



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, MNSD, FFL

Introduction

On February 6, 2020, the Landlords submitted an Application for Dispute Resolution under the *Residential Tenancy Act* (“the Act”) for money owed or compensation for damage or loss; for a monetary order for unpaid rent; to keep the security deposit; and to recover the cost of the filing fee.

The matter was set for a conference call hearing at 1:30 p.m. on June 29, 2020. The Landlord and agents for the Tenant (“the Tenant”) attended the teleconference hearing.

The Landlord and Tenant were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. The Tenant confirmed that they received a copy of the Landlords’ documentary evidence. The Tenants did not provide any documentary evidence to the Residential Tenancy Branch or to the Landlord.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Are the Landlords entitled to a monetary order to recover unpaid rent?
- Are the Landlords entitled to a money owed or compensation for damage or loss?
- Are the Landlords entitled to keep the security deposit towards unpaid rent?
- Are the Landlords entitled to recover the cost of the filing fee?

Background and Evidence

The Landlord and Tenant testified that the tenancy began on June 15, 2018 as a fixed term tenancy to continue until June 30, 2021. Rent in the amount of \$5,200.00 was to be paid to the Landlords by the first day of each month. The Tenants paid the Landlords a security deposit of \$2,600.00. Both parties provided testimony agreeing that the tenancy ended when the Tenants vacated the rental unit on November 30, 2019. The Landlords provided a copy of the tenancy agreement.

Unpaid Rent

The Landlords are seeking compensation in the amount of \$10,400.00 for unpaid rent for the months of December 2019 and January 2020. The Landlord testified that the Tenant breached the fixed term tenancy by moving out of the rental unit before the end of the fixed term.

The Landlord testified that she did not receive any rent from the Tenants for December and January. The Landlord rented the unit to a new Tenant starting February 2020.

In reply, the Tenant submitted that the lease was renegotiated in May 2019 and the parties agreed at that time the tenancy would continue thereafter on a month to month basis. The Tenant testified that there is no breach of a fixed term tenancy and a requirement to pay the landlords for a loss of rent because the tenancy was on a month to month basis.

The Tenant testified that there was construction happening on another property during the first six months of the tenancy. The Tenant testified that the Landlord failed to mention that they would be building a house on a lot adjacent to the rental unit. The Tenant testified that the noise was unbearable and amounted to a breach of the Tenants right to quiet peaceful enjoyment. The Tenant submitted that this situation was a breach of a material term of the tenancy.

The Tenant testified that due to the construction noise they sent the Landlords a termination notice on May 3, 2019 via email. The Tenant testified that the email stated that the Landlord has breached the tenancy agreement because of noise. The Tenant testified that the parties reached an agreement that the monthly rent would be reduced to \$3,500.00 for the next six months.

The Tenant suggested that the tenancy changed to a month to month basis at this time. When the Tenant was asked whether it was specifically agreed by the parties that the tenancy would continue on a month to month basis, the Tenant replied that it was suggested but an official agreement was not reached.

In reply the Landlord provided testimony agreeing that the rental property had been subdivided in 2017 a year before the tenancy and the Landlord were building another property on the separate lot. The Landlord testified that she wanted to maintain the tenancy and because of noise she agreed to compensate the Tenants by reducing the monthly rent for six a month period. The Landlord testified that she never agreed that the tenancy was changing from a fixed term lease to a month to month basis.

Loss of Future Rent

The Landlord is seeking compensation of \$7,700.00 for a loss or rent suffered due to having to rent the unit out at a lower monthly rent of \$4,500.00. The Landlord rented the unit out starting February 2020 until January 31, 2021. The Landlord is seeking \$700.00 per month for 11 months.

The Landlord testified that on December 1, 2019 she began to advertise the rental unit on local websites and newspapers at the same amount of rent. The Landlord testified that after a month with no interest she lowered the monthly rent to \$4,800.00 and negotiated monthly rent at \$4,500.00 starting February 1, 2020. The Landlord provided a copy of the tenancy agreement for the new Tenant starting February 2020 until January 31, 2021.

In reply, the Tenant again provided testimony that they feel the tenancy was on a month to month basis. The Tenant suggested that the Landlord was only able to rent the unit at a reduced rent because of the construction taking place in the adjacent lot. The Tenant testified that there was noise continuing during the period of reduced rent for 6 months.

In reply, the Landlord testified that all the rock drilling was completed three months into the time period where the rent was reduced. The Landlord testified that the second family to look at the unit negotiated and accepted the tenancy.

Utility Costs

During the hearing the Landlord withdrew her claim for compensation for hydro and gas utility costs. Accordingly, these claims are dismissed.

Security Deposit

The Landlord has applied to keep the security deposit of \$2,600.00 towards her claims for a loss of rent. The Landlord testified that she received the Tenants' forwarding address on October 31, 2019. The Landlord testified that she did not return any amount of the security deposit to the Tenants and she did not have a written agreement from the Tenants authorizing her to keep the deposit. The Landlord applied for dispute resolution and made a claim against the deposit on February 6, 2020.

Analysis

The Residential Tenancy Branch Policy Guideline #3 Claims for Rent and Damages for Loss of Rent deals with situations where a Landlord seeks to hold a Tenant liable for loss of rent after the end of a tenancy agreement. The Guideline provides:

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

Based on the evidence before me, the testimony of the Landlord and Tenant, and on a balance of probabilities, I make the following findings:

There is insufficient evidence from the Tenant to establish that the parties agreed in May 2019 that the tenancy would revert to a month to month basis. While I accept that there may have been a suggestion for this by the Tenant, I find that there was no agreement reached. I find that the tenancy was for a fixed term expiring June 30, 2021.

In addition, I am not persuaded that by the Tenants suggestion that the tenancy was terminated by email notice in May 2019. While I acknowledge that it is possible for a Tenant to end a tenancy if there is a fundamental breach of a tenancy agreement, I find that the Tenant did not provide the Landlord with a proper breach letter as set out under section 45(3) of the Act. The Tenant raised the issue of noise and remained in the unit for a further six months at the reduced monthly rent.

I find that the Tenant ended the fixed term tenancy early by vacating the rental unit on November 30, 2019 and is therefore responsible to pay the rent owing under the tenancy agreement until the property could be re-rented.

I find that reduced monthly rent agreement had expired and that rent of \$5,200.00 was due each month. I accept the Landlord's testimony that she immediately began advertising the rental unit and she was not able to find a new tenant until February 2020. I find that it is reasonable for me to find that it could take time for the Landlord to find a new tenant that is willing to pay monthly rent of \$5,200.00 on short notice.

I award the Landlord the amount of \$10,400.00 for a loss of December 2019 and January 2020 rent.

Loss of Future Rent

I have considered this claim and I am guided by the policy guideline that provides damages for loss of rent may include compensation for the difference between what would have been received from the defaulting Tenant and the amount the Landlord was able to re-rent the premises, for the balance of the un-expired term of the tenancy.

I accept the Landlords testimony that she immediately advertised the rental unit at the original rent of \$5,200.00 per month. I find that the Landlord mitigated against loss by immediately advertising at the original rent amount. I accept the Landlord's testimony that when there was no interest, she reduced the advertised rent to \$4,800.00 per month.

I have considered whether it is reasonable for the Landlord to reduce the rent and seek recovery of the difference from the Tenant. I find that if the Landlord did not reduce the monthly rent, the Tenant would be responsible to pay the full rent for as many months as it took the Landlord to find a new tenant willing to accept the terms of the unexpired fixed term tenancy. I find that it is reasonable that the Landlord reduced the rent from \$5,200.00 to \$4,800.00. I am mindful that the Landlord negotiated a further reduction of rent to \$4,500.00 per month.

I find that it is reasonable to award the Landlord a loss of rent in the amount of \$400.00 per month for an 11-month period. This is the reduced amount that the Landlord advertised after one month of inactivity. I find the further reduction to \$4,500.00 is not warranted since the rent had only recently been reduced to \$4,800.00.

I award the Landlord the amount of \$4,400.00 for the loss of future rent owing under the fixed term tenancy agreement.

Security Deposit

Section 38 (1) of the Act provides that within 15 days after the later of the date the tenancy ends, and the date the Landlord receives the Tenants forwarding address in writing the Landlord must repay any security deposit or pet damage deposit to the Tenant with interest calculated in accordance with the regulations or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

Section 38 (6) of the Act provides that if a Landlord does not comply with subsection (1), the landlord must pay the Tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

I find that the tenancy ended when the Tenant vacated the rental unit on November 30, 2019. I find that the Landlord received the Tenant's forwarding address on October 31, 2019. I find that the Landlord did not have written consent to keep the security deposit. The Landlords application to keep the security deposit was made on February 6, 2020 which is beyond 15 days from when the tenancy ended.

I find that the Landlord breached section 38 of the Act and is required to pay the Tenants double the amount of the security deposit. I award the Tenants the amount of \$5,200.00.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. Since the Landlords claims are mostly successful, I order the Tenants to repay the \$100.00 fee that the Landlords paid to make application for dispute resolution.

I find that the Landlords has established a total monetary claim of \$14,900.00 comprised of \$10,400.00 in lost rent; \$4,400.00 in loss of future rent; and the \$100.00 fee paid by the Landlords for this hearing.

After setting off the security deposit of \$5,200.00 towards the award of \$14,900.00, I find that the Landlord is entitled to a monetary order for the balance of \$9,700.00. This monetary order may be filed in the Provincial Court (Small Claims) and enforced as an order of that court. The Tenants are cautioned that costs of such enforcement are recoverable from the Tenants.

Conclusion

The Tenants ended the fixed term tenancy agreement early which resulted in the Landlord suffering a loss of rent and a loss of future rent.

The Landlord breached section 38 of the Act and is holding a security deposit in the amount of \$5,200.00.

The Landlord has established a monetary claim in the amount of \$14,900.00. After applying the security deposit towards the Landlord's award, the Tenants owe the Landlord the balance of \$9,700.00.

I grant the Landlords a monetary order in the amount of \$9,700.00.

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: July 8, 2020

Residential Tenancy Branch