Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid rent; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. 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.

At the outset of the hearing, I explored service of hearing documents and evidence upon each other. The landlord had sent two hearing packages to the tenants via registered mail using the same address. The address is the residence of the male co-tenant only. The female co-tenant was at the hearing and she confirmed that the male tenant provided her with a copy of the landlord's hearing documents and that she had the opportunity to review and prepare a response to the claims against her. Accordingly, I deemed the female tenant to be sufficiently served with the landlord's hearing documents pursuant to section 71 of the Act.

The tenants provided a written response and evidence to the landlord, in person, on December 21, 2017. Service of the tenants' package was two days late; however, the landlord had prepared and provided a written response to the Residential Tenancy Branch. The landlord did not; however, deliver a copy of her response to the tenants. It was apparent that the landlord was prepared to respond to the tenant's response and evidence so I deemed the landlord to be sufficiently served with the tenant's response under section 71 of the Act. However, since the tenants were not in receipt of the landlords' response, I did not admit the landlord's written response as to do so would be procedurally unfair. Rather, I informed the parties that the landlord may provide her response to the tenants' package orally during the hearing so that the tenants are aware of the landlord's rebuttal and have the opportunity to respond to it.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation in the amounts claimed against the tenants?
2. Is the landlord authorized to retain the tenants' security deposit?

Background and Evidence

The parties executed a written tenancy agreement for a tenancy to start on August 26, 2016 for the monthly rent of $1,700.00 payable on the first day of every month. The landlord collected a security deposit of $850.00. The tenants vacated the rental unit by May 31, 2017 and the landlord retrieved the keys and fob for the property from the tenant on June 22, 2017.

The landlord seeks compensation from the tenants for unpaid and/or loss of rent for the month of June 2017, plus one-half of July 2017, and in addition to retention of the security deposit. The landlord was uncertain as to when she re-rented the unit but believed it was re-rented starting August 2017 for the monthly rent of $1,800.00.

The tenancy agreement provided as evidence is the standard agreement that is made available on the Residential Tenancy Branch website. The tenancy agreement indicates the tenancy was to be for a fixed term ending on August 25, 2017 and then continue on a month-to-month basis or for another fixed length of time. The standard terms are included in the tenancy agreement including standard term number 14 entitled "Ending the tenancy". However, the tenancy agreement also provides for six additional terms in an Addendum that was executed by both parties. Term 3 of the Addendum provides as follows:

> "3. Tenant or Landlord should provide at least 1 (one) month notice for termination of rental agreement. Tenant should pay extra one month rent, if short notice is given to Landlord. If the unit is damaged or needs to be renovated before next user can move in, tenant should pay rent for the renovation period."

[Reproduced as written]

With respect to the above term, the landlord stated that it does not change the tenancy agreement and that this term was only intended to apply upon expiration of the fixed term.

In preparing the tenancy agreement, the landlord provided a service address as being "N/A". Nor, is a telephone number or email address provided for the landlord on the tenancy agreement. The tenants testified that the landlord had advised them that they should communicate with her by phone, text messaging or email. The tenants confirmed that they had a phone number for the landlord that they could use for text messaging and they had communicated by email before the tenancy started, on August 1, 2016.

On April 19, 2017 the tenants sent an email to the landlord to give the landlord notice to end the tenancy effective May 31, 2017. The landlord testified that she did not receive the email until it was included in another email sent to her in June 2017. The email address used to send the notice to end tenancy was an email address the tenants had used to email the landlord on August 1, 2016. The landlord confirmed that the email address is one of two email addresses she has.

The tenant also sent text messages to the landlord on April 19, 2017; April 20, 2017; April 28, 2017 and May 2, 2017 to advise the landlord to check her email but there were no responses to the tenant's text messages. The tenant testified that he also tried telephoning the landlord on multiple occasions and left two detailed voice mail messages but the landlord did not telephone the tenant back. The tenant testified that he could produce his telephone records to corroborate his statements, if necessary. The tenant testified that in late April 2017 he also enquired with the building concierge to see if there were other means of contacting the landlord but the concierge was unable to provide any further information to the tenant. Finally, a text message was received from the landlord on May 23, 2017 asking if the tenants wanted to renew the rental contract.

The landlord followed up with another text message on June 7, 2017 asking the tenant for a response to her question of May 23, 2017. As seen in the tenant's text messages, the tenant responded indicating he was sick but that "I did try to reach you several times in April and May by phone, text, and email. The concierge said you live out of country, I did not know this." The landlord responded on June 7, 2017 indicating she had taken a holiday to another country in April and May 2017 and that she had not noticed emails from the tenant.

According to the landlord's text messages, the landlord sent a text message to the tenant on June 12, 2017 asking for his reply, presumably to the question she posed on May 23, 2017. The tenant responded on June 13, 2017 advising the landlord to check her email as he had just sent an email to her and he cited the email address he used. The landlord responded by instructing the tenant to use a different email address and

pointed out that the other email address the tenant referenced was incorrect. As seen in the landlord's evidence, on June 13, 2017 the tenant sent an email to the landlord at both of her email addresses and the tenant specified which email address he used in April 2017. The parties proceeded to have an exchange of electronic communication with respect to ending of the tenancy before they eventually met in person on June 22, 2017 at a restaurant.

On June 22, 2017 the tenant returned the keys and fob for the property to the landlord and signed a document to "forfeit the opportunity to be present at the move-out inspection…" but retaining the "right to present dated photographs to counter any claims against the deposit that are excessive or if I believe are unwarranted." The tenants argued that the female tenant was not asked to participate in a move-out inspection and did not forfeit the right to participate in one.

As for lack of a written service address on the tenancy agreement, the landlord explained that she is uncomfortable giving tenants her permanent address and that she views email or text messaging to be superior and more efficient methods of contact. The landlord stated that should an emergency arise at the property, such as a fire or flood, she expect that she will be notified of it by the building manager. The landlord clarified that she does not take issue with using email as a way of delivering a notice to end tenancy. Rather, she bases her claim for unpaid and/or loss on rent on the fact she did not reach a mutual agreement with the tenants to end the tenancy earlier than the fixed term date of August 25, 2017; the tenant's personal circumstances do not form a basis to end the tenancy early; the landlord did not retrieve the keys/fob until June 22, 2017; and, the time spent repairing the rental unit before it was re-rented.

The tenants were of the position they are not liable to pay the landlord loss of rent as claimed because they gave sufficient notice to end tenancy, using the method of communication the landlord sought; and, the landlord's efforts to mitigate losses were questionable.

As for the condition the rental unit was left, the landlord submitted that there were a number of holes in the walls that were patched but not sanded or painted; items were left in the storage locker by the tenants; the blind was only closing half way; and, the faucet was leaking. The landlord did not know the reason for the leaking faucet or the blind malfunction and indicated her main concern to be the wall damage and items left behind. The landlord stated that she and her family or friends spent three days preparing and painting the walls in the rental unit.

The tenants acknowledged items were left behind at the property and submitted that $250.00 would be fair compensation for the landlord to remove these items. As for wall damage, the tenants submitted that they had installed two floating shelf units and hung a few pieces of artwork. The tenant submits that he patched and sanded the holes but did not paint over the holes. The tenant was of the position that three days to paint over the few patches is excessive.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. 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.

As the applicant in this case, the landlord bears the burden of proof. The burden of proof is based on the balance of probabilities. It is important to note, that where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Section 13 of the Act requires that the tenancy agreement include a service address and telephone number for the landlord. This requirement is not discretionary and applies to all landlords. As explained to the landlord during the hearing, this is a legal requirement and cannot be avoided since there are a number of circumstances where a tenant may need to communicate to the landlord in writing in order for the tenant to meet his/her obligations under the Act. A service address need not be the landlord's address of residence. Rather, it may be any address at which the tenant may deliver documents and the landlord may receive documents.

Parties are at liberty to create terms of tenancy in addition to the standard terms that must be included in every tenancy agreement. The standard terms are those provided in Schedule 1 of the Residential Tenancy Regulation and they are included in the tenancy agreement that was executed by the parties. Standard term 14 provides for the ways to end the tenancy. As seen in standard term 14 a tenant may give a written one month notice to end a periodic tenancy (i.e.: a weekly or monthly tenancy); however, giving a month's notice is not a way to end a fixed term tenancy.

The landlord argued that the parties had a fixed term tenancy and that the tenants were not in a position to end the tenancy by giving a month's notice. However, this case is unique in that the landlord created an additional term in the Addendum that permits the tenants to end the tenancy by giving at least one month of notice to the landlord. I reproduced Term 3 earlier in this decision and it is important to note that the term, as it is written, does not indicate that it only applies upon expiration of the fixed term as argued by the landlord.

Although it may have been the landlord's intention for Term 3 of the Addendum to apply upon the expiration of the fixed term, in interpreting contracts meaning must be given to the words used in the contract and meaning cannot be given to words that are missing or absent. The landlord argued that Term 3 of the Addendum does not change the tenancy agreement. Nevertheless, I find that Term 3 of the Addendum conflicts with the indication that this is a fixed term tenancy and that conflict creates uncertainty. Where there is uncertainty or ambiguity in a contract, the contract will be interpreted in the least favourable way for the drafter of the contract, which is the landlord in this case, under the *Contra Proferentem* rule. Therefore, I find the tenants were within their right, as conveyed to them by the landlord in Term 3 of the Addendum, to end the tenancy by giving the landlord at least one month's notice to end tenancy.

The tenants submitted evidence that they sent the landlord a notice to end tenancy by way of an email dated April 19, 2017. While email is not a recognized method of serving a document under section 88 of the Act, the landlord deliberately left her service address blank on the tenancy agreement and indicated that she preferred electronic means of communication. Therefore, I find that giving the landlord an electronic communication to end the tenancy was sufficient in this case.

The tenants submitted evidence to demonstrate that an email was sent to the landlord on April 19, 2017 using an email address that the tenants had used on a previous occasion and the landlord confirmed it to be her email address during the hearing. The landlord stated she did not receive the email; however, the tenant also provided text

messages to demonstrate he attempted to communicate with the landlord multiple times in April 2017 and May 2017 to alert the landlord to check her email account and there were no responses to those text messages. The tenant also stated he tried phoning the landlord multiple times to no avail. Also of consideration is that the tenant notified the landlord of his multiple forms of attempted communication in the text message he sent to the landlord on June 7, 2017 and the landlord did not deny receiving the text messages or provide any explanation for not receiving the tenant's various messages except to say she had been travelling in a different country. Considering all of these factors, I find I am satisfied, on a balance of probabilities, that the tenant sent a notice to end tenancy to the landlord on April 19, 2017. Therefore, I find the tenants gave the landlord at least one full month of advance notice to end the tenancy, in accordance with Term 3 of the Addendum, and the landlord's losses are largely attributable to the landlord not providing a service address and failure or inability to retrieve her electronic messages while travelling.

As for damage to the rental unit and the security deposit, I find the tenants have extinguished their right to make a claim for return of the security deposit under section 36 of the Act. It was undisputed that the landlord gave the male tenant the opportunity to participate in a move-out inspection with the landlord and was willing to accommodate a different date and time if needed. The tenant acknowledged that he decided he did not want to participate in the inspection with the landlord and this was documented in writing on June 22, 2017. Section 36 of the Act provides if a landlord has given the tenant two opportunities, as set out in the Residential Tenancy Regulations, to participate in the move-out inspection and the tenant does not participate, the tenant extinguishes the right to make a claim for return of the security deposit. This section is intended to motivate tenants to participate in the move-out inspection with the landlord. As for the obligation to give the tenant two opportunities, the second opportunity only applies if the tenant requests a different date and time of the landlord. Once the tenant signed the document acknowledging forfeiture, I find the landlord was not obligated to give him another invitation.

Although the tenant indicated that he reserved the right to dispute any claims for damage or against his security deposit in the document he signed on June 22, 2017, there is no exemption from the tenant's obligation to participate in the move-out inspection or the extinguishment provision. In other words, the tenant cannot decide to avoid his obligation to participate in the move-out inspection but retain all of the benefits that are ascribed to tenants who do participate.

As for the argument that the female tenant was not invited to participate in the move-out inspection, I find that argument without merit. This was a co-tenancy agreement, meaning the tenants are jointly and severally liable to fulfill their obligations under the Act and tenancy agreement. It is not necessary for the landlord to track down each co-tenant and invite them to participate in an inspection. Rather, the landlord need only offer the opportunity to one co-tenant to fulfill the landlord's obligation, which the landlord did in this case.

In light of all of the above, I find the tenant extinguished their right to return of the security deposit and I find this to be more than sufficient to satisfy any losses related to damage to the walls and removal of abandoned property. Accordingly, the landlord is authorized to retain the tenants' security deposit in satisfaction of any and all losses associated to this tenancy and the balance of the landlord's claim against the tenants is dismissed.

Conclusion

The landlord is entitled to retain the tenants' security deposit. The balance of the landlord's claim against the tenants 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: January 02, 2018

Residential Tenancy Branch