



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, FF; MNDC, 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 compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's security deposit, pursuant to section 38;
- authorization to recover the filing fee for her application, pursuant to section 72.

This hearing also dealt with the tenants' cross-application pursuant to the *Act* for:

- a monetary order for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of the security deposit, pursuant to section 38;
- authorization to recover the filing fee for their application, pursuant to section 72.

The 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. This hearing lasted approximately 83 minutes in order to allow both parties to fully present their submissions.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that both parties were duly served with the other party's application.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's application to increase her monetary claim to a total of \$2,940.75. The tenants confirmed receipt of the

landlord's amendment, filed on January 23, 2017, increasing her monetary claim from \$1,200.00 to \$3,050.00 to include retention of the security deposit and other monetary losses. The landlord confirmed that she was only seeking a total of \$2,940.75, not \$3,050.00 as claimed. In accordance with sections 89 and 90 of the *Act*, I find that the tenants were duly served with the landlord's amendment.

Issues to be Decided

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

Is either party entitled to a monetary order for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement arising out of this tenancy?

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

Are the tenants entitled to a monetary award for the return of their security deposit?

Is either party entitled to recover the filing fee for their 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 both parties' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on May 1, 2016 and ended on January 14, 2017. The tenancy was for a fixed term of one year ending on April 30, 2017. Monthly rent in the amount of \$1,200.00 was payable on the first day of each month. A security deposit of \$600.00 was paid by the tenants and the landlord continues to retain this deposit. A written tenancy agreement was signed by both parties and a copy was provided for this hearing. The rental unit is the first and lowest level of a three-level older wood frame building. Move-in and move-out condition inspection reports were completed for this tenancy. The tenants provided a written forwarding address to the landlord in a letter on January 17, 2017.

The landlord stated that she did not have written permission from the tenants to retain any amount from their security deposit. She confirmed that her application to retain the deposit was added on January 23, 2017, by way of an amendment. The landlord's

original application, filed on January 5, 2017, was made when the tenants were still living in the rental unit, so the security deposit was not requested at that time.

The landlord seeks a monetary order of \$2,400.00 for a loss of January and February 2017 rent and to retain the tenants' security deposit of \$600.00 to offset this amount. The landlord seeks damages to the rental unit of \$540.75 and to recover the \$100.00 filing fee paid for her application. The landlord seeks a loss of rent based on the fixed term tenancy agreement, stating that the tenants vacated early and they owe rent from January 1 to February 28, 2017, because she could not re-rent the unit until March 1, 2017. She said that she posted advertisements, conducted showings, and attempted to screen potential tenants but was unable to find anyone during the slow season, until she got referrals from the other tenants already living in the same rental building.

The tenants seek a monetary order for \$4,200.00 plus the \$100.00 filing fee paid for their application. They seek a return of their security deposit of \$600.00. They also seek a loss of quiet enjoyment for noise of \$600.00 for two months between November and December 2016 (\$1,200.00 total), as well as \$400.00 for six months from May to October 2016 (\$2,400.00 total).

The tenants claimed that they had to vacate the rental unit early because they were suffering from a loss of quiet enjoyment from noisy "upstairs neighbours" living directly above them on the second floor, which the landlord failed to address despite numerous verbal and written complaints from the tenants. The tenants stated that the upstairs neighbours were extremely noisy throughout the day and night. They said that a petite woman would frequently pace around throughout the night between 12:00 and 5:00 a.m. and a male would come home at 2:00 a.m. and make noise because he worked at a night club. They stated that on a monthly basis, the upstairs neighbours moved furniture around and their kids ran around during the day.

The tenants provided copies of emails and letters that they sent to the landlord. The male tenant claimed that he began seeing a psychiatrist and taking medication for mental health issues due to the noise and lack of sleep he suffered at the rental unit. He provided heavily redacted medical records from his doctor. The tenants provided a letter from a guest who stayed over at their place who affirmed their version of events as well as a friend who allowed them to stay over at her place due to noise. The tenants said that they wanted to move upstairs to the top third floor to minimize the noise issue but it was \$250.00 more per month in rent so they could not afford it. They claimed that they asked the landlord to be released from the fixed term tenancy

agreement but the landlord disagreed, attempting to reduce their rent instead for some months and talking to the upstairs neighbours.

The landlord denies receiving verbal complaints, saying that she was only aware of noise issues as of November 13, 2016 and made repeated efforts to mediate and talk to the upstairs neighbours as soon as she found out about the issues from the tenants. The landlord claimed that she asked the upstairs neighbours to vacate by January 15, 2017, instead of renewing their tenancy agreement. The tenants agreed that the landlord advised them on November 29, 2016 that the upstairs neighbours would be leaving first by February 15, which changed to January 15, 2017. They said they could not wait for that to happen because it was risking their health. The landlord said that she thought she solved the problem and the tenants would continue their tenancy, but then the tenants then gave notice on December 28, 2016 that they were going to leave by the end of January 2017.

Analysis

As per section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicants to establish the claim. To prove a loss, the applicants 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 other party 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 applicants followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Landlord's Application

Fixed Term Tenancy

Section 45(3) of the *Act* states that if the landlord has breached a material term of the tenancy agreement and failed to correct it within a reasonable period after the tenants give written notice of the failure, the tenants may end a tenancy effective on a date after the date the landlord receives the notice.

I find that the tenants did not provide the landlord with a proper written notice to end the tenancy for breach of a material term, in accordance with the requirements of sections 45(4) and 52 of the *Act*. The tenants did not provide the landlord with a reasonable period of time to correct the issues, as per section 45(3) of the *Act*. Although they provided written emails to the landlord regarding noise complaints and finally their notice to vacate on December 28, 2016 to leave by the end of January 2017, they are required to provide a specific notice for breach of a material term with a reasonable period to correct and then end their tenancy if no correction is made.

Therefore, I find that the tenants were not permitted to end the fixed term tenancy prior to April 30, 2017.

Loss of Rent

Section 26 of the *Act* requires the tenants to pay rent to the landlord on the date indicated in the tenancy agreement, which in this case, is the first day of each month. 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.

Based on the evidence presented, I find that the landlord failed to fully 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, even though she had them in her possession. The landlord did not provide a date for when she began posting advertisements. The landlord said she had about two to three showings of the rental unit and then relied on other people in her small rental building to find prospective tenants. She said that she re-rented to new tenants as of March 1, 2017.

I award the landlord half a month's rent of \$600.00 from January 1 to 14, 2017, because the tenants lived at the rental unit during that time and owe rent while living there.

For the reasons stated above, I dismiss the remainder of the landlord's application for a rental loss for January and February 2017, on the basis that I find that the landlord failed to fully mitigate her losses.

Damages

I find that the landlord failed to provide sufficient evidence that the tenants caused damages beyond reasonable wear and tear after vacating the rental unit. I dismiss the landlord's claim for damages of \$540.75 without leave to reapply.

The tenants disputed all of the landlord's claims, including the loss of various keys to the rental unit, claiming that they returned them all. The landlord did not indicate on the move-out condition inspection report in the specific sections of each room or section of the rental unit, what damages occurred and what action needed to be taken. She indicated damages at the end of the report in the summary section, which the tenants disputed. Yet, in the move-in condition inspection report, the landlord specifically indicated in the specific sections of each room or section of the rental unit, whether the condition was satisfactory and made notes of any repairs to be done. I find that the landlord was well aware of her obligations to properly complete the move-out report, since she knew how to do so at the start of the tenancy.

Therefore, I find that the landlord failed to properly complete the move-out condition inspection report and the tenants did not have proper notice of the specific damages and what sections of the unit were being referenced. During the hearing, the landlord was confused by her own photographs that were not labelled or time-stamped, and claimed for damages that the tenants say they did not cause. The landlord also failed to provide photographs of the condition of the rental unit when the tenants moved in. She only provided limited photographs of the condition of the rental unit when the tenants moved out.

The tenants, however, provided date-stamped coloured photographs of the condition of the rental unit when they moved out on January 14, 2017, showing a clean and satisfactory condition. They also provided multiple witness statements from friends and tradespeople who saw the unit upon move-out and confirmed that it was cleaned and left in good condition.

Tenants' Application

Loss of Quiet Enjoyment

Section 28 of the *Act* deals with the tenants' right to quiet enjoyment:

28 *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*

(a) reasonable privacy;

- (b) freedom from unreasonable disturbance;*
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.*

I dismiss the tenants' claim of \$3,600.00 for a loss of quiet enjoyment at the rental unit.

I note that in low-rise wood frame buildings, such as the rental building where the tenants were residing, sounds are more audible between floors and next door to units. In this case, the disturbing sounds were coming from the upstairs floor where the tenants were living directly below. The tenants must have an expectation of louder noise in a wood frame, rather than a concrete building. Further, the upstairs neighbours were engaging mainly in activities of daily living that were disturbing to the tenants, including walking around and kids playing during the day. The fact that one of the upstairs neighbours worked late and came home late at night and then had to walk around, is based on a different work schedule. Although the tenants were disturbed at night by these sounds, they are common sounds from regular activities of daily living, in which all tenants are entitled to engage.

While the tenants have found their upstairs neighbours' actions upsetting, these unsatisfactory interactions are not necessarily subject to intervention by their landlord. Residing in a multi-unit rental building sometimes leads to disputes between tenants. When concerns are raised by one of the tenants, landlords must balance their responsibility to preserve one tenant's right to quiet enjoyment against the rights of the other tenant who is entitled to the same protections, including the right to quiet enjoyment, under the *Act*. Landlords often try to mediate such disputes if they can, but sometimes more formal action is required.

The landlord described an appropriate process that she initiated to address this matter with the tenant's upstairs neighbours. After being informed by the tenants about the noise issues on November 13, 2016, the landlord notified the upstairs neighbours that she was not renewing their tenancy agreement and they would have to vacate. While the tenants claim they told the landlord verbally earlier than November 2016, they do not have written proof of same and the landlord disputes this fact. The landlord advised the tenants about this resolution on November 29, 2016, and the upstairs neighbours vacated on January 15, 2016.

I find that the landlord made reasonable efforts in a reasonable amount of time to correct the noise issue when she was notified. The tenants claimed that they could not wait any longer for the upstairs neighbours to leave. I find that the tenants vacated the rental unit of their own choice, they were not “forced” by the landlord to leave and no notice of eviction was given to them. I see insufficient evidence to demonstrate that the landlord failed to take appropriate action to follow up on the tenants’ concerns about their upstairs neighbours; in fact, she worked quickly to remove the problem altogether for the benefit of the tenants. Therefore, I find that the tenants did not allow the landlord a reasonable time to correct the noise issue and they gave notice to vacate in December 2016 when they were informed of a resolution in November 2016.

Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenants’ security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenants’ provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenants’ written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

The tenancy ended on January 14, 2017 and the tenants provided the landlord with a written forwarding address on January 17, 2017. The tenants did not give the landlord written permission to retain any amount from their deposit. The landlord did not return the full deposit to the tenants. The landlord filed an application for dispute resolution to claim against the deposit within 15 days of receiving the written forwarding address from the tenants. The amendment to the landlord’s application was filed on January 23, 2017, adding a claim for \$650.00, which is more than the amount of the deposit.

The landlord continues to hold the tenant’s security deposit of \$600.00. Over the period of this tenancy, no interest is payable. As per section 38(6) of the *Act*, the tenants are not entitled to the return of double the value of their deposit, only the regular return minus the portion to be retained by the landlord.

I order the landlord to retain the tenants’ entire security deposit of \$600.00, in full satisfaction of the monetary award for unpaid rent from January 1 to 14, 2017.

As both parties were mainly unsuccessful in their applications, I find that they are not entitled to recover their \$100.00 application filing fees from the other party and they must bear their own costs.

Conclusion

I order the landlord to retain the tenants' entire security deposit of \$600.00, in full satisfaction of the monetary award.

The remainder of both parties' applications are dismissed without leave to reapply.

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 10, 2017

Residential Tenancy Branch