



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, FF

Introduction

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

- A monetary order for unpaid rent and loss pursuant to section 67;
- Authorization to retain the security deposit for this tenancy in partial satisfaction of the monetary award pursuant to section 38; and
- Authorization to recover the filing fee from the tenants pursuant to section 72.

Both parties 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 co-landlord TH (the "landlord") primarily spoke on behalf of both landlords. The co-tenant ZB (the "tenant") primarily spoke on behalf of both co-tenants.

As both parties were present service of documents was confirmed. The tenants testified that they received the landlords' application for dispute resolution and evidence. The landlord testified that they had received the tenants' evidentiary materials. Based on the testimonies I find that the parties were each served with the respective materials in accordance with sections 88 and 89 of the *Act*.

At the outset of the hearing, the landlord made an application requesting to amend the monetary amount of the claim sought. The landlord indicated that there was an arithmetic error in the original amount and the actual amount being sought is \$5,102.69. Pursuant to section 64(3)(c) of the *Act* and Rule 4.2 of the Rules of Procedure, as correcting a calculation error is reasonably foreseeable and does not unfairly prejudice a party, I allow the landlord to amend the application to decrease the monetary claim from \$6,030.91 to \$5,102.69.

Issue(s) to be Decided

Are the landlords entitled to a monetary award as sought?

Are the landlords entitled to retain the security deposit for this tenancy?

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

Background and Evidence

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

The parties agreed on the following facts. This fixed term tenancy began in January, 2017 and was scheduled to end in January, 2018. The monthly rent was \$1,100.00 payable on the first of the month. A security deposit of \$550.00 was paid at the start of the tenancy and still held by the landlords.

The parties began discussing an early end of the fixed term tenancy and the landlords suggested several dates in September or October, 2017. The parties did not come to an agreement. The landlords drafted a Mutual Agreement to End Tenancy signed and dated by the landlords on July 27, 2017 providing a move-out date of October 31, 2017. The landlords provided the Mutual Agreement to the tenants for their approval and signature. The tenants returned the Mutual Agreement on August 15, 2017 having changed the move-out date to August 31, 2017 and signing the form. The landlord testified that they did not consent to the August 31, 2017 move-out date. The tenants submit that the landlords wanted the tenancy to end and therefore they believed ending the tenancy earlier was in accordance with the earlier discussions.

The parties prepared a condition inspection report at the end of the tenancy on August 30, 2017. The landlords recorded some of the issues they found with the condition of the rental suite. The tenants disagreed with the landlords' assessment and while they signed the inspection report did not provide written authorization that the landlords may deduct any amount from the security deposit.

The landlords submitted some photographs of the rental unit and gave evidence that the tenants left the suite in a state of disrepair and uncleanliness. The landlord testified that they have obtained estimates for the cost of cleaning, repairs and replacement of some items in the rental unit.

The landlord testified that they listed the rental unit as available upon receiving the tenants' notice in August, 2017 but were unable to find a new occupant. The landlord said that they were contacted by the municipality in September, 2017 and informed that they would need to either license the rental suite in accordance with local bylaws or decommission the suite. The landlords chose to decommission the suite and stopped looking for new tenants.

The parties gave evidence that in August, 2017 the tenants withheld \$30.00 of the monthly rent as they purchased bug spray to deal with a pest infestation in the rental unit. The tenants also testified that the rental unit had multiple issues including mold, which they believed to be a health risk, and garbage accumulating. The tenants gave evidence that the condition of the rental suite is one of the factors which contributed to their decision to end the tenancy.

The landlords seek a monetary award in the amount of \$51,02.69 comprised of the unpaid rent for August, 2017, the loss of rental income for the duration of the fixed term tenancy from September to December, 2017 and the cost of repairs and cleaning.

Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit.

In the present circumstance the parties gave evidence that, while the tenants may have vacated the suite earlier, the tenancy ended on August 31, 2017 and the landlords filed their application for dispute resolution on September 14, 2017. Thus, I find that the landlords filed their application within the 15 days provided under the *Act*.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention on the part of the other party. Once that has been established, the claimant must then provide evidence

that can verify the actual monetary amount of the loss or damage. The claimant also has a duty to take reasonable steps to mitigate their loss.

Section 7 of the *Act* explains, “If a tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results... A landlord who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.”

This issue is expanded upon in *Residential Tenancy Policy Guideline #5* which explains that, “Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect.”

The tenants submit that the tenancy ended on August 31, 2017 by way of the Mutual Agreement to End Tenancy dated July 27, 2017. The landlords submit that there was no agreement between the parties. The landlords submit that they provided a signed Mutual Agreement with a move-out date of October 31, 2017 for the tenants' agreement and signature. The landlord said that the Mutual Agreement was returned to them on August 15, 2017 with the tenants having changed the move-out date to August 31, 2017. The landlord said that they had not agreed to that date to end the tenancy.

I find that there was no agreement between the parties that the tenancy would end on August 31, 2017. I accept the evidence of the parties that the landlords provided the tenants with a signed Mutual Agreement form with a move-out date of October 31, 2017. I find that the landlords in issuing the Mutual Agreement form were making an offer to the tenants to end the tenancy on that date. I accept the evidence of the parties that the tenants returned the Mutual Agreement form having changed the move-out date to August 31, 2017. I find that in so doing the parties did not enter into an agreement that the tenancy would end on August 31, 2017. Instead, the tenants were rejecting the initial offer by the landlords and making a counter offer that the tenancy would end on a separate date. I find that the landlords were not, by issuing a signed Mutual Agreement form, making a blanket offer that they would accept that the tenancy could end at any time. It was open to the landlords to accept or reject the move-out date proposed by the tenants of August 31, 2017. I accept the landlord's testimony that they did not agree that the tenancy would end on August 31, 2017 and that the Mutual Agreement form was revised by the tenants to provide this date without the agreement of the landlords.

As such I find that there was no agreement to end the tenancy between the parties and the terms of the original tenancy agreement were in place in August, 2017.

The tenants also submit that the landlord breached the *Act*, regulations and tenancy agreement by failing to take appropriate steps to address their concerns. The tenants testified that there was mold in the rental unit, health concerns and general issues with the condition of the suite. The tenants submit that the landlord's failure to comply gave rise to the tenants' right to end the fixed term tenancy on a date earlier than specified under the tenancy agreement pursuant to section 45 of the *Act*.

I find that there is insufficient evidence in support of the tenants' position. I do not find the documentary evidence submitted by the tenants, including photographs of the suite, to be particularly persuasive. The tenants provided some testimony about the deficiencies they found with the rental unit but I find the complaints to not be compelling or supported in the documentary evidence. I do not find that there is evidence that the landlords failed to comply with a material term of the tenancy agreement that gave rise to the tenants' right to end the fixed term tenancy.

Section 26(1) of the *Act* provides that, a tenant must pay rent when due whether or not the landlord complies with the *Act*. Based on the evidence submitted I do not find that the landlord's conduct amounted to a failure to comply with a material term of the tenancy such that the tenants were authorized to end the tenancy. While the tenants gave evidence about the conflicts and difficulties, I do not find that the issues that arose during the tenancy were such that they were material terms of the tenancy. I find that despite the tenants' complaints the tenancy agreement was in place and the tenants were still obligated to pay their full rent owed.

The parties gave evidence that the tenants moved out at the end of August, 2017 having provided written notice in the form of the Mutual Agreement on August 15, 2017. The landlords gave evidence that they posted an advertisement for the rental unit online immediately but were unable to find a new tenant. The landlord testified that they were contacted by the municipality in September, 2017 and advised that they would have to license the rental unit in accordance with local business bylaws. Copies of the letters issued by the municipality to the landlords were submitted into evidence. The landlord said that they chose not to license the suite and they gave up seeking a new tenant for the rental unit.

While the landlords seek a monetary award in the amount of \$4,400.00 the equivalent of the rent for the duration of the fixed term tenancy I find that the landlords had an obligation to take steps to mitigate their losses. Based on the evidence I find that the landlords could have obtained a business license as required in their municipality and found a new tenant for the suite. The landlords chose not to do so and I find that they failed to mitigate their loss. The parties gave evidence that the tenants paid the monthly rent through August, 2017. Therefore, based on the evidence provided, I find that the landlord suffered a loss of the rent for September, 2017 of \$1,100.00. Accordingly, I issue a monetary award in the landlord's favour for that amount.

The parties testified that the tenants deducted \$30.00 from the rent for August, 2017. The tenants gave evidence that the amount was for bug spray as there was an insect infestation in the rental unit. The landlord testified that the deduction was made without the consent of the landlords. Pursuant to section 26 the tenants must pay the rent unless authorized under the *Act* to deduct from the rent. I find that the tenants were not authorized to make any deduction from the monthly rent of \$1,100.00 under the *Act* or by the landlords. Accordingly I find that the landlords are entitled to recover the rental arrears of \$30.00 from the tenants.

I find that the landlords have provided insufficient evidence in support of the other portions of the monetary claim. While the landlords testified that the rental unit was in need of cleaning and repairs I find there is insufficient evidence substantiating the landlords' claim. The photographs submitted into evidence do not show damage beyond that which would be expected from regular wear and tear in a living space. Many of the photographs include the landlords' addition of arrows and circles in order to identify what the landlords claim are damages. Even with the landlords' efforts to point out the damage, I do not find the photographs show significant issues with the rental suite. The condition inspection report prepared by the parties records the condition of the suite at the end of the tenancy and notes only a few instances of "nicks" and "dings". Furthermore, I note that the amount the landlords claim are estimates and that there is insufficient evidence that the landlords suffered any actual monetary loss. I find there to be insufficient evidence to find that on a balance of probabilities there has been a loss by the landlords attributable to the breach of the tenants. I dismiss this portion of the landlords' claim.

As the landlords were partially successful in their application they are entitled to recover the \$100.00 filing fee for this application.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenants' \$550.00 security deposit in partial satisfaction of the monetary award issued in the landlords' favour.

Conclusion

I issue a monetary award in the landlords' favour in the amount of \$680.00 under the following terms:

<u>Item</u>	<u>Amount</u>
Unpaid Rent August, 2017	\$30.00
Lost Rent	\$1,100.00
Filing Fee	\$100.00
Less Security Deposit	-\$550.00
TOTAL	\$680.00

The tenants must be served with this Order as soon as possible. Should the tenants 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.

The balance of the landlords' application is 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: April 13, 2018

Residential Tenancy Branch