Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNR, MNSD, FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order to retain the security deposit. Both parties participated in the conference call hearing.

Issue to be Decided

Is the landlord entitled to a monetary order as claimed?

Background and Evidence

For the most part, the facts are not in dispute. The tenancy began in 2010 at which time the tenant paid security and pet deposits of $487.50 each. In September 2011, water leaked into the rental unit from another unit and the tenant was unable to live in the unit for 3 weeks. The parties discussed the issue and agreed that because she could not live in the unit, the tenant would pay just 25% of the rent due in October as the landlord expected to recover the other 75% of the rent through her insurance. The landlord subsequently learned that because she was not making an insurance claim as the repairs were performed by the strata, the landlord's insurance would not pay for the lost income. The landlord seeks to recover the $731.29 in lost income from the tenant and claimed that the tenant should have had insurance for her displacement.

The landlord also seeks to recover lost income for the month of November. The parties agreed that on September 30, 2011, the tenant texted the landlord to advise that she would be ending the tenancy on November 1, 2011. They further agreed that the landlord advised the tenant that the notice had to be given in writing and that the tenant provided written notice. The parties dispute when the written notice was given. The tenant claimed that she put the written notice in an envelope with her October rent cheque and made it available for pickup by the landlord on October 1. The landlord claimed that she did not receive the notice with the cheque when she picked it up on or about October 3 and that she received the notice on or about October 5.

The parties agreed that the landlord began advertising the rental unit on Craigslist on October 4. The landlord testified that she was unable to re-rent the unit for November and in December listed it for sale.

The tenant argued that while the September 30 text message may not have been in compliance with the requirements of the Act, the landlord clearly had accepted the notice because she began advertising before she claimed to have received the written notice.

Analysis

In order to establish her claim for the 75% of October's rental income that was lost, the landlord must prove that her offer to reduce the tenant's rent to 25% for that month was conditional on the landlord's insurance paying the balance. The landlord acknowledged at the hearing that she had told the tenant that she would be receiving the balance from her insurance company because that was her understanding, but she did not make the offer conditional on the receipt of those moneys. I find that the landlord is bound by her unconditional offer, which was accepted and acted upon by the tenant. I note that even if the offer had been conditional, the landlord was unable to prove that there was a term in the tenancy agreement whereby the tenant was required to maintain insurance which would compensate her in the event she was unable to reside in the rental unit for some period and absent such a term, the tenant was not obligated to have obtained that insurance. The claim for the balance of October's rent is dismissed.

As for the issue of lost income, the Act requires that tenants give notice to end their tenancy in writing no later than the day before rent is due for the last month of the tenancy. In this case, that means the tenant should have given written notice no later than September 30. Section 52 of the Act requires that written notice be signed and dated and include the address of the rental unit as well as the end date of the tenancy.

The Act does not contemplate notices sent via email or text messages, but I find that in circumstances in which both parties are accustomed to communicating electronically and acknowledge having received electronic correspondence, a text message is equivalent to written notice. However, as the notice was unsigned and did not bear the tenant's signature, I find that the notice to end tenancy sent by text message did not comply with the requirements of section 52.

Section 68 of the Act gives me the authority to amend a notice to end tenancy where the recipient of the notice knew or should have known the information that was omitted from the notice and when it is reasonable in the circumstances to amend the notice. There is no question that the landlord knew which rental unit the notice referred to and it

is also clear that she knew who had sent the text message. I find it reasonable to amend the notice in these circumstances as the landlord clearly knew before having received a piece of paper that the tenancy would be ending as she started advertising the unit prior to the date on which she claims to have received that piece of paper.

For these reasons I find that the landlord received the notice to end tenancy on September 30 and I find that the tenant therefore gave adequate notice and the claim for lost income cannot be supported. The claim is dismissed.

Even if I am wrong in determining that a text message is equivalent to written notice or if I have erred in amending the notice, I note that the tenant can only be held liable for the lost income if the loss can be directly attributed to the late notice. There is no provision in the Act whereby tenants who fail to give adequate notice will be automatically held liable for loss of income for the month following the month in which they give their notice. Section 7 of the Act provides as follows:

> 7. Liability for not complying with this Act or a tenancy agreement
>
> 7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
>
> 7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

I accept that the landlord made reasonable efforts to minimize her losses by advertising the rental unit, but I am not satisfied that the landlord was unable to re-rent the unit because of the tenant's tardiness if in fact the paper notice was the only notice effective to end the tenancy and was received on October 5 as claimed by the landlord. The landlord advertised the unit prior to having received the paper notice, yet despite advertising before she had the paper notice, she was still unable to find a new tenant. I find insufficient evidence to prove that the inability to re-rent the unit was directly attributable to the delay in receiving the paper notice.

Residential Tenancy Policy Guideline #17-2 provides as follows:

> The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
> - a landlord's application to retain all or part of the security deposit, or
> - a tenant's application for the return of the deposit
>
> unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance

of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

There is no evidence before me to suggest that the tenant has extinguished her right to the return of the security or pet deposits. In the spirit of administrative efficiency and pursuant to the terms of the Residential Tenancy Policy Guidelines, I order that the landlord forthwith return to the tenant the $487.50 security deposit and the $487.50 pet deposit and I grant the tenant a monetary order under section 67 for $975.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The landlord's claim is dismissed in its entirety and the landlord is ordered to return the $975.00 in deposits to the tenant forthwith.

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: January 27, 2012

Residential Tenancy Branch