and said that in the end it was the landlord who did not set up anyone to complete the repairs while they were away.

The tenants submitted that their expectation after sending the landlord the letter of July 7, 2016 was that if the requested work had not been completed; they would contact the landlord and arrange to end the tenancy.

However, the tenants submit that the landlord had told them in an email that he would agree to then ending the tenancy by August 1, 2016 and that he already had someone set to move into the property if they moved out. The tenants provided the landlord with an email dated August 1, 2016 stating that they had vacated the residential property as of July 31, 2016.

A review of the emails and text messages submitted by both parties shows a series of emails and messages dated July 7, 2016. The chain of communication begins with an email from the male tenant to the landlord stating that they are going to be looking for a new place.

In response the landlord asks for clarification from the tenant if he is giving notice to be out by the end of July 2016 because if so they have a prospective tenant who is interested in the property. The landlord offers to end the tenancy by the end of July if there are no more texts received from the female tenant and the landlord will not charge the tenants liquidated damages. The male tenant confirmed in his testimony that he had not provided a response agreeing to the offer.

Several more emails that day were sent between the landlord and the female tenant in which the landlord makes at least two references to a verbal agreement he had with the male tenant to end the tenancy by the end of August 2016. Neither party provided a Mutual Agreement to End Tenancy that shows agreement to end the tenancy on any specific date or under what specific terms.

The landlord submitted that because the tenants had never indicated specifically when they were moving out they were only able to secure new tenants for the property when they entered into a tenancy agreement with new tenants on August 17, 2016 for a tenancy to begin on September 1, 2016.

As a result, the landlord seeks compensation for lost revenue for the month of August 2016 in the amount of $2,800.00 and liquidated damages in the amount of $625.00 as per Clause 5 of the tenancy agreement because the tenants ended the tenancy after only 1 month of the 12 month fixed term.

The landlord testified that it is their usual practice that when a tenant ends or causes the tenancy to end prior to the end of the fixed term of their agreement they are charged a penalty. I requested confirmation from the landlord that it was a penalty and he responded by saying “yes, either a penalty or a fine”.

Analysis

Section 28 of the *Act* states a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following: reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord’s right to enter the rental unit in accordance with Section 29; and the use of common areas for reasonable and lawful purposes, free from significant interference.

While the tenant submits that the landlord had breached Section 28 of the *Act* and as a result the have suffered a “lose of quiet and enjoyment, I believe they intended to submit that they had suffered a loss of quiet enjoyment. However, the tenants have not provided any explanation in their evidence or submissions how the landlord had breached their privacy; been unreasonably disturbed or limited them in their exclusive possession of the rental property.

Section 32(1) of the *Act* requires the landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety, and housing standards required by law and having regard to the age, character and location of the rental unit make it suitable for occupation by a tenant.

Section 33(1) of the *Act* defines "emergency repairs" as repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purpose of repairing:

- Major leaks in pipes or the roof,
- Damaged or blocked water or sewer pipes or plumbing fixtures,
- The primary heating system,
- Damaged or defective locks that give access to a rental unit, or
- The electrical systems.

Section 33(3) states a tenant may have emergency repairs made only when all of the following conditions are met:

- Emergency repairs are needed;
- The tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs; and
- Following those attempts, the tenant has given the landlord reasonable time to make the repairs.

Section 33(4) states a landlord may take over completion of an emergency repair at any time. Section 33(5) stipulates that a landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant claims reimbursement for those amounts from the landlord, and gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

Section 33(7) allows that if a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

Section 45(2) stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy on a date is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and is the day before the day in the month that rent is payable under the tenancy agreement.

Section 45(3) states that if the landlord has failed to comply with a material term of the tenancy 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.

Residential Tenancy Policy Guideline #8 defines a material term as a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, an arbitrator will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I agree that a fundamental obligation of a landlord is to provide, under a tenancy agreement a residential property that complies with Section 32 of the *Act*. However, in order to establish that the landlord has breached this requirement the tenant must provide sufficient evidence to establish that the landlord has failed to comply with health, safety, and housing standards required **by law** and having regard to the age, character and location of the rental unit make it suitable for occupation by a tenant.

In regard to the letter sent by the tenants on July 7, 2016 to the landlord I find that the tenants have provided no evidence as to what laws or health, safety, and housing standards required by law that the landlord has breached specific to the list of repairs they have provided. As an example, the tenants submit the linen closet and two bedroom closets do not have shelves but they have provided no evidence that shelves in closets are a requirement under any provincial or local municipal statute.

In regard to the issues such as the provision of a washing machine, while I accept it was included in the tenancy I find not having one working for a period of 10 days is not material to the tenancy or a violation of any housing standard required by law.

Considering the more urgent issues such as the leaking hot water tank, the tenants referred to Section 33 of the regulation, however, I believe they meant Section 33 of the *Act* as noted above that deals with emergency repairs. As Section 33 does outline the requirements to complete emergency repairs, I note that despite the tenant's assertion in the letter of July 7, 2016 there is no requirement that an emergency repair be resolved within 24 hours.

Furthermore, in the event that landlord does not make an emergency repair within a reasonable time after twice being called by the tenant then Section 33 allows the tenant to make the repairs themselves and get reimbursed from the landlord after the fact. As such, the tenants had a remedy immediately available to have the leak repaired and as such this cannot be considered a breach of a material term.

In addition, in fact for any of the requested repairs, the tenants could have applied for an order to have the landlord complete repairs and for an order of a reduced rent while the repairs were being made. Again, the tenants had a remedy available to them that they did not pursue.

From the submission of both parties, including the lists of deficiencies; the Condition Inspection Report and the photographic evidence, I find the tenants have failed to establish that the rental unit was not suitable for occupation. Further, while I accept the male tenant and owner had discussed a number of repairs to be made I note that any agreement on what was to be completed prior to the start of the tenancy or the consequences if they had not been was not put to writing.

As a result, I find the tenants have failed to establish the landlord was in breach of a material term of the tenancy agreement.

In addition, I find the letter of July 7, 2016 (the breach letter) does not comply with the requirements set out in Policy Guideline # 8 as noted above. Specifically, the tenants are suggesting that the letter dated July 7, 2016 can impose a deadline based on previous request dates. The requirement for reasonable time to fix a breach must be provided moving forward from the date of the breach letter.

By example, the request to repair the hot water tank was already completed when the tenants wrote the letter. As such, even if the issue of the hot water tank were a material term it was already fixed and the landlord was no longer in contravention of any part of the tenancy agreement. Therefore, ending a tenancy because the landlord had correct breach would not comply with the requirements of Section 45(3).

Further, the letter does not stipulate that the tenants intended to end the tenancy if the breach was not corrected; rather they stated that they will convert the tenancy to a month to month basis and will stay until they find a new place to live. Section 45(3) does not give authourity to the tenant if a material term is breached to convert the tenancy from a fixed term to a periodic tenancy.

I also accept that, while I find both parties could have communicated in a more reasonable fashion throughout this short tenancy, the tenants were not cooperative in allowing access to the property to begin repairs. I find that other than the issues of the water leak and the front door handle and door locks none of the repairs requested were urgent in nature. As such, I find for the most part the landlord was prepared, within a reasonable time to begin the majority of

repairs requested but could not begin because the tenants original disagreement to not allow trades in while they were away.

For the reasons above, I find the tenants have failed to end the tenancy in accordance with Section 45(3) and as such the earliest the tenants could end the tenancy was the end of the fixed term as per Section 45(2) or by mutual agreement pursuant to Section 44 of the *Act*. Section 44(1)(c) of the *Act* states a tenancy may end if the landlord and tenant agree in writing to end the tenancy.

From the evidence submitted by both parties, I find that while the parties had, on various occasions, been discussing the potential to end the tenancy early, I find in the correspondence between the parties there was never made an actual agreement between the two parties. As such, I find the tenants have not established that they had a mutual agreement compliant with Section 44(1)(c) to end the tenancy by July 31, 2016.

As a result, I find the landlord is entitled to compensation for lost revenue in the amount of $2,800.00 for the month of August 2016.

Residential Tenancy Policy Guideline #4 stipulates that a liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable.

Despite the wording in the tenancy agreement, the landlord's testimony specifically identified that their practice to charge a penalty or fine for breaking a fixed term tenancy. As a result, I find that Clause 5 of the tenancy requirement constitutes a penalty and not a true pre-estimate of the loss for ending the tenancy early. As a result, I dismiss the landlord's claim for liquidated damages.

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **$2,850.00** comprised of $2,800.00 lost revenue and $50.00 of the $100.00 fee paid by the landlord for this application as they were only partially successful in their claim.

This order must be served on the tenants. If the tenants fail to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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 22, 2017

Residential Tenancy Branch