



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MACGREGOR REALTY & MANAGEMENT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNRL -S, FFT, FFL

Introduction

This hearing was scheduled for 1:30 p.m. on April 9, 2020, via teleconference call, to deal with monetary cross applications. The tenants applied for return of their security deposit and/or pet damage deposit. The landlord applied for compensation for unpaid rent and authorization to retain the tenants' deposits.

The landlord's agents appeared at the hearing; however, there was no appearance on part of the tenants despite leaving the teleconference call open for over 30 minutes.

The landlord's agents confirmed receipt of the tenant's Application for Dispute Resolution and confirmed they were prepared to respond to the tenants' Application for Dispute Resolution. Since the tenants did not appear to present their basis for their Application for Dispute Resolution, I dismissed their Application for Dispute Resolution without leave to reapply; however, I have recognized the landlord continues to hold the tenants' deposits and I have taken the deposits into account in making a decision under the landlord's Application for Dispute Resolution.

The landlord's agents testified that the landlord's proceeding package and evidence was sent to each of the tenants on December 6, 2020 using the forwarding address the tenants provided in an email dated November 21, 2020. A search of the tracking numbers showed that both of the registered mail packages were delivered on December 10, 2020. I was satisfied the tenants were duly served with the landlord's Application for Dispute Resolution and other documents and I continued to hear from the landlord's agents without the tenants present.

Issue(s) to be Decided

1. Is the landlord entitled to recovery unpaid rent in the amount claimed?
2. Is the landlord authorized to retain all or part of the tenants' deposits?

Background and Evidence

The landlord submitted that the parties executed a written tenancy agreement for a tenancy set to commence on December 2, 2017 for a fixed term set to expire on November 30, 2019 at which time the tenants were required to vacate the rental unit because the owner was going to move into the home upon expiration of the fixed term. The landlord provided a copy of the executed tenancy agreement as evidence.

The tenants paid a security deposit of \$2875.00 and a pet damage deposit of \$2875.00 and the landlord continues to hold the sum of \$5750.00 in trust pending the outcome of this proceeding.

The written tenancy agreement stipulates that the monthly rent was set at \$5750.00 payable on the first day of every month. By way of a hand-written notation that was initialled by the parties, the parties agreed that the monthly rent would increase to \$6000.00 starting on December 1, 2018. The landlord's agents acknowledged that a Notice of Rent Increase was not served upon the tenants with respect to the rent increase set to take place on December 1, 2018.

I informed the landlord's agents that the rent increase was not accomplished in a manner that complies with the Act. The landlord's agents took the position that the rent was set at \$6000.00 per month but had been discounted to \$5750.00 for the first year due to alterations made to the property. As such, the landlord did not view the change in the rent to be an increase in the second year.

The landlord's agents testified that the tenants paid the rent as stipulated in the tenancy agreement with the exception of the month of November 2019 when no rent was paid.

The landlord's agents testified that the tenants vacated the rental unit at the end of October 2019 but the landlord sent a 10 Day Notice to End Tenancy for Unpaid Rent to the tenants on November 5, 2019 via registered mail with respect to unpaid rent for November 2019.

The parties then participated in a move-out inspection together on November 8, 2019. The tenants did not authorize the landlord to make deductions from their deposits.

The landlord's agents testified that the tenants had requested the tenancy end at the end of September 2019 because they had purchased their own home and under the mistaken belief their tenancy was set to end at the end of October 2019, but the tenancy was actually set to end on November 30, 2019. The landlord's agents testified that they attempted to re-rent the unit for November 2019 but did not succeed in doing so before the owner decided to sell the property.

The landlord seeks recovery of unpaid rent of \$6000.00 for the month of November 2019.

The landlord provided a copy of the tenancy agreement, a 10 Day Notice to End Tenancy for Unpaid Rent dated November 5, 2019, the condition inspection report, and registered mail receipts as evidence.

Analysis

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with 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. Under section 43(5) of the Act, a tenant may withhold rent payable to the landlord if the tenants have paid an unlawful rent increase.

Based on the executed tenancy agreement before me, I accept that the tenancy commenced on December 2, 2017 for a fixed term set to end on November 30, 2019. Where a tenant ends a fixed term tenancy early, the tenant may be held liable to pay the rent for the remainder of the fixed term provided the landlord took reasonable steps to mitigate losses. I was provided unopposed testimony that the tenants ended the tenancy early by vacating the rental unit at the end of October 2019 and the landlord attempted to re-rent the unit for November 2019 but was unsuccessful. As such, I find the landlord entitled to receive rent for the month of November 2019.

Based on the executed tenancy agreement, as it is written, I find it clearly states the rent was set at \$5750.00 per month when the tenancy commenced and was to increase to \$6000.00 on December 1, 2018. There is no indication that the rent was actually set at \$6000.00 and discounted to \$5750.00 as the landlord suggested. Further, the sum of the deposits is consistent with the amount a landlord may charge when the rent is

\$5750.00 which I find to further conflict with the landlord's position that the rent was actually set at \$6000.00 but discounted in the first year.

Having found the rent was set at \$5750.00 and increased to \$6000.00 per month, the legality of the rent increase is relevant as an unlawful rent increase is deductible from rent payable under section 45(3) of the Act.

To legally increase the rent to \$6000.00 per month would require the landlord to comply with the rent increase provisions of sections 40 through 43 of the Act.

Increasing the rent \$250.00 per month is an increase of more than 4.3% and is beyond the annual allowable amount; however, as permitted under section 43(1) of the Act, a landlord may increase the rent by an amount that exceeds that annual allowable amount with the tenant's written consent. I accept that the tenants did consent to an increase of \$250.00 per month, in writing, by initialling and signing the tenancy agreement that is before me.

Regardless of the amount of the increase, section 42 of the Act imposes restrictions and requirement on the timing and notice for a increasing the rent. Section 42(1) provides that rent must not be increased within 12 months of the start of the tenancy. Since the tenancy started on December 2, 2017 the earliest the rent could be increased was starting January 1, 2019. As such, increasing the rent on December 1, 2018 is non-compliant.

Sections 42(2) and (3) require the landlord give the tenant a notice of rent increase, in the approved form, at least three months before the rent is set to increase. The landlord did not sere the tenants with a Notice of Rent Increase in the approved form. As such, I find the landlord failed to comply with these requirements.

In light of the above, I find the landlord did not lawfully increase the rent and the rent payable by the tenants remained at \$5750.00 per month. Since the tenants paid \$6000.00 per month for the months of December 2018 through October 2019, I find the tenants are entitled to deduct the unlawful increase they paid from rent otherwise payable.

I calculate the rent overpaid between December 2018 through October 2019 to be \$2750.00 [$\250.00×11 months] and this amount is deducted from \$5750.00 rent payable for November 2019. Therefore, I find the landlord entitled to recover unpaid rent in the net amount of \$3000.00.

I further award the landlord recovery of the \$100.00 filing fee paid for its application.

The landlord continues to hold deposits totalling \$5750.00 and I authorize the landlord to retain \$3100.00 of the deposits; and, in keeping with Residential Tenancy Policy Guideline 17, I order the landlord to return the balance of \$2650.00 to the tenants without further delay. I provide the tenants with a Monetary Order in the amount of \$2650.00 to ensure payment is made by the landlord.

Conclusion

The tenants' Application for Dispute Resolution is dismissed without leave to reapply.

The landlord was partially successful in its Application for Dispute Resolution and has been authorized to retain \$3100.00 of the tenants' security deposit and pet damage deposit; and, the landlord is ordered to return the balance of the deposits, in the amount of \$2650.00, to the tenants without delay. The tenants are provided a Monetary Order in the amount of \$2650.00 to ensure payment is made.

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 16, 2020

Residential Tenancy Branch