



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPN, OPB, MND, MNR, MNSD, FF

Introduction

This hearing was convened by way of conference call in response to the Landlord's Application for Dispute Resolution (the "Application") filed on November 21, 2016 requesting a Monetary Order for: damage to the rental unit; unpaid rent; keeping the Tenants' security deposit; and, recovering the filing fee from the Tenants. The Landlord also applied for an Order of Possession to end the tenancy.

An agent for the company Landlord (the "Landlord") appeared for the hearing and provided affirmed testimony as well as documentary evidence prior to the hearing. There was no appearance for the Tenants during the 20 minute hearing or any submission of evidence prior to the hearing. Therefore, I turned my mind to the service of documents by the Landlord.

The Landlord testified that he served each Tenant with a copy of the Application and the Hearing Package by registered mail on November 23, 2016 to the Tenant's forwarding address that was provided at the end of the tenancy by the Tenants. The Landlord provided the Canada Post tracking numbers into evidence to verify this method of service.

Section 90(a) of the *Residential Tenancy Act* (the "Act") provides that a document is deemed to have been received five days after it is mailed. A party cannot avoid service through a failure or neglect to pick up mail. As a result, based on the undisputed evidence of the Landlord, I find the Tenants were deemed served with the required documents on November 28, 2016 pursuant to the Act. The hearing continued to hear the undisputed evidence of the Landlord as follows.

The Landlord confirmed that he did not need an Order of Possession as the tenancy had ended and this was clerical mistake. Therefore, the Landlord withdrew the request for an Order of Possession.

The Landlord also withdrew his monetary claim for damage to the rental unit as he had not served parties with evidence relating to this. As the Tenants failed to appear for this hearing, I provided the Landlord leave to re-apply for damages to the rental unit.

Issue(s) to be Decided

- Is the Landlord entitled to unpaid/lost rent?
- Is the Landlord entitled to liquidated damages?
- Did the Landlord comply with the Act in dealing with the Tenants' security deposit?

Background and Evidence

The Landlord testified that this tenancy started on September 1, 2016 and was for a fixed term of one year which was set to expire on August 31, 2017. Rent under the signed tenancy agreement was payable by the Tenants in the amount of \$965.00 on the first day of each month. The Tenants paid a \$482.50 security deposit on at the start of the tenancy which the Landlord still retains.

The Landlord testified that on October 31, 2016 he received a letter from the Tenants informing him that they were going to be vacating the rental unit the following day on November 1, 2016. The Landlord testified that the Tenants left on October 31, 2016 and this was when he completed a move out condition inspection of rental unit with the Tenants who refused to sign the condition report. The Landlord testified that it was at this point the Tenants provided their forwarding address in writing to him.

The Landlord confirmed that he had not applied to keep the Tenants' security deposit within the 15 day time period because he was under the impression that this time limit started at the end of the fixed term date of August 31, 2017.

The Landlord testified that the Tenants failed to pay any rent for November 2016 but through a series of advertisements he was able to re-rent the unit for December 1, 2016. As a result, the Landlord now claims \$965.50 from the Tenants for unpaid and lost rent for November 2016.

The Landlord also claims \$200.00 because the Tenants broke the fixed term tenancy and this was the amount documented as liquidated damages the Tenants would be liable for in the signed tenancy agreement. The Landlord referred to clause 21 of the agreement subtitled "LEASE BREAK". This clause states the following:

“Tenants breaking this Lease Agreement remain responsible for the payment of rent and utilities for the duration of the lease. Additionally, the Tenant will be assessed the sum of Two Hundred (\$200.00) as liquidated damages and not as a penalty, to cover the Landlord’s administration costs of re-renting the said premises. A duly signed, written vacate notice from the tenancy is required before efforts to rent the unit can commence. There is a reasonable possibility that the unit not be not be successfully rented before end a lease term and the tenant fully accepts that risk.”

[Reproduced as written]

As a result, the Landlord now seeks to claim from the Tenant a total of \$1,165.00.

Analysis

I first turn my mind to the Landlord’s Application to keep the Tenants’ security deposit. The Landlord testified that he received the Tenants’ forwarding address on October 31, 2016.

Section 44 of the Act lays out the ways in which a tenancy may end. In particular, Section 44(1) (d) of the Act provides that a tenancy ends when a tenant vacates a rental unit. Therefore, as the Tenants vacated the rental unit on October 31, 2016, irrespective of whether they vacated illegally or contrary to the tenancy agreement, I find this was the end date of the tenancy pursuant to their departure.

The Act contains comprehensive provisions on dealing with a tenant’s security deposit. Section 38(1) of the Act states that, within 15 days after the latter of the date the tenancy ends, and the date the landlord receives the tenant’s forwarding address in writing, the landlord **must** repay the security deposit or make an Application to claim against it.

As I have determined the tenancy ended on October 31, 2016 and this was the date the Landlord received the Tenants’ forwarding address, I find the Landlord would have had until November 15, 2016 to make the Application to keep the Tenant’s security deposit or return it to them to the address provided by the Tenants. However, the Landlord did not make the Application until November 21, 2016, this being outside of the 15 day time limit provided for by the Act.

Section 38(6) of the Act states that if the landlord fails to make an application to keep the tenant’s security deposit or return the deposit within 15 days, then the landlord must pay double the amount of the deposit to the tenant. I have no discretion in this respect. Furthermore, Policy Guideline 17 on security deposits states that an arbitrator will order

the return balance of the deposit whether or not the tenant has applied for arbitration for its return. Therefore, the Landlord must pay the Tenants double the security deposit in the amount of \$965.00.

I now turn my mind to the Landlord's monetary claim. Fixed term tenancies are designed to strictly prohibit a tenant or landlord from ending the tenancy without authority under the Act. In this case, I accept the Landlord's evidence that the Tenants broke the fixed term tenancy by vacating the rental unit well before the end date stipulated on the signed tenancy agreement.

Therefore, I find the Landlord is entitled to unpaid rent of \$965.00 because the lack of notice given by the Tenants did not allow for sufficient time to re-rent the unit for November 2016.

In relation to the Landlord's claim for liquidated damages, Policy Guideline 4 defines liquidated damages as:

"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..."

[Reproduced as written]

The Tenants signed the tenancy agreement which contained a liquidated damages clause, as detailed above. Therefore, I find the Tenants are liable to pay to the Landlord liquidated damages in the amount of \$200.00 as required by the tenancy agreement.

As the Landlord has been successful in this matter, pursuant to Section 72(1) of the Act, the Landlord is also entitled to recover from the Tenant the \$100.00 filing fee for having to make this Application. Therefore, the total amount payable by the Tenants to the Landlord is \$1,265.00 (\$965.00 + \$200.00 + \$100.00).

The Act allows me to set off amounts that I find are payable to the parties. The Tenants are entitled to \$965.00 for double the amount of their security deposit, and the Landlord is entitled to \$1,265.00 for lost rent and liquidated damages. Therefore, the resulting difference is \$300.00 payable by the Tenants.

The Landlord is issued with a Monetary Order for this amount. This order must be served on the Tenants along with instructions for the Tenants to make payment. The Landlord may file and enforce the order in the Small Claims Division of the Provincial Court if the Tenants fail to make voluntary payment. Copies of this order are attached to

the Landlord's copy of this Decision. The Tenants may also be held liable for any enforcement costs incurred by the Landlord.

Conclusion

The Tenants have breached the Act by not paying rent and ending the fixed term tenancy early. The Landlord is granted a Monetary Order for \$300.00 after offsetting the amounts payable to the Tenants for double the return of their 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 Act.

Dated: May 24, 2017

Residential Tenancy Branch