Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, FF
MNDC, MNSD, FF

Introduction

This hearing was convened by way of conference call concerning applications made by the landlord and by the tenants. The landlord has applied for a monetary order for unpaid rent or utilities and to recover the filing fee from the tenants for the cost of the application. The tenants have applied for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement; for a monetary order for return of all or part of the pet damage deposit or security deposit; and to recover the filing fee from the landlord for the cost of the application. The tenants' application specifies a claim for double the amount of the security deposit.

The hearing did not conclude on the first date scheduled; it was determined that the landlord had sent evidence to the tenants at an incorrect address, having inadvertently transposed the digits in the house number. The matter was adjourned by consent, and all named parties attended on the first day of the hearing, and the landlord and one of the tenants attended on the second day of the hearing. The parties gave affirmed testimony, and evidentiary material was exchanged by the parties and provided to the Residential Tenancy Branch prior to the re-commencement of the hearing. The parties were given the opportunity to cross examine each other on the evidence and testimony provided, all of which has been reviewed and is considered in this Decision.

No further issues with respect to service or delivery of documents or evidence were raised.

During the course of the hearing, the landlord applied to amend the Application for Dispute Resolution stating that the point of the landlord's application was to obtain an order to keep the security deposit but the landlord did not see a box on the application for that. The tenant opposed the application, and opposed an adjournment.

With respect to amendments to applications after a hearing has commenced, I refer to the Residential Tenancy Branch Rules of Procedure, which states as follows:

8.4 Scope of dispute resolution proceeding and decision

> The arbitrator must accept evidence only on the matters stated on the Application for Dispute Resolution unless, at the request of a party made at the start of the dispute resolution proceeding, the arbitrator permits an amendment to the application to include other related matters that may be the subject of an Application for Dispute Resolution between the parties.
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> In considering whether to permit an amendment to an application at the start of a dispute resolution proceeding to include other related matters, the arbitrator will consider whether the amendment would prejudice the other party, or result in a breach of the principles of natural justice and the arbitrator must:
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> > a) allow the other party the opportunity to make argument that the dispute resolution proceeding of the combined matters or of the additional matter or matters be adjourned; and
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> > b) rule whether to adjourn in accordance with Rule 6.4 [criteria for granting an adjournment] and give a reason for granting or refusing the adjournment. The Dispute Resolution Office may give reasons in accordance with Rule 6.7 [written reasons for an adjournment].

In a proceeding such as this, where a party has neglected to tick a box on an application but has mentioned it in the details section of the application, I take the position that the application has been made and that a party is not required to apply to amend the application. In this case, the landlord filed an application for dispute resolution on December 14, 2012 claiming an Order of Possession for breach of an agreement and a monetary order for unpaid rent. The landlord then filed an amended application for dispute resolution on December 19, 2012 claiming a monetary order for unpaid rent. The landlord amended the first application because the tenants had already vacated the rental unit and as such, an Order of Possession was not required. However, the landlord has already filed an amended application and has not mentioned the deposits at all in either of the applications either by ticking the appropriate box or by mentioning the request for such an order in the details section. I also consider that the tenants have applied for double recovery of the security deposit and pet damage deposit due to the landlord's failure to comply with the *Act* by failing to return the deposits in full to the tenants or applying for dispute resolution claiming against those deposits. In the circumstances, I find that the tenants would be prejudiced by a further amendment, and the landlord's application to amend the application again is hereby dismissed.

Issue(s) to be Decided

- Has the landlord established a monetary claim as against the tenants for unpaid rent or utilities?
- Have the tenants established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement?
- Have the tenants established a monetary claim as against the landlord for return of all or part or double the amount of the pet damage deposit or security deposit?

Background and Evidence

The landlord testified that this fixed term tenancy began on November 1, 2012 and was to expire on November 1, 2013, however the tenants moved out of the rental unit on or about November 28, 2012. Rent in the amount of $1,175.00 per month was payable in advance on the 1st day of each month. At the outset of the tenancy the landlord collected a security deposit in the amount of $575.00 and a pet damage deposit in the amount of $200.00, and both deposits are still held in trust by the landlord. A copy of the tenancy agreement was provided for this hearing. It confirms the fixed term, amount of rent, and the amount of the deposits as per the landlord's testimony, but also states that rent is $1,175.00 per day payable on the 1st day of each month. The agreement also contains an addendum, which states, in part, that no smoking is permitted in the rental unit or anywhere on the rental property.

The landlord further testified that on November 7, 2012 the landlord received a complaint of smoking on the rental premises. The landlord gave the tenants an opportunity to move out on November 14, 2012 but the tenants didn't agree. The tenants were given a notice to end tenancy for cause on November 21, 2012 for smoking on the rental premises, and on November 26, 2012 the tenants agreed to move out.

The rental unit was re-rented for December 1, 2012 by moving tenants in the lower level of the rental complex into the tenant's unit because the landlord thought it would be easier to re-rent the lower unit. The tenants that had been in the lower level continued to pay rent at the rate they were paying while in the lower level after they moved into the upper level, which was $925.00 per month. The lower level was then advertised at $950.00 per month on KIJIJI, a free on-line advertising website on December 1, 2012 but no evidence of such advertisements has been provided. The landlord negotiated a rental amount of $900.00 per month for the lower level commencing January 1, 2013. The upper unit was not advertised after the tenants had moved out.

The landlord applies for a monetary order for one month's rent in the amount of $1,175.00.

The tenant testified that on November 14, 2012 the tenants received an email from the landlord asking that they move out by November 30, 2012. The tenants looked for another place to live and then received the notice to end tenancy on November 23, 2012. On November 24, 2012 the tenants agreed to move out but couldn't agree prior to that because they hadn't found a place to move into, and 3 days notice was not enough time. The landlord had told the tenants that 6 days was not enough time to re-rent.

The parties completed a move-out condition inspection report on December 1, 2012 with no deductions noted on the report. A copy of the report was provided for this hearing, and it contains a forwarding address of the tenants and is dated December 1, 2012. The tenants received an email on December 10, 2012 from the landlord asking the tenants to sign off on the security deposit and pet damage deposit so the landlord could keep them without making an application for dispute resolution, but the tenants did not agree and did not provide written permission for the landlord to keep either deposit.

The tenant further testified that the tenants had found a place to live on November 24, 2012 expecting to receive back the deposits, but the landlord didn't return the deposits so the tenants lost that rental unit and had 2 weeks in December with no place to live.

The tenant denies smoking on the rental property.

The tenants apply for double recovery of both the pet damage deposit and security deposit.

Analysis

Firstly, with respect to the landlord's application for a monetary order for unpaid rent, I have reviewed the tenancy agreement and I accept, as a result of the testimony of both parties that the amount of rent payable was $1,175.00 per month, not $1,175.00 per day. I also find that the parties entered into a fixed term contract to expire on November 1, 2013, and the tenants moved out earlier after being served with a notice to end tenancy by the landlord. I refer to Residential Tenancy Policy Guideline 3 which states:

> "These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of

> the *Act* or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.
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> "If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice.
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> "The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.
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> "In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

Where tenants fail to remain renters after signing such an agreement, the tenants are generally liable for the rent until the rental unit is re-rented, and if re-rented at a lower amount, would be liable for the difference until the end of the fixed term. However, that is dependent on the landlord's attempts to mitigate the loss suffered as a result of that breach. In this case, the landlord issued a notice to end tenancy on November 21, 2012, and I have reviewed the notice which contains an expected date of vacancy of December 31, 2012. The tenants therefore were not required to move out of the rental unit until December 31, 2012, but the landlord had an obligation to advertise the rental unit at the same rent that was contracted with the tenants. The landlord did not do that, but moved other tenants into the rental unit at a lower amount of rent, and then advertised the lower level suite and was successful in obtaining a new tenant at a lower amount yet. The *Residential Tenancy Act* requires a party to do whatever is reasonable to mitigate, or reduce the amount of financial loss suffered as a result of the end of the tenancy. I find that the landlord has not proven mitigation with respect to subsequent months and the tenants cannot be held liable for the landlord's failure to mitigate. However, the tenants did not dispute the notice to end tenancy which, I find, ended the tenancy on December 31, 2012. The tenants did not pay rent for the month of December, and therefore, I find that the landlord is entitled to a monetary order in the amount of $1,175.00, but is not entitled to further rent payments.

With respect to the tenant's application for double recovery of the deposits, the *Act* states that a landlord must return the deposits in full or make an application for dispute resolution claiming against those deposits, within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenants' forwarding address in writing. In this case, I find that the tenancy ended on November 28, 2012 and the landlord received the tenants' forwarding address in writing on the move-out condition inspection report on December 1, 2012. The landlord filed the application for dispute resolution on December 14, 2012, which I find is within the 15 days provided by the *Act,* but did not apply to keep the deposits. Therefore, I find that the tenants are entitled to recovery of the $575.00 security deposit and $200.00 pet damage deposit, and double that amount is $1,550.00.

Since both parties have been partially successful with the applications, I decline to order that either party recover the filing fee for the cost of the applications.

The *Act* also permits me to set off amounts owing from monetary orders, and I find that the tenants are entitled to a monetary order for the difference in the amount of $375.00.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the tenants pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $375.00.

This order is final and binding on the parties and may be enforced.

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: April 22, 2013

Residential Tenancy Branch