Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes DRI, CNR, MNDC, MNSD, RR, FF

Introduction

This hearing was scheduled to deal with the tenants' application to cancel a Notice to End Tenancy for Unpaid Rent; to dispute a rent increase; authorization to reduce rent; and a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; and, return of the security deposit.

Both parties appeared at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the commencement of the hearing the tenants confirmed they have vacated the rental unit. Accordingly, it was not necessary to consider the request to cancel the Notice to End Tenancy. Nor was it necessary to consider the tenants' request to reduce future rent payable.

Issue(s) to be Decided

1. Have the tenants established that the landlord has collected a rent increase that is non-compliant with the Act?
2. Have the tenants established an entitlement to recover damage or loss under the Act, regulation or tenancy agreement?
3. Are the tenants entitled to return of their security deposit?

Background and Evidence

I was provided the following undisputed evidence: There is no written tenancy agreement. The tenants moved in to the rental unit November 26, 2011 and a $675.00 security deposit was paid to the landlord. The tenants paid $1,350.00 to the landlord for the months of December 2011 and January 2012. Starting February 1, 2012 the tenants paid $1,400.00 to the landlord for the months of February and March 2012. The tenants did not pay rent for April 2012 and were served with a 10 Day Notice to End Tenancy for Unpaid Rent.

I heard that the tenants vacated the rental unit on April 30, 2012 or May 1, 2012. It was undisputed that the tenants have not yet provided the landlord with a forwarding address in writing and a move out inspection has not yet taken place.

It was also undisputed that the hydro and gas accounts were put in the tenant's name and there is a basement suite on the property which uses gas and electricity supplied by the tenant's accounts. Further, there is metal storage container used by the landlord that uses electricity from the tenant's account.

The tenants are seeking compensation from the landlord for three items. I have summarized the tenants' position with respect to these items and the landlord's response to each item.

Rent Increase

Tenants' submissions – The tenancy commenced November 26, 2011 and on that date a third party vacated the detached garage as the detached garage was to be provided to the tenants' for their use under the terms of tenancy. After an offer to purchase the landlord's property fell apart in January 2012 the landlord demanded the tenants pay an additional $50.00 in rent. The tenants are seeking return of the $50.00 overpayments made in February and March 2012.

Landlord's submissions – The tenants were permitted occupancy of the property in November 2011 pursuant to a verbal agreement that the tenants would purchase the property. The $1,350.00 paid for December 2011 and January 2012 was not rent. After the purchase agreement fell apart the parties agreed a tenancy would commence February 1, 2012 for $1,400.00 per month, including the detached garage. When the tenants moved onto the property the garage was being used by a third party who was paying the landlord $200.00 per month until the male tenant told the occupant to vacate the garage in January 2012.

Utilities

Tenants' submissions -- The tenants estimate that the hydro and gas costs attributable to the basement suite are $100.00 per month. For the months of December 2011 through April 2012 the tenants are seeking recover of $500.00 from the landlord.

The tenants estimate that the hydro costs attributable to the landlord's heated storage unit are $25.00 per month. The tenants are seeking to recover $125.00 from the landlord for the months of December 2011 through April 2012.

Landlord's submissions – The tenants agreed that they would be responsible for paying all of the utilities when the tenancy formed. The tenants have been compensated $150.00 per month starting February 2012 by way of use of the detached garage at a much reduced rate of $50.00 per month.

The tenants provided copies of gas and hydro bills and a spreadsheet showing their estimation of utilities consumed by the basement suite tenant, based on a 60/40 split.

Security deposit

Tenant's submissions – The tenants submitted that the landlord will not return their security deposit and the landlord did not prepare condition inspection reports.

Landlord's submissions – The tenants did not pay rent for April 2012 and the landlord has not yet determined the condition of the rental unit after the tenants vacated.

It was undisputed that as of the date of this hearing the parties have not conducted a move-out inspection and the tenants have not yet provided a forwarding address to the landlord in writing. At the end of the hearing the tenants provided the landlord with a telephone number at which the landlord can call them to make arrangements for a move-out inspection.

Documentation provided for this proceeding included: written submissions of both parties; copies of the gas and hydro bills; the tenants' spreadsheet showing calculations to apportion the utilities; the 10 Day Notice to End Tenancy for Unpaid Rent; and photographs of the storage unit and extension cord running between the storage container and the house.

Analysis

The law requires that agreements that deal with an interest in land, including tenancy agreements, are required to be in writing. The obligation to prepare a tenancy agreement is the burden of the landlord; however, should a landlord and tenant enter into an unwritten tenancy agreement the Act continues to apply. Verbal terms are enforceable, provided they do not violate the Act or Residential Tenancy Regulation.

The difficulty in enforcing verbal tenancy agreement terms arise when the parties are in dispute as to what was agreed upon verbally, often several months or years prior.

In this case the agreements between the parties, including a purported agreement that involved purchasing the property and a tenancy agreement were verbal. Accordingly, I provide the following findings and reasons with respect to each of the issues under dispute based on the balance of probabilities and which party bears the burden of proof.

Rent Increase

During the hearing the parties were in dispute as to when a tenancy agreement formed.

Despite the landlord's verbal submissions during the hearing that the tenants were given occupancy in November 2011 under an agreement that they would be purchasing the property and that a tenancy agreement did not form until January 2012 (to be effective February 1, 2012) I note that in the landlord's written submissions include the following statements:

- "the verbal agreement was ***rent*** of the upstairs, one room in the basement, and the attached garage for $1,350.00/mo., plus Tenant pay utilities for the whole building."

- "Dec & January OK – ***rent*** paid @ $1,350.00.

It is also important to note that, by definition, a tenancy agreement includes a license to occupy. Tenancy agreement is defined under the Act to mean

> *an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities,* ***and includes a licence to occupy a rental unit****;*
>
> [my emphasis added]

As provided in Residential Tenancy Policy Guideline 9: *Tenancy Agreements and Licenses to Occupy,* the definition of "tenancy agreement" in the Residential Tenancy Act includes a license to occupy. A license to occupy is described as a living arrangement that is not a tenancy. Under a license to occupy, a person, or "licensee", is given permission to use a site or property, but that permission may be revoked at any time.

Given the above described definition of a tenancy agreement, including a license to occupy, the absence of a written purchase agreement, and the landlord's written submissions which are consistent with the tenants' verbal submissions that ***rent*** was paid for December 2011 and January 2012, I accept the tenants' position that a tenancy agreement formed November 26, 2011.

Having found a tenancy formed November 26, 2011 at issue is whether the rent was legally increased or whether a new tenancy formed to reflect new terms, such as use of the detached garage.

Sections 40 through 43 of the Act provide for the timing and notice for rent increases as well as limitation on the amount the rent may be increased. In this case, the landlord did not issue a Notice of Rent Increase and the rent was not legally increased.

Alternatively, if a landlord and tenant were to enter into a new tenancy agreement and change the terms of the agreement the new agreed upon rent may be upheld. As a landlord is obligated under the Act to prepare and present written tenancy agreements, in the absence of a written tenancy agreement starting February 1, 2012 and given the disputed testimony concerning occupation of the detached garage I find I am unsatisfied that a new tenancy agreement formed for February 1, 2012.

In light of the above, I find the rent was not legally increased and there is insufficient evidence that a new tenancy agreement formed for February 1, 2012; therefore, the rent remains at $1,350.00 per month. Since the tenants paid two months at $1,400.00 I grant their request to recover $100.00 from the landlord.

Utilities

It was undisputed that the tenants were paying for all of the gas and electricity used at the property during the time they resided on the property. The landlord was of the position this was agreed upon and the tenants were of the position this was unfair and not something they were in agreement with.

Section 6 of the Act provides that terms of a tenancy agreement, even if the terms were agreed to, are not enforceable if the term is unconscionable. Unconscionable means the term is one-sided and grossly unfair to one party.

Residential Tenancy Policy Guideline 1: *Landlord & Tenant – Responsibility for Residential Premises* deals with shared utilities. It states, part:

SHARED UTILITY SERVICE

1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable[5] as defined in the Regulations.

2. If the tenancy agreement requires one of the tenants to have utilities (such as electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills.

Based upon section 6 of the Act, the definition of unconscionable, and policy guideline 1 I find an agreement that the tenants pay all of the utilities, even those consumed by others using the property, to be unconscionable. In keeping with policy guideline 1, I find a reasonable estimation of the utility costs attributable to the utilities consumed by another tenant and the landlord to be recoverable from the landlord.

The landlord submitted that the tenants did receive compensation equivalent to $150.00 per month for use of the detached garage for the months of February through April 2012. The landlord bears the burden to show the compensation given to the tenants to offset utilities paid by the tenants for other users of the utilities. However, I was only presented with disputed verbal testimony that the tenants were given use of the detached garage after their tenancy formed or that use of the detached garage was in recognition of the utilities payable by the tenants. Therefore, I find I am not satisfied that the tenants were given compensation for the utilities for which they are responsible for paying to the utility companies.

Upon review of the utility bills submitted as evidence and the tenants' spreadsheets I find their request to recover $625.00 from the landlord for the period of December 2011 through April 2012 to be reasonable and I award that amount to the tenants.

Security Deposit

As the tenancy had not ended when this application was made, the tenants had not provided the landlord with a forwarding address and a move-out inspection had not been conducted as at the date of the hearing, I find the tenants' request for return of the security deposit to be premature. The security deposit remains in trust, to be administered in accordance with the Act. The tenants' request for return of the security deposit is dismissed with leave to reapply.

Monetary Order

Given the relative success of the tenants' application, and considering they did not pay rent for April which was part of the reason they filed this application, the tenants have been awarded one-half of the filing fee, or $25.00.

In light of the above findings and awards, I provide the tenants with a Monetary Order calculated as follows:

Overpaid rent for February and March 2012	$ 100.00
Utilities recoverable from landlord	625.00
Filing fee (one-half)	25.00
Monetary Order	$ 750.00

The Monetary Order is enforced by serving it upon the landlord and filing it in Provincial Court (Small Claims) as necessary to enforce as an Order of the court.

Conclusion

The monthly rent is set at $1,350.00 per month. The tenants have been provided with a Monetary Order in the amount of $750.00 to serve upon the landlord. The tenants' request for return of the security deposit has been dismissed with leave to reapply.

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: May 10, 2012.

Residential Tenancy Branch