

## **DECISION**

**Dispute Codes:** MNSD, MNDC and FF

### **Introduction**

Application was made by the tenants on April 18, 2011 seeking return of one month's rent after the landlord processed their cheque for the month following their move out of the rental unit. The tenants also sought to recover their filing fee for this proceeding from the landlord.

The tenants had also applied for return of their security and pet damage deposits and the balance of their post dated cheques but withdrew that part of the application as the deposits and cheques were returned after their application was submitted.

### **Issues to be Decided**

This matter requires a decision on whether the tenants are entitled to a Monetary Order for return of one month's rent or some portion thereof.

### **Background and Evidence**

This tenancy began on September 1, 2010 under a fixed term rental agreement set to end on August 31, 2011. Rent was \$1,050 per month and the landlord held security and pet damage deposits of \$525 each, paid on August 3, 2010 and returned by cheque dated April 13, 2011.

The tenants gave notice to end the tenancy by email dated March 1, 2011 that they would be leaving the tenancy on March 31, 2011, thereby breaching the fixed term agreement by leaving five months early.

The email giving notice cited deficiencies in the rental unit as their reason for ending the tenancy early including: tears in the carpets and no underlay, holes in the walls, the need for painting, a sewerage leak in pipes under the unit rendering a downstairs washroom unusable for three weeks, an odour from the furnace ducts and mold around

the windows. The notice stated that as the tenants were expecting a child, they were concerned about bringing a newborn into a compromised environment. The tenants stated that the landlord had promised the deficiencies would be remedied at the time they signed the agreement but the work was never done.

There is no written record of those promises nor of written notice to the landlord that the tenants believed the landlord had breached a material term of the rental agreement by failing to do the repairs and demanding that the repairs be done.

The landlord gave evidence that she took over property management of the rental unit on March 1, 2011 and was at a disadvantage with respect to previous communications concerning the condition of the rental unit.

She stated had retained the rent for April 2011 on the grounds that the tenants notice to leave early had breached the fixed term agreement and had been given late even for a month to month tenancy. I further note that email is not an approved method of service of notice as it does not contain a signature as required under section 52 of the *Act*; however, that is not at issue in the present matter as the landlord acknowledged notice.

The landlord noted that she had been unable to find new tenants for the rental unit until July 1, 2011 and had a loss of rent for three months which she had not claimed. In addition, the landlord did not make claim on the \$525 liquidated damages clause in the rental agreement. She stated that she had two other empty units at the time one of which remains vacant. Under the circumstances, the landlord felt it was abundantly fair to simply retain the one month loss of rent for April.

## **Analysis**

Section 45(2) of the *Act* states that tenants may give notice to end a fixed term tenancy only on a date that is not before the end date set by the fixed term agreement which was August 31, 2011 in the present matter.

The only exception, granted at section 45(3), states 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.” (Emphasis added.)

In the present matter, the tenants have provided no copies of written notice to the landlord that would substantiate a right to end the fixed term agreement early.

Section 7 of the *Act* provides that if a party to a rental agreement suffers a loss due to the non-compliance of the other with the legislation or rental agreement, the non-compliant party must compensate the other for the loss. However, this section also requires that the aggrieved party must do whatever is reasonable to minimize the loss.

In the present matter, the landlord has submitted no evidence of efforts to find new tenants. However, I accept the evidence of the landlord that attempting to find a new tenant by April 1, 2011 would have been futile due to the other vacancies in the building and she retained only the absolute minimum indicated by the breach of the fixed term agreement.

As the landlord made no claim for the additional two months loss of rent, returned the security and pet damage deposits in a timely manner and did not impose the liquidated damages clause, and as the tenants have not substantiated their claim of landlord’s breach regarding repairs, I find that the tenants were responsible for the April rent. Therefore, I decline to order that it be returned to them.

## **Conclusion**

The application is dismissed on its merits without leave to reapply.

August 8, 2011