Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MARLBOROUGH HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

CNR

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a Ten-Day Notice to End Tenancy for Unpaid Rent dated April 3, 2013 with effective of April 15, 2013. The tenant was also seeking an order that the tenant should have been permitted to assign or sublet the rental unit and that the landlord had unreasonably withheld permission.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Issue(s) to be Decided

Should the landlord's Ten-Day Notice to End Tenancy for Unpaid Rent be cancelled?

Has the landlord unreasonably withheld permission for the tenant to sublet or assign the fixed term tenancy?

Preliminary matter: Request by Applicant to Submit Additional Evidence

Rule 3.4 of the Residential Tenancy Rules of Procedure, requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

During the proceedings, the tenant testified that an evidence package had been submitted to the file and served on the landlord on May 3, 2013. This evidence was not found on file and the landlord denied ever receiving the evidence.

The tenant supplied the Canada Post tracking number and it was found that the mail had been received for mailing on May 10, 2013. Service by mail is deemed by the Residential Tenancy Rules of Procedure to be received 5 days after mailing.

The tenant requested an adjournment to permit the evidence to be considered. Rule 11.6 deals with the consideration of evidence not provided to the other party or the Residential Tenancy Branch in advance. This rule permits the Dispute Resolution Officer to adjourn a dispute resolution proceeding to receive evidence that a party states was submitted to the Residential Tenancy Branch but was not received by the Dispute Resolution Officer before the dispute resolution proceeding.

I found that there was insufficient support to prove that that the applicant did not have a fair opportunity to make evidentiary submissions. I found that delaying the hearing further, particularly for the purpose of allowing the applicant a second opportunity to submit evidence that could have been served on the other party and placed into evidence in advance of the hearing, would be prejudicial to the respondent.

Accordingly, I found that there was not adequate justification under the Act and Rules of Procedure to support imposing an adjournment on the other party. Therefore the tenant's request for an adjournment to receive additional supporting evidence was denied. The tenant was at liberty to provide verbal testimony on the evidentiary submissions.

Background and Evidence

The tenancy began as a fixed term on October 21, 2012 expiring on September 30, 2013 with rent of $1,099.00. A security deposit of $549.50 and pet damage deposit of $549.50 had been paid.

Both parties testified that the tenant terminated the tenancy before the fixed term expired and moved out on March 15, 2013. The tenant testified that they paid the rent for March in full, and on March 9, 2013 spoke to the landlord about their plans to try and find a replacement tenant to assign/sublet their rental unit for the duration of the fixed term. The tenant supplied the landlord with a written Notice to End Tenancy following that conversation. The tenant testified that they then placed advertisements and received numerous responses from potential tenants. The tenant testified that they gathered preliminary data from those interested in seeing the unit ,so that the landlord could later screen the applicants.

The tenant testified that on March 11, 2013, the tenant spoke to the landlord about their plan to show the rental unit to some of the 5 applicants who had expressed interest in the assigned tenancy. At that time, according to the tenant, the landlord was not

amenable to the tenant arranging their own assignee and the landlord was insistent that one of the landlord's agents be present for the showings.

The tenant made reference to an email communication from the landlord following this phone conversation. A copy of this email, dated March 11, 2013, was in evidence containing the following message:

> "*Just want to confirm a few things after our conversation tonight.*
>
> *It is not our practice for our tenant to rent out the unit themselves even if they want to break their leases. We do not let the tenant sublet there either…..You are not allowed to rent it yourself. Please take off your posting so it will not confuse people."*

The tenant testified that they were still hopeful of finding a renter to take over the lease as of April 1, 2013 or earlier and so they continued to refer interested parties, including all of each applicant's application data and references, to the landlord. The tenant stated that they did not receive any response from the landlord and could not reach her by telephone.

The tenant testified that the candidates they referred were good prospects and the landlord did not appear to be considering any of them, nor did they see signs that the landlord was actively marketing or showing the unit to find a renter to mitigate the potential loss for the April 1, 2013 rent.

The tenant's position is that the landlord had unreasonably denied the tenant their statutory right to sublet or assign their rental unit and had impeded their efforts to advertise on their own to find a sublet candidate to take over their lease before April 1, 2013. The tenant's position is that they should, therefore, not be held liable for the landlord's claim of loss of rent for the month of April 2013.

The tenant testified that the landlord had retained their security deposit and pet damage deposit without their authorization and failed to refund it or make an application claiming against it within 15 days, as required by the Act.

The landlord acknowledged that they did issue the 10-Day Notice to End Tenancy for Unpaid Rent claiming rental arrears for a period falling *after* the tenant had already terminated the tenancy and vacated. The landlord further acknowledged that they did not return the tenant's post-dated cheques at the end of the tenancy and even attempted to cash the tenant's April 1, 2013 post dated cheque, which pertained to a period that fell beyond the last day of the tenancy. The landlord also admitted that they failed to return the tenant's security and pet damage deposits, but applied these funds towards the landlord's loss of revenue incurred for the month of April 2013.

However, the landlord pointed out that, after the tenant's application was filed, the landlord has since made their own application seeking a monetary order for damages and loss, and this is application is scheduled to be heard in July 2012.

The landlord testified that the communication dated March 11, 2013, was not meant to circumvent the tenant's right to sublet their unit. According to the landlord, they merely wanted the authority to screen the applicants to ensure that they met the landlord's tenancy standards. The landlord felt that their agent should show the unit to prospective renters. The landlord testified that they did receive the candidate applications sent to them by the tenants and they were unable to find a suitable renter. The landlord testified that they did not succeed in re-renting the unit until May 2013.

Analysis

10-Day Notice to End Tenancy for Unpaid Rent

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act, the Regulation or the tenancy agreement. However, in this instance I find that the tenant terminated the tenancy agreement on March 15, 2013, albeit prior to the expiry date of the fixed term contract. Therefore, I find that he landlord issued the Ten Day Notice to End Tenancy for Unpaid Rent claiming rental arrears after the tenancy had already ended.

In regard to the landlord's action in retaining and attempting to cash the tenant's post-dated cheque for April 2013, after the tenancy had ended, I find that the Residential Regulation, in Paragraph 5(4) of the *Schedule*, states that a landlord is required to return all post-dated cheques to the tenant on the final day that the tenant is in possession of the rental unit or sent to the forwarding address left by the tenant. (my emphasis)

I find that a landlord is not permitted under the Act to retain and cash any post-dated cheques, once either party has terminated the agreement and the landlord did not act in compliance with the Act.

I find that the landlord cannot claim rental arrears after March 15, 2013 and that any claim relating to loss of rent or revenue, would have to be a claim in damages.

Although the landlord gave evidence and testimony with respect to their loss of rent for April 2013, ***I make no finding on the issue of damages or losses claimed by the landlord***, because the only issue before me is the tenant's application.

Given the above, I find that the Ten Day Notice to End Tenancy for Unpaid Rent must be cancelled because it was issued and served after the tenancy ended.

Refund Of Security Deposit And Pet Damage Deposit

I find that, regardless of the landlord's position with respect to their claims, section 38 of the Act states that the landlord can only retain a security deposit or pet damage deposit if the tenant agrees to this in writing at the end of the tenancy. If the permission is not in written form and signed by the tenant, then the landlord has no right to keep the deposits.

However, a landlord may keep a deposit to satisfy a liability or obligation of the tenant if, after the end of the tenancy, the landlord makes an application for dispute resolution and successfully obtains a monetary order to retain the amount from the security deposit and pet damage deposit to compensate the landlord for proven damages or losses caused by the tenant.

The landlord must either make the application, or refund the security deposit within 15 days after the tenancy had ended and they receive a written forwarding address.

In this instance I find that the landlord received the tenant's forwarding address on March 15, 2013 and was obligated to either refund the deposits or file an application for dispute resolution seeking to retain the deposits for monetary losses by the end of March 2013.I find that the landlord did not refund or make a claim against the deposits as of March 31, 2013.

Section 38(6) provides that if a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit, and must pay the tenant double the amount of the security deposit.

Accordingly, I find that the landlord must refund the tenant $2,198.00 representing double the security deposit and pet damage deposit.

Unreasonably Withholding Permission to Assign or Sublet

In regard to the tenant's allegation that the landlord had unreasonably withheld permission to sublet or assign their fixed term tenancy, I find that section 34 of the Act requires the tenant to request consent from the landlord to sublet or assign their tenancy. Unless the landlord consents in writing, a tenant is not allowed to assign a tenancy agreement or sublet a rental unit. I find that the tenant did make such a request and clearly presumed that the landlord would permit them to seek a sublet or assignment of the tenancy, as evidenced by their

action in advertising the unit and taking applications and attempts to get a decision on the candidates from the landlord.

The Act also states that, if a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required and also is not permitted to charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

An assignment is the act of transferring all or part of a tenant's interest in or rights under a lease or tenancy agreement to a third party, who becomes the tenant of the original landlord and takes on the obligations of the original tenant commencing at the time of the assignment. The assignee is not responsible for actions or failure of the assignor to act prior to the assignment. Unless the landlord agrees otherwise, the original tenant may retain some residual liability, in the event of a failure of the assignee to carry out the terms of the tenancy agreement or lease.

A sublease is a lease given by the tenant or lessee of residential premises to a third person (the sub-tenant or sub-lessee). A sublease can convey substantially the same interest in the land as is held by the original lessee, however such a sublease must be for a shorter period than the original lease in order that the original lessee can retain a reversionary interest in the property. The sub-tenant does not take on any rights or obligations of the original tenancy agreement that are not contained in the sub-agreement, and the original lessee remains the tenant of the original lessor, and is the landlord of the sub-tenant.

I find that, where an individual agrees to sublet a tenancy for the full period of the tenancy, and does not reserve the last day or some period of time at the end of the sublease, the agreement amounts in law to, and will be treated as, an assignment of the tenancy.

According to the Residential Tenancy Guidelines, it is not reasonable for a landlord to withhold consent and to require a new tenancy agreement with an assignee. While it may be reasonable for a landlord to withhold consent if reference or credit checks indicate that a prospective tenant is unlikely to adhere to the terms of the tenancy agreement, a landlord who arbitrarily or unreasonably withholds consent to assign or sublet the tenant's interest in a tenancy agreement, is acting contrary to the provisions of the Legislation. In such cases, the tenant may apply to an arbitrator for an order that the tenancy agreement is assigned or sublet. The arbitrator would consider whether the landlord has properly responded to the request, and whether the reasons given for refusing the request were reasonable.

In this instance, I find that the tenant was not provided with an opportunity to present possible assignee's for approval. In fact, I find that the landlord arbitrarily denied the tenant permission to sublet or assign the remainder of their tenancy as illustrated in the landlord's communication dated March 11, 2013. I further find that there were not sufficient reasons provided for the refusal to be considered reasonable.

In addition to the landlord's apparent lack of support and cooperation with the tenant's efforts to sublet or assign the unit, I find that the landlord did not sufficiently prove that they attempted to find a sublet or assigned tenancy on behalf of the tenant. Instead, it is apparent that the landlord focused on establishing a new fixed-term tenancy which they successfully obtained in May 2013.

However, notwithstanding the findings above, I make no findings with respect to any claim by the landlord for loss of revenue relating to April's rent, as this is not an issue before me and I note that this matter is scheduled to be heard in dealing with the *landlord's application* on July 24, 2013.

Based on the evidence, I find that the Ten Day Notice to End Tenancy for Unpaid Rent dated April 3, 2013 must be cancelled and I order that it is of no force nor effect.

I further grant the tenant a monetary order for $2,248.00 comprised of double the $549.50 security deposit, double the $549.5 pet damage deposit and the $50.00 cost of the application. This monetary order must be served on the landlord and may be enforced through Small claims Court if unpaid.

Finally, I find that the landlord did unreasonably deny the tenants their statutory right to not be unreasonably denied permission to assign the rental unit and find as a fact that this was in violation of the Act.

No findings are made with respect to any existing or potential monetary claims put forth by the landlord in their evidence or during their testimony disputing the tenant's application.

Conclusion

The tenant is successful in the application to have the Ten Day Notice to End Tenancy cancelled, in obtaining a monetary order for double their security and pet damage

deposit and in establishing that the landlord violated the tenant's right not to be unreasonably denied permission to assign their fixed term tenancy.

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 13, 2013

Residential Tenancy Branch