



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

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

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

The two landlords, "male landlord" and "female landlord" (collectively "landlords") and the tenant 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 62 minutes in order to allow both parties to fully present their submissions. I note that the landlords spoke for most of the hearing time.

The tenant confirmed receipt of the landlords' application for dispute resolution and notice of hearing. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was duly served with the landlords' application and notice of hearing.

The tenant testified that she did not receive the landlords' written evidence package. The female landlord confirmed that she mailed a copy to the tenant and dropped off a copy to a Residential Tenancy Branch ("RTB") office. The landlords were unable to provide a service date or tracking number for the mailing to the tenant. I notified the landlords that I had only received a six-page written tenancy agreement for a new tenant. I advised both parties that I could not consider the landlords' written evidence at the hearing or in my decision because it was not served to the tenant as required by Rule 3.1 of the RTB *Rules of Procedure*, since the landlords did not provide the date or tracking number for service.

After the hearing concluded, the landlords sent a copy of the tenant's six-page tenancy agreement to the RTB on April 12, 2018. I did not ask them to provide any documents to me after the hearing and I specifically told them that they were not permitted to serve any further documents to me after the hearing. At the hearing, the tenant confirmed that the landlords never provided her with a copy of her original tenancy agreement during the tenancy. Accordingly, since the tenant did not have this document, had no notice the landlords were submitting it to me after the hearing, and I specifically notified the landlords not to submit any further evidence to me after the hearing, I did not consider this document at the hearing or in my decision.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlords' application to add a monetary claim for damages to the rental unit and increase their monetary claim from \$500.00 to \$607.50. The landlords did not file an amendment to increase their monetary claim, as required. However, the tenant responded to the landlords' claims for painting and carpet cleaning damages and was prepared to deal with the claims at the hearing. Therefore, I amended the landlords' claim and considered the higher amount at the hearing.

Issues to be Decided

Are the landlords entitled to a monetary order for unpaid rent and for damages to the rental unit?

Are the landlords entitled to retain the tenant's security deposit?

Are the landlords entitled to recover the filing fee for this application from the tenant?

Background and Evidence

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

Both parties agreed to the following facts. This tenancy began on August 28, 2016 for a fixed term of one year ending on August 31, 2017. The tenant vacated the rental unit on October 15, 2016, pursuant to notice given to the landlords on September 19, 2016. Monthly rent of \$875.00 was payable on the first day of each month. A security deposit of \$500.00 was paid by the tenant and the landlords continue to retain this deposit in full. Both parties signed a written tenancy agreement.

Both parties agreed that no move-in or move-out condition inspection reports were completed for this tenancy. The landlords said that they did not have written permission to keep any amount from the tenants' security deposit. The tenant confirmed that she provided a written forwarding address to the landlords in a letter, dated September 13, 2017, that was sent by registered mail and signed for by the landlords on September 16, 2017. The landlords confirmed receipt of the letter, dated September 13, 2017, but could not recall the date of receipt. The landlords filed this application to retain the tenant's security deposit on September 19, 2017.

The landlords seek a monetary order of \$437.50 for a loss of rent, \$70.00 in carpet cleaning, \$100.00 for painting walls, and \$100.00 for the application filing fee.

The landlords seek a loss of rent of \$437.50 from October 16 to 31, 2016, because they said that the tenant vacated on October 15 and only paid rent from October 1 to 15, 2016 in the amount of \$437.50. They explained that they were unable to re-rent the unit for the above time period, despite reasonable efforts to advertise and show the place. They stated that they had multiple showings and were able to re-rent to a new tenant starting on November 1, 2016, for a higher amount of \$925.00 compared to the \$875.00 that the tenant was paying. They claimed that the rental market was positive so they knew they could get an increased rent. The male landlord said that he advertised the unit to be available for October 15, 2016 but the tenant prevented showings and required 24 hours' notice before showings so he was unable to get a tenant sooner. The male landlord claimed that potential tenants scheduled to attend showings and then would not show up.

The tenant disputes the landlords' claim for a loss of rent of \$437.50. She said that she moved out earlier than the end of the fixed term because there was a bad cigarette smoke smell in her rental unit that made her sick to the point where she went to the hospital. She stated that the landlords advertised the rental unit as non-smoking and when she viewed it, she could only smell air fresheners so she did not smell the smoke at that time. She claimed that she informed the landlords about the smoke smell, they verified her illness with her work, and the male landlord told her she could move out. She testified that she did not prevent access to the landlords to show the unit, she accommodated their showings as much as possible, and she even left the unit so the landlords could show the unit freely, as long as they provided her with proper notice. She said that the landlords often notified her of viewings just two to three hours beforehand.

The landlords seek \$70.00 for carpet cleaning and \$100.00 for painting the walls after the tenant vacated the rental unit. The male landlord claimed that he always does carpet cleaning at the beginning and end of each tenancy and he uses a person to do the work. He stated that the tenant caused scratches and damage to the walls so he and his son used leftover paint and spent about four hours total at a rate of \$25.00 per hour to repaint the walls. He said that he is a contractor and does not have any written documentation to support the above amount for painting. He claimed that he does not have any receipts for the carpet cleaning or the painting.

The tenant disputes the landlords' claims for damages. She said that she cleaned the rental unit before vacating. She claimed that the female landlord completed a visual inspection of the unit and told the tenant there were no damages. She stated that she left the rental unit in a better condition than it was when she moved in. She testified that the landlord did not complete any move-in or move-out condition inspection reports for this tenancy.

Analysis

I find that the landlords and tenant entered into a fixed term tenancy for the period from September 1, 2016 to August 31, 2017.

Subsection 45(2) of the Act sets out how a tenant 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 tenant cannot give notice to end the tenancy before the end of the fixed term. If she does, she may have to pay for rental losses to the landlords. In this case, the tenant ended her tenancy on October 15, 2016, prior to the end of the fixed term on August 31, 2017. I find that the tenant breached the fixed term tenancy agreement.

I find that the tenant did not provide the landlords with a 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 tenant did not provide the landlords with a “reasonable period” of time as per section 45(3) of the *Act* to rectify any potential issues with the smoke. She moved in on August 28, 2016 and provided notice less than a month later on September 19, 2016, to move out.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlords for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on landlords claiming compensation for loss resulting from tenant’s 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 applicants to establish the claim. To prove a loss, the landlords 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 tenant in violation of the *Act*, *Residential Tenancy 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 landlords 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 landlords failed to mitigate their losses in their efforts to re-rent the unit to prospective tenants. Accordingly, I dismiss the landlords’ application for a rental loss of \$437.50 for October 16 to 31, 2016 on the basis that I find that the landlords could have re-rented the unit for October 16, 2016.

The landlords failed to provide copies of any rental advertisements that they said they posted in order to prove how, when and on what terms they attempted to re-rent the unit. Further, the landlords sought a higher rent of \$925.00 because they knew they could receive it in the booming rental market. This may have detracted potential tenants from making inquiries or renting the unit.

The tenant provided 26 days' notice, from September 19 to October 15, that she was vacating the rental unit on October 15, 2016. I accept the tenant's testimony that she provided access to the rental unit so that the landlords could show it to prospective tenants, as often as possible. The male landlord even agreed that some prospective tenants did not view the unit when they had already agreed to the scheduled showing times. He also stated that because he had to give the tenant at least 24 hours' notice, he was not able to show it to as many people; however, the notice is required under section 29 of the *Act* and is not the fault of the tenant.

The landlords claimed that they had a lot of showings and interest but did not indicate how many showings were done or how many inquiries were answered from potential tenants. Yet, the landlords were unable to re-rent the unit to new tenants as of October 16, 2016.

Furthermore, the landlords admitted during the hearing that they re-rented the unit to a new occupant as of November 1, 2016 and charged him \$925.00 per month, a higher amount than the \$875.00 amount that the tenant was paying during her tenancy. The landlords were able to profit from this higher rent amount.

I dismiss the landlords' claims without leave to reapply for \$70.00 for the carpet cleaning and \$100.00 for the painting of walls. The landlords failed part 3 of the above test by not providing move-in or move-out condition inspection reports, invoices, receipts or estimates to substantiate their claims.

As the landlords were unsuccessful in this application, I find that they are not entitled to recover the \$100.00 filing fee paid for this application.

The landlords continue to hold the tenant's security deposit of \$500.00. I note that this amount is contrary to section 19(1) of the *Act*, which prohibits landlords from collecting more than half a month's rent (in this case \$437.50) as a security deposit.

Over the period of this tenancy, no interest is payable on the tenant's security deposit. I order the landlords to return the tenant's entire security deposit in the amount of \$500.00 to the tenant within 15 days of receiving this decision. I find that the tenant is entitled to the return of her deposit from the landlords, as per Residential Tenancy Policy Guideline 17, which requires me to deal with the deposit when the landlords have applied to keep it, including the return of it to the tenant without the tenant's application.

I find that the tenant is not entitled to the return of double her security deposit as per section 38(6) of the *Act* and Residential Tenancy Policy Guideline 17. Although the landlords' right to claim against the deposit for damages was extinguished for failure to complete move-in and move-out condition inspection reports for this tenancy, as required by sections 24 and 36 of the *Act*, the landlords applied for a loss of rent which is not damages. I find that the landlords filed their application within 15 days of the tenant's forwarding address being provided.

Conclusion

The landlords' entire application is dismissed without leave to reapply.

I order the landlords to return the tenant's entire security deposit in the amount of \$500.00 to the tenant within 15 days of receiving this decision.

I issue a monetary order in the tenant's favour in the amount of \$500.00 against the landlord(s). The landlord(s) must be served with this Order as soon as possible. Should the landlord(s) 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: April 13, 2018

Residential Tenancy Branch