Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

On April 8, 2020, the Landlord submitted an Application for Dispute Resolution under the *Residential Tenancy Act* ("the Act") for money owed or compensation for damage or loss; 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 this date. The Landlord and 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 he received a copy of the Landlord's evidence.

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.

Preliminary and Procedural Matters

At the start of the hearing the Landlord clarified that he applied to keep the security deposit in addition to his claim for a loss of rent.

The Notice of Dispute Resolution Proceeding document does not include a claim against the security deposit. The Residential Tenancy Branch case management system provides a copy of the Landlords original application. I reviewed the Landlord's application and I find that the application did clearly identify that he was also applying to keep the security deposit.

The Landlord's claim against the security deposit will be considered at this hearing.

Issues to be Decided

- Is the Landlord entitled to a monetary order to recover unpaid rent?
- Is the Landlord entitled to keep the security deposit towards unpaid rent?
- Is the Landlord entitled to recover the cost of the filing fee?

Background and Evidence

The Landlord and Tenant testified that the tenancy began on October 1, 2019, as a one-year fixed term tenancy. Rent in the amount of $3,000.00 was to be paid to the Landlord by the first day of each month. The Tenant paid the Landlord a security deposit of $1,500.00 and a pet damage deposit of $750.00. The parties provided testimony agreeing that the Tenants moved out of the rental unit on March 31, 2020. The Landlord testified that his mother who lives in a separate suite on the property pays a ¼ share of hydro and gas utilities and the Tenants are responsible to pay a ¾ share of the costs. The parties testified that the Landlord has returned the pet damage deposit to the Tenants.

The Landlord testified that the Tenants broke the lease by moving out of the rental unit prior to the end of the fixed term tenancy.

The Landlord is seeking compensation of $6,000.00 for a loss of April 2020 and May 2020 rent.

The Landlord testified that as soon as he knew that the Tenants had vacated the rental unit, he placed an advertisement to rent the unit. The Landlord testified that on March 31, 2020 he placed an advertisement for the unit on a local website. The Landlord testified that he advertised the rental unit at the same amount of rent. The Landlord testified that he has not re-rented the unit. The Landlord provided a copy of the advertisement that indicates it was posted on March 31, 2020.

In reply, the Tenants advocate asked to cross examine the Landlord. In accordance with section 7.21 of the Rules of Procedure the request was granted.

The Tenants' advocate asked the Landlord about the Tenants ability to access a front patio area on the residential property and whether or not it was considered common space. The Landlord replied yes it was common space. The interaction between the Tenants advocate and the Landlord was not constructive and it was unclear where the advocate was heading with the questions. The Tenants advocate was informed that his

cross examination was not being productive and was directed to make his submissions directly to me.

The Tenants' advocate then explained that the Tenants were supposed to have access to a patio area. The advocate submitted that what was promised was not delivered. The Tenants advocate submitted that section 45(3) of the Act permits that Tenants to end the tenancy if the Landlord breaches a material term of the tenancy.

The Tenant testified that on March 4, 2020 they sent the Landlord a breach letter regarding use of the patio area and that the occupant living above was controlling the space. The Tenant stated that the Landlord was given enough time to rectify the breach.

The Tenants advocate submitted that the Landlord has breached the Tenants right to quiet enjoyment of the rental unit which amounts to a breach of a material term of the tenancy. The Tenants advocate submitted that the Landlord has an obligation to minimize damage or loss. He submitted that the Landlord only advertised on one website and only placed the advertisement after the Tenants vacated the rental unit.

The Tenants' advocate provided referenced a previous RTB decisions where an Arbitrator found substantial interference with the ordinary and lawful enjoyment of the premises when a Landlord failed to take reasonable steps regarding complaints about animal noise.

In reply, the Landlord confirmed that he received the Tenants' letter on March 4, 2020. The Landlord testified that he was aware that the Tenants were having issues using space due to some construction.

Hydro and Gas Utilities

The Landlord testified that the Tenants failed to pay the hydro and gas bill for the month of March 2020. The Landlord is seeking the amount of $428.00. The Landlord provided a copy of A hydro bill dated March 20, 2020 and a gas bill for the period of February 2020 to March 17, 2020.

In reply, the Tenant testified that they have no problem paying the hydro and gas bills; however, the Landlord never provided them to the Tenants until they received the Landlords documents for this hearing.

Security Deposit

The Parties testified that the Tenants vacated the rental unit on March 31, 2020. On April 8, 2020 the Landlord applied to keep the security deposit of $1,500.00 in partial satisfaction of his claim for a loss of rent.

The Tenants provided their forwarding address in writing to the Landlord on March 4, 2020 prior to vacating the rental unit.

Analysis

Section 64 (2) of the Act provides that the director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part.

Residential Tenancy Policy Guideline # 3 Claims for Rent and Damages for Loss of Rent provides the following information:

> *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.*

Section 45(3) of the Act provides that if a Landlord has failed to comply with a material term of the tenancy 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.

Residential Tenancy Policy Guideline # 8 Unconscionable and Material Terms provides:

> *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.*

Sections 23 and 35 of the Act provides that a Landlord and Tenant together must inspect the condition of the rental unit on the day the Tenant is entitled to possession of the rental unit, and at the end of the tenancy before a new tenant begins to occupy the

rental unit. Each section also requires that the Landlord complete the condition inspection report; both the Landlord and Tenant must sign the condition inspection report and the Landlord must give the Tenant a copy of that report in accordance with the regulations.

Section 36 (2) of the Act provides that the right of the Landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the Landlord does not perform an inspection and complete an inspection report in accordance with the regulations.

Section 18 of the tenancy regulation provides that a Landlord must give the Tenant a copy of the signed condition inspection report of an inspection made under section 35 of the Act, promptly and in any event within 15 days after the later of the date the condition inspection is completed, and the date the landlord receives the tenant's forwarding address in writing.

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

I have considered whether or not the Tenants properly ended the fixed term tenancy due to a breach of a material term of the tenancy. The Act requires a Tenant to give written notice of the failure. I have considered that policy guideline #8 provides that notice must inform the Landlord that they believe the problem is a breach of a material term of the tenancy agreement; that the problem must be fixed by a reasonable deadline included in the letter, and that if the problem is not fixed by the deadline, the party will end the tenancy.

I accept that in November 2019, the Tenants raised the issue with the Landlord regarding the front patio space. On February 25, 2020 the Tenants texted the Landlord and again raised the issue of the lease and the outside space. In the text message the Tenants gave the Landlord notice that they will be vacating the unit on April 1, 2020.

While a Tenant testified that a breach letter was provided to the Landlord on March 4, 2020, a copy of the letter was not submitted into evidence by the Tenants or the Landlord. I note that the Tenants had already decided to move out of the unit as stated in their February 25, 2020 text message.

Upon review of the tenancy agreement and addendum there is no mention of the use of common areas. However, I do accept that submissions that the parties agreed that that

there was term of the agreement that the Tenants could have some use the upper patio space.

I am left curious as to why the Tenants would not take any steps to deal with what they submit was a material breach of the tenancy agreement and a failure of the Landlord to rectify the breach. I find that there is insufficient evidence from the Tenants to establish that use of the common area /patio was agreed upon by the parties to be so important that the term is a material term of the contract and a breach could result in ending the tenancy.

The evidence before me indicates the Tenants raised the issue in November 2019 and again at the end of February 2020 when they also stated they are vacating the unit. The Tenants could have applied for dispute resolution within that three-month period seeking an order that the Landlord comply with a term of the tenancy agreement.

Furthermore, I do not accept the submission that Tenants loss of use of the patio area amounts to be a breach of their quiet enjoyment. I accept that a loss of quiet enjoyment can be a material breach; however, the I find that the term was not a material term and I note that there was no evidence that the Tenants actively pursued the matter with the Landlord. It appears the Tenants now want to rely on this issue being considered a material breach after they already had notified the Landlord, they are vacating the unit.

There is insufficient evidence from the Tenants to prove that they served the Landlord with a breach letter containing a statement that there is a material breach that must be corrected within a reasonable period or the Tenants will end the tenancy. I accept the Guideline which provides that this information is required in order to end a tenancy for a material breach. I find it would unreasonable for a Tenant to end a fixed term tenancy without notice, reason, and an opportunity to the Landlord to rectify the situation.

I find that the Tenants did not have a legal right to end the fixed term tenancy due to a material breach of the tenancy agreement on the part of the Landlord.

With respect to the submission that the Landlord did not mitigate against his loss by advertising the unit earlier, I find that the Landlord was not obligated under the Act to advertise the rental unit until the Tenants had vacated the unit. I find that on March 31, 2020 the Landlord advertised the rental unit on a local website at the same amount of rent. I find that the Landlord took reasonable steps to minimize the loss of rent.

I find that the Tenants vacated the rental unit prior to the end of the fixed term tenancy and are responsible to pay the Landlord for a loss of rent until the rental unit is re-rented.

I award the Landlord the amount of $6,000.00 for a loss of April 2020 and May 2020 rent.

Hydro and Gas Utilities

The Tenant testified that they have no problem paying the hydro and gas utility and that the Landlord never presented the bills prior to serving evidence for this hearing.

I have reviewed the utility bills and I find that the Tenants are responsible to pay a ¾ share of $570.52. I find the Tenants owe the Landlord the amount of $427.89 for hydro and gas costs.

Security Deposit

I find that the Landlords made a claim against the security deposit within 15 days of receiving the Tenants forwarding address in writing. However, I find that the Landlord extinguished his right to make a claim against the security deposit for damage when he failed to provide the Tenants with a copy of a proper condition inspection report as required by the tenancy regulation.

I grant the return of the $1,500.00 security deposit to the Tenants.

While the Landlords extinguished his right to apply against the security deposit for damage is extinguished, section 72 of the Act, provides that if an Arbitrator orders a party to a dispute resolution proceeding to pay any amount to the other party, the amount may be deducted from any security deposit or pet damage deposit due to the Tenant.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. The Landlord was successful with his claims for rent and utilities. I order the Tenants to repay the $100.00 fee that the Landlord paid to make application for dispute resolution.

I find that the Landlord has established a total monetary claim of $6,527.89 comprised of $6,000.00 for April 2020 and May 2020 rent; $427.89 for unpaid utilities, and the $100.00 fee paid by the Landlord for this hearing. After setting off the security deposit

of $1,500.00 against the award of $6,527.89, I find that the Landlord is entitled to a monetary order for the balance of $5,027.89. 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 early which resulted in the Landlord suffering a loss of rent for April 2020 and May 2020. The Tenants are also responsible to pay a hydro and gas bill at the end of the tenancy.

The Landlord has established a monetary claim in the amount of $6,527.89. I order that the Landlord can keep the security deposit in the amount of $1,500.00 in partial satisfaction of the Landlord's claim.

I grant the Landlord a monetary order for the balance of $5,027.89.

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: August 20, 2020

Residential Tenancy Branch