



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MND, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("Act") for:

- a monetary order for unpaid rent and for damage, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord and her agent (collectively "landlord") and the two tenants (male and female) attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed that her agent had authority to speak on her behalf at this hearing. This hearing lasted approximately 99 minutes in order to allow both parties to fully present their submissions.

The tenants confirmed receipt of the landlord's application for dispute resolution hearing package and the landlord confirmed receipt of the tenants' written evidence package. In accordance with sections 89 and 90 of the *Act*, I find that the tenants were duly served with the landlord's application and the landlord was duly served with the tenants' written evidence package.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's application to add the female tenant as a respondent, as she is a named tenant in the parties' written tenancy agreement. The landlord filed an amendment to her application on December 20, 2016 and the tenants confirmed receipt of the amendment. The female tenant consented to this amendment request during the hearing.

Issues to be Decided

Is the landlord entitled to a monetary award for unpaid rent and for damage?

Is the landlord entitled to retain the tenants' security deposit?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on September 15, 2016 and was for a fixed term ending on September 30, 2017. The tenants vacated the rental unit on December 14, 2016. Monthly rent of \$1,300.00 was due on the first day of each month. A security deposit of \$650.00 was paid by the tenants and the landlord continues to retain this deposit. A move-in condition inspection report was completed with both parties, but a move-out condition inspection report was only completed with the landlord present, not the tenants. A written forwarding address was provided by the tenants by way of a note on December 15, 2016.

The landlord seeks a monetary order of \$1,300.00 for a loss of rent from December 1, 2016 to January 20, 2017 and to offset the tenants' security deposit of \$650.00 against this amount. The landlord also seeks to recover the \$100.00 filing fee paid for her application.

The landlord seeks a loss of rent because she said that she was unable to re-rent the unit until January 20, 2016. She claimed that the tenants provided notice to her on November 1, 2016 by way of email, which is an improper method of service. She said that she posted an advertisement on one online website on December 15, 2016, after the tenants had left the previous day. She claimed that the tenants were particular about showing the unit so she was limited. She claimed that she performed at least two showings of the unit around Christmas time to people who emailed inquiries to her. She provided copies of both emails.

The tenants dispute the landlord's claim for a loss of rent. They stated that they ended their tenancy before the fixed term was over because there were numerous issues at the rental unit. They said that they moved in on September 26, 2016, despite the fact that their tenancy began on September 15, because the landlord had to paint and fix up the rental unit which was completed on September 25. The tenants provided photographs of the condition of the rental unit when they moved in. They claimed that the water was shut off by the strata company for three days between September 27 and 30, 2016, so they could not use it.

The tenants also disputed the landlord's efforts to re-rent the unit. They claimed that the landlord delayed in posting a rental advertisement on December 15, 2016, when she had notice on November 1, 2016 that the tenants were vacating the rental unit. They said that the rental market was good for the landlord, lots of people were looking to rent at that time, they did not prevent the landlord from showing the unit, and the landlord delayed in answering potential tenant inquiries to see the unit.

Analysis

I find that the landlord and tenants entered into a fixed term tenancy for the period from September 15, 2016 to September 30, 2017.

Subsection 45(2) of the Act sets out how tenants may end a fixed term tenancy:

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.

The above provision states that the tenants cannot give notice to end the tenancy before the end of the fixed term. If they do, they may have to pay for rental losses to the landlord. In this case, the tenants ended the tenancy on December 14, 2016, prior to the end of the fixed term on September 30, 2017. I find that the tenants breached the fixed term tenancy agreement. As such, the landlord may be entitled to compensation for losses she incurred as a result of the tenants' failure to comply with the terms of their tenancy agreement and the Act.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Based on the evidence presented, I find that the landlord failed to mitigate her losses in her efforts to re-rent the unit to prospective tenants. The landlord did not provide a copy of any advertisements for re-rental. The landlord delayed in posting the rental advertisement until 1.5 months after she was given notice by the tenants, which she agreed receiving, regardless as to whether it was by email. The landlord did not know exactly how many inquiries or showings she conducted to re-rent the unit or when the showings occurred. She said that there were "at least two" showings around "Christmas."

The landlord delayed her response to rental inquiries from potential tenants. In one email sent to the landlord on December 19, 2016, the landlord responded one week later on December 26, 2016, stating in part: "sorry I didn't see you e-mail until know" (sic). In another email, the landlord responded the day after a December 25, 2016 inquiry to see the rental unit, stating in part: "If there isn't any snow will Wednesday be Ok?" The landlord did not provide a copy of the new tenancy agreement signed with the new tenants indicating when their tenancy began and what they were paying for rent.

Accordingly, for the reasons stated above, I dismiss the landlord's application for a rental loss of \$1,300.00 from December 1 to January 20, 2017, on the basis that I find that the landlord failed to mitigate her losses. I also dismiss the landlord's application to retain the tenant's security deposit of \$650.00 to offset the loss of rent for the above time period.

The landlord continues to hold the tenants' security deposit of \$650.00. Over the period of this tenancy, no interest is payable. I find that the tenants are entitled to the return of the deposit from the landlord, as per Residential Tenancy Policy Guideline 17, which requires me to deal with the deposit when the landlord has applied to keep it, including the return of it to the tenants without the tenants' application.

As the landlord was unsuccessful in her application, I find that she is not entitled to recover the \$100.00 filing fee from the tenants.

Conclusion

The landlord's entire application is dismissed without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of \$650.00 against the landlord. The landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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: June 29, 2017

Residential Tenancy Branch