Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MNR, MNDC, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and a cross-application by the tenants for a monetary order. Both parties participated in the conference call hearing and had opportunity to be heard.

Issue(s) to be Decided

Is the landlord entitled to a monetary order as claimed?
Are the tenants entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on September 1, 2008 under a tenancy agreement which set a fixed 13 month term for the tenancy, ending on September 30, 2009. Rent was set at $1,195.00 per month which did not include utilities. The parties further agreed that the tenants gave notice on January 30, 2009 that they would be vacating the rental unit on March 1, 2009. The tenants actually vacated the unit on February 28, 2009. The landlord testified that when the tenants' notice was received, an advertisement was immediately placed on the landlord's corporate website which is linked to Craigslist. The landlord posted other Craigslist advertisements in February and March and was able to re-rent the unit on April 1 at a monthly rate of $1,095.00 per month. The landlord seeks an award for $1,195.00 in loss of income for the month of March and an additional $600.00 which represents the $100.00 monthly difference between the rent the tenants were paying and the new rental rate for the balance of the fixed term. The tenants claimed that in an email dated February 18, one of the property managers, E.K., stated that "The last day of your lease is February 28, 2009" which they understood to mean that he had mutually agreed that the tenants could end the fixed term early.

The tenants claimed that during the time they lived in the rental unit, the noise in the unit from the upstairs tenants was disturbing, the heat was insufficient, the electrical system was unsafe and inconsistent, they had problems with termites and they experienced health problems due to allergies. The tenants further claimed that the hydro bills were inflated due to the inadequacy of the heating system. The tenants seek to recover 25% of the rent paid during their tenancy, recovery of the cost of oil and recovery of a portion of their hydro bills.

The tenants testified that they put soundproofing between their unit, which was on the lower floor, and the upper unit and only charged the landlord for the cost of materials. The tenants claimed that the tenants in the upper unit made excessive noise. The landlord responded by saying that after the tenants had installed soundproofing, they reported that it "made a big difference."

The tenants testified that the heat was controlled by the tenants in the upper suite and although it was kept at a very high level, it did not adequately heat the rental unit. The tenants testified that they repeatedly complained about the lack of heat throughout the tenancy. The landlord provided a copy of an email dated December 20, 2008 in which the tenant wrote that he had bought a heater, a door sweep and vinyl film for the windows, which he said "has helped a lot." The landlord reimbursed the tenants for these purchases. The tenants wrote another email on December 30 advising that the electrical outlets were heating up and arcing and the heat was inadequate. The landlord responded by email on the same day advising the tenants to call an electrician to address the electrical problems and advising that the heating issue could be looked into upon their return from their vacation. The following day the landlord sent another email suggesting that perhaps the vents needed to be cleaned and offering to pay for an electric fireplace if the tenants would pick it up. In an email dated January 19, 2009 the tenant wrote "After cleaning some of the vents and the air filter for the central heating and the warmer weather I don't think we will need the extra heater we discussed yesterday. It has been a lot better." The tenants testified that they wrote this email after becoming extremely frustrated during a face to face meeting with the landlord in mid-January in which it became apparent to them that the landlord would not be addressing their complaints.

The parties agreed that the tenants complained about termites very early in the tenancy and that a bug was submitted to a pest control company so an opinion could be obtained. The landlord testified that the pest control company advised that spraying was unnecessary. There is no evidence that there was further communication on this issue between the parties.

The tenants gave oral testimony about suffering from allergies related to dust mites and the upper tenant's dog, but provided no supporting medical evidence.

The tenants provided copies of their hydro bills to show how much they were paying for electricity to heat the rental unit and provided copies of the invoices from the two occasions on which the landlord filled the oil tank and the one occasion on which they filed the oil tank. The tenants testified that the landlord had agreed to fill the oil tank twice at a cost of $1,000.00 each time. The landlord testified that his wife had promised to fill the oil tank twice but had not committed to a dollar figure. The landlord provided a copy of an email from his wife in which she stated that she had promised to fill the tank twice and an email from him in which he advised the tenants in December that the tank had been filled a second time at the expense of the landlord and that the tenants would be responsible for future fills.

Analysis

Beginning with the landlord's claim, I find that the February 18 email from E.K., which was sent more than two weeks after the tenants gave written notice that they were breaking the lease, was not a mutual agreement to end the tenancy but an acknowledgment that the tenants would not be continuing to live in the rental unit after February 28. Under the Act, absent an agreement of the parties, a fixed-term tenancy can only be broken if the landlord has breached a material term of the tenancy agreement and has been so advised by the tenants and has been given an opportunity to correct the breach. While the tenants may have made complaints, I find that the tenants did not at any time advise the landlord that they considered the landlord's action or inaction to constitute a material breach of the tenancy agreement. I find that the tenants did not have the right to unilaterally end the fixed term early. I find that the landlord acted reasonably to mitigate losses and I find the landlord is entitled to recover

$1,195.00 in loss of income for the month of March and $600.00 in loss of income which represents the difference in rent for the period from April – September 2009. The landlord is also entitled to recover the $50.00 filing fee paid to bring this application. I award the landlord a total of $1,845.00.

As for the tenants' claim, in order to be successful in their claim the tenants must prove that they made the landlord aware of the problems they were experiencing, that the landlord failed to adequately address the problems and that they suffered some loss as a result. At the beginning of the tenancy it appears that both parties acknowledged that soundproofing was required. The parties entered into an agreement whereby the tenants installed soundproofing and the landlord paid for the materials. There is no evidence that the tenants complained about the noise after the soundproofing was installed.

After reviewing the evidence with respect to the electrical and heating problems, I find that the landlord responded each time the tenants made a complaint. The landlord made offers to pay for electricians, space heaters and an electric fireplace in addition to having provided space heaters and conducted inspections. I find that the landlord's promise to fill the oil tank twice was a gratuitous promise that was not part of the tenancy agreement and done as a matter of good will rather than obligation. I find that the landlord acted reasonably and was justified in assuming that the problems had been rectified.

In the absence of evidence showing continued complaints from the tenants about termites, I find that the landlord acted reasonably in following the advice of the exterminator. I note that the tenants suggested there were more written complaints, not just about the termites but about other problems as well. The tenants suggested that the landlord should have provided this evidence to the tribunal. The landlord is not obligated to provide the evidence the tenants require to prove their claim and in the absence of this evidence, I have concluded that the only complaints were those in writing and those verbal complaints acknowledged by the landlord.

The tenants have submitted no evidence supporting their claim that they suffered from allergies. Further, they provided no explanation as to why they would be allergic to the

dog belonging to the upper tenant and not to their own dogs or an explanation as to why the landlord should be held responsible for their allergic reactions.

I find that the tenants have not proven their claim on the balance of probabilities and I dismiss the tenant's claim in its entirety.

Conclusion

The tenant's claim is dismissed. I grant the landlord an order under section 67 for $1,845.00. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated May 21, 2009.