Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNDC, MNR, MNSD, FF

Introduction

This hearing dealt with monetary cross applications. The landlords applied for a Monetary Order for unpaid rent; damage; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. The tenant applied for a Monetary Order for return of the security deposit and compensation for damage or loss under the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

Only one of the two named landlords appeared at the hearing. I heard that the tenant sent his hearing package only to the male landlord, who was in attendance at the hearing. An applicant is required to serve each respondent with their Application for Dispute Resolution and other related hearing documents. Since the tenant only sent one registered mail package which was delivered to the male landlord and the female landlord did not appear at the hearing to confirm she was aware of the claims against her, I informed that parties that should the tenant succeed in his claims; his award would be against the male landlord only.

Issue(s) to be Decided

1. Have the landlords established an entitlement to compensation from the tenant in the amounts claimed?
2. Has the tenant established an entitlement to compensation from the landlords in the amounts claimed?
3. Disposition of the security deposit.

Background and Evidence

The parties executed a written tenancy agreement for a tenancy set to commence on August 30, 2016 for a fixed term set to expire on April 29, 2017. The monthly rent was set at $850.00 payable on the first day of every month. The tenant paid a security deposit in the amount of $450.00.

The tenant moved his possessions from the rental unit at the end of December 2016 or early January 2017. The tenant paid rent for January 2017 and retained possession of the rental unit until early February 2017. The tenant returned the keys by sliding them under the door of the rental property on February 2, 2017 and notified the landlord of that on February 4, 2017 via email. The tenant did not pay rent for February 2017.

The landlord and the tenant inspected the rental unit together on February 24, 2017 and on that date the tenant authorized the landlord to retain he security deposit, in writing, on the move-out inspection report.

Below, I have summarized the parties' respective monetary claims against each other and their respective responses.

Landlords' claims

1. Unpaid and/or loss of rent

The landlords seek to recover unpaid and/or loss of rent for the remainder of the fixed term, or the months of February 2017, March 2017 and April 2017, less monies received from re-renting the unit. The landlord submitted evidence that the landlord received rental income for the rental unit in the amount totalling $737.19 in the month of March 2017 and $1,069.99 in the month of April 2017 but nothing for the month of February 2017.

Initially, the landlord testified that he was unaware the tenancy was ending until he received an email from the tenant dated February 4, 2017. However, the parties both provided evidence that there was preceding communication with respect to ending the tenancy early.

It is undisputed that the tenant emailed the landlord on October 20, 2016 to indicate he wanted to end the tenancy. The landlord responded by informing the tenant of his

obligation to fulfill the fixed term tenancy. On November 21, 2016 the tenant emailed the landlord again to confirm that he intended to end the tenancy and preferred the dates of either December 31, 2016 or January 1, 2017. The landlord proceeded to advertise the rental unit in December 2016 and January 2017.

The landlord submitted that in December 2016 the parties had an oral conversation whereby the tenant informed the landlord that he was moving in with his uncle and both parties would look for replacement tenants but that the tenant remained obligated to fulfill the tenancy agreement. The landlord claims to have suffered a loss of rent for the month of February 2017 as a result of the tenant's actions and breach of the agreement.

The tenant stated that he had moved out of the unit at the end of December 2016; however, he paid rent for January 2017 as he felt obligated to do so after communicating with the landlord and because he had paid rent for January 2017 he continued to hold possession of the rental unit. The tenant did not pay rent on February 1, 2017; rather, the tenant slid the keys to the rental unit under the door on February 2, 2017 and sent an email to the landlord notifying the landlord of this on February 4, 2017.

The tenant or his mother called the City's by-law enforcement department in January 2017 to determine the legality of the rental unit. The City by-law officer inspected the unit and the tenant was informed that the creation of the rental unit as being separate from the adjacent living unit was not legal. The tenant stated that the City was called as he had concerns about the legality of his unit since he did not have full access to the kitchen that was located the adjacent living unit that was separated by an interior door with a lock. The adjacent unit was occupied by the landlords' daughter. The tenant stated that he decided to end the tenancy because he did not feel comfortable renting an illegal suite and did not have 24/7 access to the kitchen in the adjacent living unit; however, the reasons the tenant provided in the October 2016 email indicated the lack of public transportation in the area was the reason for wanting to end the tenancy.

The landlord stated that the tenant was not promised 24/7 access to the kitchen in the adjacent unit and that when the tenancy formed the tenant was told that he was at liberty to make an arrangement with the occupant of the adjacent unit for access to the kitchen in that unit. The landlord stated that the tenant and the occupant of the adjacent unit were friends. The landlord pointed out that the rental unit was equipped with a burner, a microwave and a small fridge.

I noted that term 1 of the tenancy agreement describes the rented premises as being unit “B” or “2” and there is no indication in the written agreement that the tenant is to be provided use or access to any other unit. Further, term 53 states: “This Lease constitutes the entire agreement between the parties.” In light of these terms I informed the parties that discussion regarding access to use of the kitchen in the adjacent unit was parol evidence and that I would rely upon the tenancy agreement to determine whether the tenant was entitled to access or use of the kitchen in the adjacent unit.

The tenant was also of the position that the landlords could have done more to try to find replacement tenants and the tenant offered to advertise at the educational institution but the landlord did not want him to do that. As for the landlord’s advertising efforts, the landlord stated that there was not much interest in December 2016 and January 2017. I noted that the landlord’s actions and testimony appeared inconsistent in that he had stated he was unaware the tenancy was ending until he received the email of February 4, 2017 yet he testified that he was advertising the rental unit in December 2016 and January 2017. In response, the landlord stated that he did not make any commitments to prospective tenants enquiring about the rental unit.

2. Re-rent levy

The landlord seeks a “re-rent levy” of $425.00 from the tenant pursuant to a term in the tenancy agreement that states: “If the Tenant moves out prior to the natural expiration of this Lease, a re-rent levy of $425.00 will be charged to the Tenant.”

The landlord submitted the re-rent levy is intended to compensate the landlords for the landlords‘ efforts to find a replacement tenant in the event the tenant ends the tenancy early.

The tenant pointed out that the term does not indicate what it is for and when signing the tenancy agreement he thought the term meant he would lose his security deposit if he ended the tenancy early.

3. Wall damage

It was undisputed that the tenant damaged a wall during the tenancy and the tenant was agreeable to taking responsibility for that damage. The landlord submitted that the repair cost $200.00 and provided a receipt in support of that amount.

The tenant questioned whether the charge included repairs or painting to other walls and that the charge appeared high. The landlord stated that the amount claimed is what he was billed to repair only the damaged wall.

4. Mailing costs and filing fee

The landlords seek to recover mailing costs from the tenant and the filing fee paid for this application. Mailing documents is one of the ways a party is required to give documents to the other party and the cost to mail documents is not recoverable form the other party under the Act. Accordingly, I dismissed the landlords' request to recover mailing costs summarily.

As for the filing fee, I informed the parties that I am authorized to award recovery of all or part of the filing fee, if any, at my discretion under section 72 of the Act.

Tenant's claims

1. Return of security deposit

The tenant seeks return of the security deposit even though he authorized the lnalrods to keep all of it at the move-out inspection. The tenant pointed out that he authorized the landlord to keep the security deposit for damage and that the actual cost is less than his security deposit. The tenant also pointed out that there was no move-in inspection report done.

2. Re-rent levy

The tenant seeks the re-rent fee. The tenant did not pay the re-rent fee. I considered this request to be a rebuttal to the landlords' request for a re-rent levy.

3. Compensation for being locked out of kitchen of adjacent living unit

The tenant withdrew this claim during the hearing.

4. Compensation for lack of heat

The tenant seeks compensation of $100.00 per month for five months for lack of adequate heat.

The tenant submitted that he was asked by the landlord not to turn on the electric baseboard heat and to use the gas fireplace for heat since gas is paid for by the strata corporation. The tenant stated the fireplace did not generate enough heat and he was often too cold. The tenant acknowledged that he did have access to the thermostats for the electric baseboards and that he did not object to the request of him. Rather, he explained that he did as asked as he feared being locked out of the kitchen in the adjacent unit if he disobeyed the landlord.

The landlord stated that he informed the tenant that they preferred that the tenant use the fireplace first but stated that if the tenant needed more heat he was free to turn on the electric baseboard heat.

5. Mailing costs

The tenant also requested recovery of mailing costs which I dismissed summarily for same reasons provided in response to the landlords' request for mailing costs.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Upon consideration of everything before me, I provide the following findings and reasons with respect to each Application for Dispute Resolution.

Landlords' claims

1. Unpaid and/or loss of rent

Under section 26 of the Act, a tenant is obligated to pay rent when due under their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent.

The tenant raised the issue of the legality of the rental unit and whether the landlord had the legal right to rent the rental unit. I am satisfied by the evidence before me, including the description of the rental unit provided to me by way of testimony and photographs, and the emails from the City by-law officer, that the rental unit is likely not an authorized or legal suite. Residential Tenancy Policy Guideline 20: *Illegal Contracts* provides information and policy statements with respect to illegal suites. It states, in part:

> This guideline deals with situations where a landlord rents premises in a circumstance where the rental is not permitted under a statute. Most commonly this issue is raised where municipal zoning by-laws do not permit secondary suites and rental of the suite is a breach of the zoning by-law. However municipal by-laws are not statutes for the purposes of determining whether or not a contract is legal, therefore a rental in breach of a municipal by-law does not make the contract illegal.
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> Breach of a statute which is only incidental to the rental of premises, where the rental would otherwise be legal, does not make the contract illegal and thus void. For example, while failure to have a written tenancy agreement is a breach of the provisions of the Residential Tenancy Regulation and the Manufactured Home Park Tenancy Regulation, it does not make the tenancy agreement itself illegal and thus unenforceable. The landlord may be liable, on conviction, to pay a fine.
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> Recently the Courts have adopted a more flexible approach to the issue of statutory illegality and enforcement of contracts made in breach of a statute. Before finding a contract made in breach of a statute is void, the following factors will be examined:
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> - The serious consequences of invalidating the contract
> - The social utility of those consequences

- The class of persons for whom the legislation was enacted to determine whether a refusal to enforce the contract would affect other than that group.

To find tenancy agreements invalid where creation or use of a rental unit does not meet municipal zoning requirements would negatively impact all tenants residing in “illegal suites” since it would strip tenants of the rights under the Act. Yet, the tenant seeks to enforce rights and remedies under the Act as evidence by his Application for Dispute Resolution. It would appear the tenant seeks to have benefits of the Act but not be bound the obligations under the Act. Therefore, I decline to find the tenancy agreement illegal or unenforceable just because the rental unit does not comply with building codes, land use or zoning by-laws.

In light of the above, I find the rights and obligations of the tenancy agreement and the Act remains enforceable upon both parties in this case, including the tenant’s obligation to pay rent.

Section 44 of the Act provides for the ways a tenancy ends. A tenancy ends when a tenant vacates or abandons a rental unit. Although the tenant was of the position the tenancy ended at the end of December 2016 when he ceased residing in the rental unit, the tenant remained in possession of the rental unit through January 2017 and did not relinquish possession until he returned the keys and notified the landlord of such in early February 2017. The tenant was in a fixed term tenancy which requires him to fulfill his oblation to pay rent until the end of the fixed term on April 29, 2017. Therefore, I find the tenant was in violation of his tenancy agreement by failing to fulfill the term of his fixed term tenancy agreement.

It is not unusual for fixed term tenancies to end before the expiry of a fixed term and in such cases the landlord may pursue the tenant for loss of rent for the remainder of the fixed term; however, if the landlord must be prepared to demonstrate that reasonable steps were taken to mitigate losses. Where a tenant notifies the landlord that he will be ending the tenancy early it is reasonable to expect that the landlord would commence efforts to re-rent the unit so as to mitigate losses.

Upon review of the emails exchanged between the parties, I see that on October 20, 2016 the tenant informs the landlord he would like to terminate the tenancy, pointing to a lack of public transportation. The tenant asks how soon he could end the tenancy. The landlord responds on October 23, 2016 informing the tenant that the tenant remains legally obligated to pay rent until an acceptable replacement tenant is found. On

November 21, 2016 the tenant confirms that he wants to terminate the tenancy and prefers to do so on December 31 or January 1.

Upon hearing from both parties and consideration of the evidence before me, I find both parties acted in a way that is inconsistent with the positions they have presented.. To illustrate: During the hearing the landlord initially testified that he was unaware the tenancy was ending until he received the email of February 4, 2017; however, the landlord also testified that there was an oral conversation with the tenant that took place in December 2016 and the landlord was aware that the tenant was moving in with his uncle and the landlord had placed advertisements for the rental unit in December 2016 and January 2017. The tenant was of the position the tenancy ended at the end of December 2016 when he removed his possessions from the rental unit and ceased residing in the rental unit; yet, he did not give up possession of the rental unit until early February 2017.

Considering the parties had a fixed term tenancy, the landlord informed the tenant that he would remain obligated to pay rent until the end of the fixed term, and the tenant remained in possession of the rental unit until early February 2017, I find the landlords entitled to recover some unpaid or loss of rent from the tenant. However, I find I am unsatisfied by the landlord's efforts to mitigate losses. The landlords started advertising the rental unit in December 2016 and did not succeed in renting the unit until March 2017 but the landlord did not provide an example or otherwise describe the advertisements placed and the landlord acknowledged that he was not making any commitments to people enquiring about the rental unit in response to the advertisements in December 2016 or January 2017. Therefore, I limit the landlords' award to one-half of the rental loss for February 2017, or $425.00.

2. Re-rent levy

The Act provides for amounts a landlord may charge a tenant. There are no provisions to charge a tenant a "levy". A landlord may seek rent, certain "fees" as permitted under the Residential Tenancy Regulations; and, damages or losses.

The re-rent levy does not meet the definition of "rent" under the Act and the Regulations do not provide for a fee associated to re-renting or breach of a fixed term tenancy, leaving me to consider whether the re-rent levy constitutes damages or losses recoverable by the landlord.

The landlord submitted that the re-rent levy is to compensate the landlords for the landlord's efforts to re-rent the unit. However, the landlord did not provide evidence of the costs of such efforts including the amount of time spent doing so or the cost of advertisements. As such, I find the landlords did not the burden to prove damages or loss in the sum of $425.00.

I did not consider the "re-rent levy" to meet the criteria for an enforceable liquidated damages clause. Residential Tenancy Policy Guideline 4: *Liquidated damages* provides information and policy statements with respect to claims for liquidated damages. It states, in part:

> 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. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

Based on the wording of the term 50 in the tenancy agreement, I find it does not indicate that the sum is a pre-estimate of damages the landlord will incur if the tenant ends the tenancy early. Upon hearing from both parties during the hearing, it is also apparent that the parties had a different understanding as to what the sum represented. As the drafter of the agreement, the landlord has the burden to write terms that clearly convey what was agreed upon and to ensure the terms do meet the requirements of the Act and do not violate the Act. Section 6 of the Act provides that any term in a tenancy agreement that is unclear or is inconsistent with the Act is unenforceable. I find the term the landlord relies upon does not clearly convey that it is pre-estimate of damages for ending the tenancy early and I decline to enforce it. Therefore, I dismiss this portion of the landlords' claim.

3. Wall damage

Under section 37 of the Act a tenant is required to leave the rental unit undamaged. It is undisputed that the tenant caused some damage to the drywall during the tenancy. Upon review of the receipt provided as evidence I find there is no indication any other walls were included in the charge and I am satisfied that the amount claimed is within reason. Therefore, I award the landlords $200.00 for wall damage as requested.

4. Filing fee

As the landlords were partially successful in their claims, I award the landlords recovery of one half of the filing fee, or $50.00.

Security Deposit

The tenant has already authorized the landlords to retain the security deposit and I confirm that the landlords may retain the tenant's security deposit by way of this decision. The security deposit shall be used to offset the awards provided to the landlords above.

Tenant's application

1. Return of security Deposit

I dismiss the tenant's request to recover the security deposit as the landlords have been authorized to retain it as described above.

2. Compensation for lack of heat

Where a party is of the view the other party is violating their rights under the Act, regulations or tenancy agreement, to mitigate one's losses I find it reasonable that the party suffering the loss put the other party on notice of the loss.

In this case, the tenant did not use the electric heat at the request of the landlord; however, the tenant was not bound to oblige, the tenant did not complain that he was too cold, and nothing barred the tenant from accessing the electric baseboard thermostats. Although the tenant submitted that he feared he would lose access to the kitchen in the adjacent unit, I find the tenant did not have a right to that kitchen under the tenancy agreement. Therefore, I find the tenant failed to mitigate his losses if he was suffering a loss and I dismiss this portion of the tenant's claim.

3. Filing fee

As the tenant was unsuccessful in his application I make no award for recovery of the filing fee to the tenant.

Monetary Order

In keeping with all of my findings above, the landlords are provided a Monetary Order to serve and enforce upon the tenant, calculated as follows:

Loss of rent	$425.00
Wall damage	200.00
Filing fee (partial award)	50.00
Less: security deposit held	(450.00)
Monetary Order	$225.00

Conclusion

The landlords are authorized to retain the tenant's security deposit and are provided a Monetary Order for the balance of $225.00 to serve and enforce upon the tenant.

The tenant's application was 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: September 28, 2017

Residential Tenancy Branch