



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNR, FF

Introduction

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

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed that the landlords served the tenant with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on November 4, 2017. Both parties also confirmed that the tenant served the landlords with her submitted documentary evidence via Canada Post Registered Mail on May 23, 2018. I accept the undisputed evidence of both parties and find that both parties have been sufficiently served as per sections 88 and 89 of the Act.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for unpaid rent, for money owed or compensation for damage or loss and recovery of the filing fee?

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 applicant's claim and my findings are set out below.

This “sub-lease” tenancy began on June 1, 2015 on a month-to-month basis as shown by the submitted copy of the signed tenancy agreement dated May 14, 2015. The monthly rent was \$750.00 payable on the 1st day of each month and a security deposit of \$375.00 was paid. The tenancy required that the tenant pay 30% of the utilities (Electricity and Gas). Both parties agreed that the security deposit was returned to the tenant on October 25, 2017.

The landlords seek a monetary claim of \$874.12 which consists of:

\$750.00	Unpaid Rent/Loss of Rental Income, November 2017
\$124.12	Unpaid Utilities, Hydro \$119.51 and Fortis \$4.61

Both parties agreed that this tenancy ended on October 30, 2017. Both parties agreed that the tenant gave notice to vacate the rental unit on October 10, 2017 for November 30, 2017, but that the tenant vacated the rental unit on October 30, 2017.

The landlords claim that as a result of the improper notice the landlords attempted to re-rent the unit for November 1, 2017, but were unsuccessful. The tenant argued that she feels the tenancy agreement was made invalid due to the landlords’ failure to provide a suitable rental unit, specifically she cites:

- Broken Refrigerator reported to the landlord on July 30, 2017 and as of the end of the tenancy, (October 30, 2017) remained unfixed or replaced.
- Numerous Noise Complaints, unresolved by the landlords.
- Garbage Full, remain so even after collection date.
- Landlord entered the rental premises without permission or notice.

The tenant also argues that the landlords have used the laundry excessively all of the time and that she feels that she should not have to pay the 30% utilities as agreed to on the tenancy agreement. The landlords responded by stating that in June 2017 a newborn baby joined their family and that as result there was an increase in consumption and garbage. The landlords argued that the tenant had never raised this issue prior to the end of tenancy, but in any event the terms of the tenancy agreement were clear that the tenant must pay for 30% of the utilities.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay

compensation to the other party. 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 of the *Act* 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 tenant must provide 1 Month Notice as per section 45 of the *Act* which states in part that:

A tenant may end a periodic 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 after the landlord receives the notice, and
- (b) is before the day in the month...that rent is payable under the tenancy agreement.

In this case, the tenant argued that the landlord failed to provide a “suitable” rental unit and that she was entitled to end the tenancy for a breach of the terms for an unfit rental. Section 45(3) of the *Act* allows a tenant to end a tenancy for breach of a material term:

45 (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Section 45(4) sets out that a notice under section 45 must comply with the form and content set out in section 52. Section 52 sets out, among other things, that a notice to end tenancy must be in writing. In this case, it is clear based upon the undisputed evidence that the tenant provided her notice to end the tenancy on October 10, 2017 to end the tenancy on November 30, 2017, but had vacated the rental unit on October 30, 2017. As such, the tenant is responsible for the tenancy until November 30, 2017. However, I also note that the landlord provided undisputed affirmed testimony that attempts were made to re-rent the unit for November 1, 2017, but were unsuccessful.

The tenant provided testimony that a broken refrigerator, numerous noise complaints, constantly full garbage container and the landlord entering the rental unit without permission or notice constituted a breach of a material term of the tenancy. Residential Tenancy Branch Policy Guideline #8, Unconscionable and Material Terms state in part,

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing: that there is a problem; that they believe the problem is a breach of a material term of the tenancy agreement; that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement², and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I find in this circumstance that although issues were raised with the landlord near the end of tenancy, the tenant failed to provide notice that these issues were a breach of a material term of the tenancy. In this case, the tenant had referred to the section of the tenancy agreement that the “Maintenance” the owner would do any required maintenance on the basement suite...the landlords would contact the owner and he would tend to the problem as soon as possible. As such, I find in the circumstances that the tenant has failed to provide sufficient evidence that the landlords were in breach of a material term of the tenancy and in any event the tenant must provide 1 “clear” months’ notice to end the tenancy as she had originally given to the landlord. I also find that the landlords mitigated any possible losses by attempting to re-rent the unit as soon as possible. The landlords have established a claim for \$750.00 for the loss of rental income/unpaid rent for November 2017.

On the landlords claim for \$124.12 regarding unpaid utilities (\$4.61, Fortis and \$119.51, Hydro), the tenant has claimed that due to excessive usage by the landlord that the tenant should not be responsible for their 30% share of the utilities as agreed upon in the signed tenancy agreement. The tenant has cited that the landlords were constantly

using the laundry facilities that prevented the tenant from using it. The landlords confirmed that a new born baby joined them in June 2017, but that the tenant still had usage of the laundry facilities. The landlords argue the term of 30% of the total utilities were agreed upon as per the signed tenancy agreement and that the tenant never notified them of this issue prior to the end of the tenancy. I accept the evidence of both parties and find that the landlords have established a claim for unpaid utilities of \$124.12. Although the tenant argued that excessive usage by the landlords resulted in an increase in the usage, the landlords have also provided undisputed evidence that the tenant also had her boyfriend living with her that also resulted in an increase in utilities. In any event the tenant failed to notify the landlords of this issue in an attempt to resolve this issue prior to the end of tenancy. This portion of the landlords claim is granted.

The landlords have established a total monetary claim of 874.12. The landlords having been successful are entitled to recovery of the \$100.00 filing fee.

Conclusion

The landlords are granted a monetary order for \$974.12.

This order must be served upon the tenant. Should the tenant fail to comply with the order, the 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: June 06, 2018

Residential Tenancy Branch