Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MND, MNR, MNSD, MNDC, FF
Tenants: MNDC

Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking monetary orders.

The hearing was conducted via teleconference and was attended by the landlord and his assistant; the tenants; their legal counsel and witnesses.

This hearing originally convened on November 21, 2012 and was adjourned at the request of both parties. The hearing was reconvened on March 22, 2013 and due to time constraints the hearing was adjourned until April 26, 2013.

In addition at the original hearing it was agreed by all parties that the landlord's two Applications would be joined and heard together when the hearing reconvened.

In between the hearings of March 22, 2013 and April 26, 2013 the landlord submitted additional evidence and a Monetary Worksheet that substantially increased the value of his total claim from $7,000.00 to $14,648.20. I advised the landlord at the start of the April 26, 2013 that I would not be considering this additional evidence.

As part of the revised total amount of claim arises from the landlord's actual costs versus what he had originally claimed I will consider only the revised amounts in this decision with the exception of the landlord's submission of $4,000.00 for legal fees as this was not a part of either of his original Applications.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for lost revenue; for compensation for damage to the rental unit; for all or part of the security deposit and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 38, 45, 67, and 72 of the *Residential Tenancy Act (Act).*

It must also be decided if the tenants are entitled to a monetary order for compensation for damage or loss and for return of double the amount of the security deposit, pursuant to Sections 38, 45, 67, and 72 of the *Act.*

Background and Evidence

The landlord provided a copy of a tenancy agreement signed by the parties on April 23, 2011 for a 1 year fixed term tenancy beginning on May 1, 2011 for the monthly rent of $1,500.00 due on the 1st of each month with a security deposit of $750.00 paid. The agreement also stipulated that the tenants must vacate the rental unit at the end of the fixed term tenancy.

The landlord also provided a copy of a tenancy agreement signed by the parties on April 22, 2012 for a 1 year fixed term tenancy beginning on May 1, 2012 for the monthly rent of $1,500.00 due on the 1st of each month.

The landlord submits that when they negotiated the new tenancy agreement the tenants had originally sought to have a month to month tenancy but that they did ultimately agree to the additional 1 year fixed term.

The landlord submits that the female tenant contacted him on September 1, 2012 to ask for the landlord to not deposit the rent cheque for September 2012 and they would give him cash the next day. The landlord submits that the next day he received $500.00 and the male tenant told him they would give him the rest the next day, but that he never heard from the tenants over the next couple of days until the landlord rang the doorbell at the rental unit and the male tenant answered.

The landlord submits the tenant opened the door and told him they would not be paying the rent because the house had black mould. The landlord submits that he suggested they would clean it up but the tenant demanded it be professionally cleaned. The landlord submits he agreed on the provision the tenants pay the rest of September 2012 rent.

The landlord submits the male tenant insisted the landlord take down the wall and put the tenants up in a hotel until everything was dealt with and the female tenant asked the landlord to pick up the balance of rent the next morning before she went to work. The landlord states he went to the unit the next day and no one would answer the door so he sat in the parking lot, until the police came and told him to deal with the situation through the Residential Tenancy Branch.

The tenants submit that in early September 2012 they discovered an extensive mould problem in the rental unit, following several months of advising the landlord about humid conditions and leaking windows and when they asked the landlord to clean it up she said he didn't have the money to do so. The tenants have provided no evidence that they had reported any problems to the landlord during either of the two fixed term tenancies.

The tenants submit that unbeknownst to them a co-worker of the female tenant had looked at the rental unit at the same time that the tenants were looking and she had rejected the property as a place she would consider renting because there was an extensive mould problem. The tenant had the co-worker attend the hearing and confirm that this was why she turned down the rental unit. The landlord could not recall this witness ever viewing the rental unit or turning it down for the reason of mould.

The tenants submit that the landlord forced his way into the rental unit and that he was yelling and aggressive. The tenants submit that the landlord has exhibited this behaviour before at her place of employment, when the landlord came to her worksite to collect overdue rent. The tenants also indicate the landlord then arrived the next day at the rental unit at 6:00 a.m. and sat in his truck in the driveway until the tenants called police to ask him to leave.

The tenants' witness testified that he had witnessed the landlord approach the female tenant at her workplace and that he was loud and aggressive in front of the residents in the facility and her co-workers. He further testified that he had to actually intervene and that the landlord would not leave until well after he was warned that the police would be called if he didn't leave.

The tenants and their final witness testified that during the landlord's visit to the rental property at the beginning of September 2012 the landlord was aggressive towards the female tenant and scared her children because of his behaviour.

The tenants submit that as a result the landlord had breached two material terms of their tenancy agreement, specifically: the implied covenant of quiet enjoyment through his harassing behaviour at the female tenant's workplace and the rental unit and his obligation to maintain the residential property in a state of repair that complies with the health, safety and housing standards required by law because of the mould issue.

As a result the tenants submit they were entitled to end the tenancy under Section 45(3) and therefore not liable for the payment of rent sought by the landlord in his original claim for September and October 2012. Two copies of a handwritten letter from the tenants provide their reasons for ending the tenancy.

Both letters are dated September 10, 2012 and start by stating: "This letter is to let you know we are ending our tenancy." The letters go on to state the reasons why the tenants are ending the tenancy on September 17, 2013 and include: unsafe living conditions (black mould); main bathroom leaks; "not meeting up to your end of the lease"; harassment and defamation of character; respiratory problems due to black mould; excessively noisy neighbours; damage to furniture and toys because of black mould and flooding; the landlord's insistence on fixing things himself and not using professionals; window ledges dripping water; ants and silverfish.

The tenants also seek compensation for moving expenses in the amount of $50.00 and furniture and clothing damaged by mould in the amount of $300.00. The tenants provided no evidence of damage to their furniture or clothing and did not provide receipts for any replacement furniture or clothing. The tenants also did not provide any receipts for moving costs.

The tenants seek aggravated damages in the amount of $500.00 for the harassing behaviour and $127.50 for NSF charges because the landlord attempted to cash two of the cheques he had in his possession that the tenants had put stop payments on and a subsequent loan payment that was returned insufficient funds as a result of the landlord's attempts to cash these cheques.

The tenants submitted a detailed bank statement that confirmed on November 5, 2012 the tenant's car payment was returned as NSF and a charge of $42.50; on November 6, 2012 a cheque in the amount of $1,500.00 was returned as NSF and a charge of $42.50; and on November 7, 2012 a cheque in the amount of $1,500.00 was returned as NSF and a charge of $42.50. There is no indication in the statement as to who the payee was for the $1,500.00 cheques.

The tenants submit they provided their forwarding address to the landlord via registered mail on September 27, 2012 and on October 26, 2012 with their forwarding address. The tenants provided receipts for these registered mail charges but did not provide any tracking information. The tenants seek return of double the amount of the security deposit.

During the hearing I asked both parties if I could check the tracking information online and both parties agreed. The tracking information for the registered mail sent on September 27, 2012 indicates that on September 28, 2012 the item was "being returned to sender went out for delivery"; "return to sender attempted. Card left indicating where item can be picked up". The tracking information goes on to say that the item was available for pick up and that it was eventually, by October 17, 2012, returned to the sender.

The tracking information for registered mail sent on October 26, 2012 shows the landlord received registered mail from the tenants on November 9, 2012.

The landlord seeks compensation for the payment of rent for the month of September 2012 and lost revenue for the months of October 2012 to February 2013 totalling $8,500.00. The landlord submits that as a result of the condition the rental unit was in when the tenants vacated he could not re-rent the unit until March 1, 2013.

The landlord also seeks compensation for cleaning ($548.80); carpet cleaning ($429.52); carpet replacement ($616.60); window blind replacement ($167.78); landfill fees ($246.40); and replacement locks, light bulbs, and fire alarm ($140.12).

The landlord has provided a copy of a move in Condition Inspection Report completed on May 1, 2011 at the start of the original fixed term tenancy, however the Report is not signed by either the tenants or the landlord. The landlord has provided photographs of the condition of the rental unit at the end of the tenancy. The tenants have provided photographs that they state they took at the start of the tenancy.

The landlord has submitted receipts for all portions of his claim for costs for repairs and cleaning. The landlord submits that he was out of the country between September 10, 2013 and October 22, 2013 and that he had provided contact information for all of his tenants for emergencies. The landlord submits that while the contact did not have authourity to make decisions in the landlord's absence she could contact the landlord directly and he would have provided direction. The tenants submit they never received this contact information.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 45(1) of the *Act* stipulates that a tenant may end a tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice and is the day before the day in the month that rent is payable under the tenancy agreement.

Section 45(3) states that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

The tenants submit that the breach of the material term is twofold: first the right to quiet enjoyment when the landlord harassed the tenants for the payment of rent; and secondly the landlord's failure to maintain the property.

In the case of the tenants assertion that the landlord breached the tenant's right to quiet enjoyment while I find the landlord's behaviour was unacceptable at the female tenant's place of employment and in the rental unit I also find that this behaviour was in relation to the tenant's breach of the most fundamental of all material terms in a tenancy agreement – the payment of rent.

As such, the tenants had just as much ability to ensure the landlord would not have any reason to be upset with them by simply paying their rent when it was due in accordance with Section 26 of the *Act*, which requires a tenant pay rent when it is due regardless of any disputes with the landlord.

Secondly, I find that the tenants had failed to identify any problems with the rental unit at all until their altercation with the landlord in early September 2012 when they only provided the landlord with 1/3 of the month's rent. In fact, if the rental unit was as bad as the tenants assert it was throughout the tenancy, I find it incredulous that they would enter into a new fixed term tenancy agreement only 5 months prior to the letters intending to end the tenancy.

Further, I note that Section 45(3) requires the tenants to provide the landlord with a written notice of the breaches; give him time to correct the problems and if he fails to correct them they can then vacate the property. The September 10, 2013 letter states the tenants are ending the tenancy period – and at least one of the letters states they will end the tenancy on September 17, 2013. I find this length of time is completely unreasonable for the landlord to complete any investigation let alone repairs for mould.

Finally, I find the tenants have failed to provide any evidence as to the type of mould that may have existed or whether or not it was harmful; no evidence in regards to their claims that members of their family were suffering from any medical conditions related to the mould that may have been present in the rental unit.

For these reasons, I find the tenants have not established that they had reason to end the tenancy under Section 45(3) or that they provided the landlord reasonable time to respond to their written complaints of breach. Therefore, I find the tenants are responsible for the payment of rent for the duration of the fixed term, subject to the landlord's obligations to mitigate his losses.

While I accept that the landlord was out of the country until October 22, 2013, I find, from his own submission, that he had an agent available locally who could have taken responsibility to deal with the problems of this tenancy while he was away. I find that since the landlord submitted an Application for Dispute Resolution related to the tenant's non-payment of rent before he left the country, he was sufficiently aware of the potential that the tenants might vacate the property and his agent should have been given the authourity to check on the rental and find out if the tenants had vacated.

In addition, from the landlord's testimony on November 21, 2012 he indicated that he needed more time to prepare for his case because he had not done any of the work yet and his receipts for all work are dated no earlier than December 2012, I find the landlord took absolutely no steps to prepare or advertise the rental unit for new tenants for at least 2 months. By doing so, I find the landlord failed to take steps to mitigate any losses and dismiss his claim for any lost rent from November 1, 2012 onward.

However, as the tenants were still in the rental unit for the majority of the month of September 2012; they have not established sufficient reason to end the tenancy in accordance with Section 45(3); and, from the Canada Post tracking information, the registered mail they sent to the landlord on September 27, 2012 was immediately redirected to the tenants and therefore never received by the landlord, I find the landlord had no requirement to mitigate losses for September and October 2012. I grant the landlord $2,500.00 for the rent for this period.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

As noted above, I find the registered mail dated September 27, 2012 was undeliverable and as such the earliest the tenants provided the landlord with their forwarding address was in the registered mail of October 26, 2012 for which the landlord received this on November 9, 2012 (according to Canada Post tracking information).

As such, the landlord had 15 days from November 9, 2012 to file his Application to claim against the deposit. I note the landlord filed his Application on November 15, 2012 and I find the landlord has complied with Section 38(1) and is not required to pay the tenant's double the security deposit.

As to the tenant's claim for moving costs and replacement costs for clothing and furniture damaged by mould, the tenants have provided no evidence that they incurred these costs; that there was a valid reason for ending the tenancy that would make the landlord responsible for moving costs; or that any furniture or clothing was damaged sufficiently to require replacement. I therefore dismiss this portion of the tenant's Application.

As noted above, I accept the landlord's behaviour in seeking the payment of late rent was inappropriate and as such, I find the tenants are entitled to some compensation for aggravated damages. However, as I also noted the landlord would not have had to try and track down the tenant for rent payments if the tenant's had not breached the tenancy agreement and the *Act* by failing to pay rent in the first place. I grant the tenants $50.00.

In regard to the tenant's claims for NSF charges, I note the tenant's state in their submission that they incurred these costs because the landlord attempted to cash post dated cheques that they had put stop payments on. However, if the tenants had put stop payments on these cheques they provided no evidence that they contacted their financial institution to have the NSF charges reversed, mitigating their losses.

In addition, the tenants submit that a loan payment was charged back for insufficient funds as a result of the landlord's attempts to cash the post dated cheques, however,

from their documentary evidence the loan payment was noted as insufficient funds the day before the post dated cheque went through the tenant's account. I find the charge back of the loan payment was a result of the tenant's inability to have sufficient funds in their account and not the landlord's attempts to cash post dated cheques. I dismiss this portion of the tenant's claim.

Section 37 of the *Act* requires a tenant who is vacating a rental unit to leave the unit reasonably clean, and undamaged except for reasonable wear and tear, and give the landlord all keys or other means of access that are in the possession and control of the tenant and that allow access to and within the residential property.

As the landlord's only record of the condition of the rental unit prior to the start of the tenancy is the unsigned Condition Inspection Report of May 1, 2011 and the tenants have provided photographic evidence that they state is from the start of the tenancy, I find the landlord is unable to establish the condition of the rental unit at the start of the tenancy that would warrant holding the tenants responsible for the replacement of carpeting; blinds; light bulbs; or the fire alarm and I dismiss these portions of the landlord's claim.

In relation to cleaning, I find that the landlord is not required to provide evidence of the cleanliness of the rental unit at the start of a tenancy but rather it is the obligation of the tenants to leave the residential property reasonably clean. From the photographic evidence provided by the landlord I find the tenants failed to meet this obligation and are responsible for the following cleaning charges: carpet cleaning ($429.53); landfill fees ($246.40); cleaning ($548.80).

I also accept the tenants failed to leave all keys to the rental unit and I find the landlord is entitled to claim for the replacement of locks. From the receipts submitted I find the landlord is entitled to $77.95.

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **$3,852.68** comprised of $2,500.00 rent owed; $1,224.73 cleaning costs; $77.95 lock replacement and $50.00 of the $100.00 fees paid by the landlord for this application, as he was only partially successful.

As the tenants were mostly unsuccessful in their claim I dismiss their claim to recover the filing fee for their Application.

I order the landlord may deduct the security deposit and interest held in the amount of $750.00 and the $50.00 awarded to the tenants in this decision in partial satisfaction of this claim. I grant a monetary order in the amount of **$3,052.68**.

This order must be served on the tenants. If the tenants fail to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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