



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding KINGSGATE GARDEN CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing convened as a result of the Tenant's Application for Dispute Resolution wherein the Tenant requested monetary compensation from the Landlord and to recover the filing fee.

The hearing was conducted by teleconference on March 28, 2017. Both parties called into the hearing and were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form, and make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

TEXT

Background and Evidence

S.L. testified that when he arrived at the rental unit on 1:00 p.m. on September 1, 2016 the rental unit was not ready for occupation as it had not been cleaned and the former tenants' items were in the rental unit. The Tenant testified that the carpet wasn't cleaned, and the rental unit was not clean.

The Tenant stated that the lights didn't work, there were baby wipes on the floor, the carpets were not cleaned, and there was a bin full of garbage and abandoned possessions.

The Tenant stated he was waiting outside with his moving truck and realized that he could not move in in the condition the rental unit was.

The Tenant asked the company if they could provide him accommodation while the rental unit was being cleaned and they suggested he move in and they would clean after. The Tenant realized this was problematic as the carpets would not be cleaned properly if his items were already in place. He decided at that point that he did not wish to move into the rental unit. He stated that he called the Residential Tenancy Branch to determine his options and on their advice wrote a letter to the Landlord confirming he did not wish to move into the rental unit.

The Tenant further testified that the Landlord assured him that they would provide him with a professional carpet cleaning receipt. Instead of a carpet cleaning receipt the Tenants received an invoice indication the Landlord was charged \$100.00 for a "Move-in inspection"

S.L. testified that the security deposit was returned and as such the Tenants no longer sought return of their deposit.

The Tenants confirmed that he sought a monetary order in the amount of \$1,450.00 representing he rent for September 2016, in addition to the filing fee.

A.T. testified on behalf of the Landlord.

He confirmed that the Landlord sought to retain the rent payment for September 2016 as they were not able to rent the unit until October 2016.

A.T. testified that this is not an uncommon situation where a tenant moves out, the carpets are cleaned in approximately 15 minutes and 45 minutes to an hour later the carpet would be dried. He stated that he had someone waiting to clean the carpets and finish cleaning the rental unit when the Tenant arrived to move in and the Tenant simply did not allow the Landlord the opportunity to finish cleaning.

A.T. further submitted that according to the *Residential Tenancy Act*, the Tenant must give the Landlord a reasonable amount of time to correct any issues, which the Tenant failed to do. He simply refused to move in.

A.T. stated that the rental unit was reasonably clean as required by section 37(2) of the *Act*, and they simply required time to finish the cleaning. The Landlord further submitted that section 37(1) provides that a tenancy ends at 1:00 p.m. on the date the tenancy ends. He noted that this Tenant arrived right at 1:00 p.m. which did not give the Landlord sufficient time to correct any issues.

The Landlord further directed my attention to section 16 of the *Act*, which provides that the rights and obligations of the Landlord and Tenant under a tenancy agreement take effect from the date the tenancy agreement was entered into whether or not the Tenant ever occupies the rental unit.

A.T. further submitted that section 45(3) provides that a Tenant may end a tenancy in the event the Landlord fails to correct a material term; however, he noted that this section further provides that the Tenant was to give the Landlord a reasonable period of time to correct the situation.

A.T. then noted that the letter the Tenant sent was sent several weeks after the tenancy was to begin not the next day as the Tenant submitted; submitted that pursuant to section 45, the letter must have a date and a signature, both of which are missing in this letter.

A.T. testified that they sent an email to the Tenant to try to have him reconsider continuing with the agreement; however, when the Tenant refused to move in, they made their best efforts to put the property back on the market as soon as possible to minimize any loss.

A.T. also noted that the Landlord had several people interested in the rental unit who applied at the same time as the Tenant but that

A.T. confirmed that they returned the Tenant's security deposit, but believe that due to the monetary losses incurred by the Landlord, the Landlord should be entitled to retain the Tenant's rental payment for September 2016.

Analysis

Based on the testimony of the parties, the evidence before me and on a balance of probabilities, I find as follows.

I find the Tenant's application for return of the rent paid for September 2016 should be dismissed.

The Landlord's agent correctly noted that pursuant to section 16 of the *Residential Tenancy Act*, the rights and obligations of the landlord and the tenant take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

As such, the Tenant was required to end the tenancy in accordance with the *Residential Tenancy Act*. Section 44 of the *Act* provides as follows:

44 (1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 [*tenant's notice*];

(i.1) section 45.1 [*tenant's notice: family violence or long-term care*];

(ii) section 46 [*landlord's notice: non-payment of rent*];

(iii) section 47 [*landlord's notice: cause*];

(iv) section 48 [*landlord's notice: end of employment*];

(v) section 49 [*landlord's notice: landlord's use of property*];

(vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];

(vii) section 50 [*tenant may end tenancy early*];

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(c) the landlord and tenant agree in writing to end the tenancy;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

As it was the Tenant ending the tenancy, the Tenant was required to follow section 45 which provides as follows:

- 45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
- (a) is not earlier than one month after the date the landlord receives the notice, and
 - (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.
- (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
- (a) is not earlier than one month after the date the landlord receives the notice,
 - (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
 - (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.
- (3) If a 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.
- (4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

The letter provided in evidence by the Tenant is not dated or signed and therefore does not comply with the above.

While not specifically argued, the Tenant's submissions suggest he is relying on section 45(3), that the Landlord breached a material term of the tenancy by not having the rental unit ready for occupation.

Residential Tenancy Policy Guideline 8. Unconscionable and Material Terms provides as follows:

Material Terms

A material term is 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, the Residential Tenancy Branch 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.

In the case before me, I find that the Tenant failed to comply with the above in that he did not provide the Landlord with a reasonable opportunity and deadline to correct the problem (the cleaning of the rental unit).

I accept the Landlord's evidence that they made their best efforts to re-rent the rental unit as soon as possible and were not able to do so until October 2016.

For all the above reasons, I find the Landlord is entitled to retain the Tenant's September 2016 rent payment and I therefore dismiss his application for monetary compensation. As he has been unsuccessful, I also dismiss his claim for recovery of the filing fee.

Conclusion

The Tenant failed to give notice to end the tenancy in accordance with the *Act*, and failed to give the Landlord a reasonable opportunity to correct the problem with the condition of the rental unit on the date of move in. The Tenant's Application for return of his September 2016 rent payment and recovery of the filing fee 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: March 31, 2017

Residential Tenancy Branch