Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: MNR, MNSD, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for a monetary order for loss of rent, cleaning costs and an order to retain the security deposit in partial satisfaction of the claim.

The landlord testified that, although the tenant did not leave a written forwarding address, he had verbally told her that he was moving back to his parent's home and the landlord used the address provided by the tenant in his application for tenancy. Despite being served by registered mail sent on December 7, 2011, the respondent did not appear. I accept the landlord's testimony that the tenant was validly served as Canada Post records confirmed that the tenant had signed for the registered mail sent.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence is whether or not the landlord is entitled to monetary compensation for loss of rent and cleaning.

Background and Evidence

A copy of the month-to-month tenancy agreement , move-in condition inspection report signed by both parties, move-out condition inspection report signed only by the landlord and communications between the parties, were in evidence.

The landlord testified that the tenancy began May 6, 2009, at which time the tenant paid a security deposit of $370.00. The landlord testified that, on November 2, 2011, the tenant suddenly gave notice to vacate effective on or before December 1, 2011 which was inadequate notice under the Act and the contract.

The landlord submitted into evidence a copy of the tenant's written Notice to vacate dated November 2, 2011ending the tenancy effective "*on or before*" December 1, 2011.

The landlord also submitted a copy of a letter dated November 6, 2011, that was given by the landlord to the tenant in response to his Notice. This letter stated, in part,

> " *WE ARE UNABLE TO ACCEPT YOUR NOTICE TO VACATE. WE REQUIRE A FULL MONTHS NOTICE HANDED IN NO LATER THAN THE LAST DAY OF THE MONTH TO TAKE EFFECT AT THE END OF THE FOLLOWING MONTH.....THIS CONFIRMS OUR POSITION TO ENFORCE THE TENANCY AGREEMENT. YOU WILL BE HELD RESPONSIBLE FOR PAYMENT OF RENT TO THE END OF DEC 2011*".

The letter went on to state:

"*WE WILL NOTIFY YOU TOWARD THE END OF DEC FOR A DATE AND TIME TO PERFORM THE MANDATORY CONDITION INSPECTION*…" (Reproduced as written)

The landlord also stated in the letter that they were doing their best to try and re-rent the unit including posting vacancy signs and advertising in the newspaper and the internet.

The landlord testified that, despite their best efforts to find a replacement tenant for December, they lost a month of rent in the amount of $770.00 The landlord submitted evidence verifying that the unit was advertised in December in the form of invoices from local newspapers. The landlord is claiming $276.46 for advertising costs that were incurred in December 2011. No receipts for any costs incurred during November 2011 were submitted.

The landlord testified that, although the tenant's Notice stated that he would be vacating on or prior to December 2011, he actually abandoned the unit on November 21, 2011 and left the keys to the unit under the landlord's door. The landlord testified that, because the tenant did not give any advanced notice that he was vacating, they were not able to schedule a move-out condition inspection prior to his departure.

The landlord testified that the tenant was notified in a written document dated and signed on November 21, 2011, that an inspection could be scheduled for November 29, 2011 or November 30, 2011 and requested that the tenant confirm his preference for one of the two dates offered. The landlord testified that on November 21, this communication was deposited in the mailbox of the rental unit that had been vacated by the tenant. The landlord testified that a "Notice of Final Opportunity to Schedule a Condition Inspection" was also deposited in the mailbox of the tenant's former rental unit on November 21, 2011, specifying that the move-out inspection was scheduled for 12:30 p.m. on November 30, 2011. Copies of both these documents were in evidence. The landlord testified that the reason the Notices scheduling the move-out condition inspection were left in the tenant's mailbox was because, despite the tenant vacating the unit and returning the keys on November 21, 2011, the landlord did not consider that the tenancy was over until the end of November. Moreover, according to the landlord, they were not sure of the tenant's current forwarding address at the time.

The landlord testified that because there was no immediate response from the tenant, the landlord went ahead with the move-out condition inspection report in the tenant's absence on November 21, 2011. A copy of the move-out condition inspection report was in evidence and indicated that an inspection was completed on November 21, 2011. There were deficiencies noted on the report with respect to the cleanliness and in a section of the form titled, "*Security Deposit Statement*" the landlord included $770.00 unpaid rent owed for December, a $25.00 late fee for December, $40.00 cleaning costs, $66.08 carpet cleaning and $45.00 for window cover cleaning. The total claim was for $946.08. The form was not signed by the tenant. However in the section on the form reserved for the tenant's signature, the landlord had written, ""*FAILED TO GIVE PROPER NOTICE TENANT ABANDONED UNIT NOV 21/11*".

Analysis

Section 45 of the Act permits a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that:

> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Section 7 of the Act states that if a landlord or tenant's actions do not comply with the Act, the regulations or the tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances. It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

> Test For Damage and Loss Claims
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> 1. Proof that the damage or loss exists,
> 2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
> 3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
> 4. Proof that the claimant followed section 7(2) of the Act by taking reasonable steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord, to prove the existence and value of the damage/loss stemming directly from a violation of the

agreement or a contravention of the Act by the respondent and verify that a reasonable attempt was made to mitigate the damage or losses incurred

Based on the evidence, I find that on November 2, 2011, the tenant gave written notice to end the tenancy by December 1, 2011. I find that, in this instance, the notice given by the tenant did not comply with the Act because the effective date given was earlier than one month after the date the landlord received the notice.

I accept the landlord's testimony that the landlord suffered a loss of $770.00 rent for the month of December as the unit was not re-rented for December 1, 2011. I find that the landlord's claim for loss of rent clearly meets elements 1, 2 and 3 of the test for damages.

However, to satisfy element 4 of the test for damages, I find that the landlord must provide proof that reasonable efforts were made as soon as possible to mitigate the potential loss of rent for December. I find that, although the landlord gave verbal testimony that the unit was marketed from November 2, 2011 onwards, once the landlord had received the tenant's written Notice to end tenancy on November 2, 2011, the landlord did not present any evidence that the unit was advertised at all in November. Invoices for the ads submitted into evidence were dated December 2011.

For this reason, I find that the landlord failed to present sufficient proof that reasonable steps were taken to minimize the loss of rent during the month of November. That being said, I do accept that the evidence proves that the landlord did attempt to mitigate the potential loss during December. Therefore, I find that the landlord is entitled to be compensated for 50% of the rental loss in the amount of $385.00.

In regard to the landlord's monetary claims for late payment fees of $25.00, I find that Section7(1)(d) of the Residential Tenancy Regulation allows a landlord to charge an administration fee of not more than $25 for late payment of rent and section 7(2) of the Act states a landlord must not charge the fee described in paragraph (1) (d) unless the tenancy agreement provides for that fee. I find that the tenancy agreement between these two parties did have a term permitting the landlord to impose a late fee of $25.00. However, I find that the landlord's claim for compensation was related to loss of rent incurred by the early ending of the tenancy by the tenant which is a claim in the category of damages. Late fees would be applicable under the tenancy agreement for rental arrears. As the tenancy had ended, I find that the term in the tenancy agreement requiring payment of the $25.00 for late payment fee was no longer applicable because the tenancy agreement terms were no longer applicable after the contract was terminated on November 21, 2011.

I find that the tenant permanently ended the tenancy by vacating and returning the keys to the landlord on November 21, 2011 and was no longer in possession of the rental unit as of that date.

With respect to the claims for cleaning costs, I find that section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear and must give the landlord the keys to the unit.

In regard to determining whether or not the tenant had complied with section 37 of the Act, I find that the tenant's liability can be established by comparing the condition before the tenancy began, with the condition of the unit after the tenancy ended. This would be achieved through the submission of properly completed copies of the move-in and move-out condition inspection reports conducted jointly and signed by both parties. In this instance I find that the section 23(1) of the Act was followed because the landlord and tenant both participated in, and signed, the move-in inspection.

However, with respect to the move out inspection, that was conducted in the tenant's absence on November 21, 2011, I find that only the landlord had filled out and signed the report.

Section 35 of the Act states that, in arranging the move-out inspection, the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. Part 3 of the Regulation goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted and section 17 of the Regulation states that:

(1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

The Act states that the landlord must make the inspection and complete and sign the report without the tenant if:

(a) the landlord has complied with subsection (3), and

(b) the tenant does not participate on either occasion.

I find that the landlord apparently attempted to comply with the Act and did offer the tenant two different inspection dates in a letter dated November 21, 2011. I also find that the landlord issued a "Notice of Final Opportunity to Schedule a Condition Inspection" on the approved form as required.

However, I find that the landlord did not give the tenant adequate time to respond to the notifications before going ahead and conducting the inspection on the same date of the two notices.

More importantly, I find that these notifications were served to an address where the landlord was aware the tenant no longer resided and no longer had access. In fact, the tenant had already vacated, took all of his possessions and left the keys with the landlord. Section 44(1)(d) of the Act states that a tenancy has ended when the tenant vacates the unit. Therefore, I find that it follows that the rental unit can no longer be considered a valid service address where important legal notifications can be left. Therefore I find that the letter proposing two dates for the inspection and the Notice of Final Opportunity were not properly served on the tenant.

With respect to the landlord's claim that the landlord did not have any forwarding address for the tenant on November 21, 2011, I find that this testimony contradicted the landlord's earlier claim that, prior to the tenant vacating, he had informed the landlord that he was returning to his former address to live with a parent. In fact, I find that the landlord successfully served this tenant with the hearing documents sent to that address two weeks after the tenant had vacated the unit, despite no further direct communication with the tenant.

For the reasons above, I find that the landlord failed to comply with the Act by notifying the tenant of the proposed inspection scheduled for November 21, 2011and neglected to properly offer and serve the tenant with two opportunities to participate.

Section 36 (2) of the Act states that the right of the landlord to claim against a security deposit, for damage to residential property is extinguished if the landlord does not comply with section 35 (2) *[2 opportunities for inspection]*,

Even if I find that the landlord's right to claim against the security deposit was *not* extinguished under section 36(2) of the Act, I still must find that, the value of the move-

out condition inspection report was affected by serious procedural deficiencies that function to negatively impact the evidentiary weight of this report.

For this reason I find I must dismiss the landlord's claim for compensation for the cleaning costs that relied on data contained in the move-out condition inspection report.

Based on the above facts I find that the landlord has established a total monetary claim of $385.00 comprised for loss of rent and I order that the landlord retain the security deposit of $370.00 in partial satisfaction of the claim leaving a balance due of $15.00.

Conclusion

I hereby grant the Landlord an order under section 67 for $15.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The remainder of the landlord's application, including the request for the cost of filing, is dismissed without leave.

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: February 14, 2012.

Residential Tenancy Branch