Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction
This hearing dealt with two related applications. The tenant has applied for a monetary order and return of the security deposit. The landlord has applied for a monetary order. Both parties appeared and had an opportunity to be heard.

At the beginning of the hearing neither party was aware of the other's application nor had they a copy of the other's party application for dispute resolution and evidence in their possession.

The tenant said she served her application by registered mail. The landlord acknowledged receiving a notice that there was registered mail for pick-up but he was in the hospital at the time. By the time he was able to get to the post office, the item had been returned.

The landlord said he served his application for dispute resolution on the tenant by registered mail at the address provided by the tenant. The tenant adamantly denied receiving anything until all parties to the hearing looked up the Canada Post tracking number on the Canada Post web site at which point the tenant acknowledged that the signature shown was her father's. The tenant also acknowledged being advised by her parents that some documents were subsequently delivered to their home by the landlord.

As both applications had been served in accordance with the *Residential Tenancy Act*, the hearing proceeded on both applications. As the parties and circumstances are the same on both applications, one decision will be rendered.

Issue(s) to be Decided
Is either party entitled to a monetary order and, if so, in what amount?

Background and Evidence

On March 28, 2013, after the tenant viewed the rental unit, the parties signed a tenancy agreement. The agreement was for a six-month fixed term tenancy commencing April 1, and continuing after the expiry of the term as a month-to-month tenancy. The agreement provided for payment of a monthly rent of $1795.00 and a monthly parking fee of $55.00. The rent was due on the first day of the month. The first three months of parking was to be paid in advance. The tenant was also responsible for all utilities. The agreement specified that the lease includes one parking space and locker storage. The parties added one term to the pre-typed agreement: “Agreement that suite will be fully cleaned up to Landlords and Tenants satisfaction (e.g., full floor cleaning of solarium).”

When the agreement was signed the tenant paid the landlord $900.00. The landlord testified that this was not a security deposit, which was specified in the tenancy agreement, but a separate non-refundable deposit for holding the unit because so many people were interested in it. There was a separate agreement for this deposit.

The unit is a two bedroom/ two bathroom unit; approximately 800 square feet in size. The unit had carpet in the living room, two bedrooms and hallway. The kitchen, bathrooms and solarium had tile flooring.

The landlord testified that when he showed the unit to the tenant she wanted the carpet replaced with hardwood. He also testified that while the carpets were dirty, they were only two years old and only required cleaning, but he agreed to replace them. He told the tenant he could get some one in and she said it would be okay if it took a few days.

The tenant testified that the Craig’s List ad said the unit had hardwood floors. When she looked at the unit the previous tenants were still there. The unit was a mess and the carpets were in terrible condition. The landlord told her he had arranged for someone to come in on March 31 (Easter Sunday) and promised the unit would be ready for 12:30 on April 1.

The landlord testified that the ad merely said hardwood could be installed.

The agreement to replace the carpets was not reduced to writing and the tenancy agreement continued to read: “The lease is for the premises as is condition at the time of viewing upon rental”.

The landlord testified that he was able to get a contactor to start work on April 1 .He spoke to the tenant on the telephone on April 1 and 2. He told her that the unit would be available on April 3 and agreed to a small rent reduction. He also told her that she could start moving her goods into the unit, where they would move her furniture around as they worked, or into the storage locker. He testified that that locker was floor to ceiling in height and was about 400 square feet.

The tenant testified that she called the landlord on April 1 around noon. He told her the place was not ready but she could start moving her stuff in. She told him she was not prepared to move into a construction zone. She testified that the storage locker was never mentioned.

The tenant testified that in one of their conversations she suggested to the landlord that the start date of the tenancy be changed to April 15 but the landlord refused. The landlord testified that this conversation never took place.

The tenant testified that on April 2 at 3:24 pm she texted the landlord saying she wanted to see the place and that if he did not answer she would assume the place was not ready. The landlord testified that when he received this message he was in a meeting. He left the meeting and rushed to the rental unit, without responding to the tenant. When he got to the unit he waited for the tenant. He also tried, unsuccessfully, to contact her by cell phone.

The tenant testified that when she did not get a response from the landlord she did not go to the rental unit. Instead she saw a lawyer at 5:00 pm. At 6:42 pm she filed her application on-line with the Residential Tenancy Branch.

The tenant testified that at 9:00 am on April 3 she sent the landlord a text advising him that she had filed for dispute resolution and an hour later she sent him a text giving him her parents' address as her contact address and asking that the deposit be sent to her there. She testified that over the next few days she sent several texts to the landlord asking for his mailing address. When he did give her an address she sent the application for dispute resolution to him by registered mail.

The landlord testified that he and the tenant had several telephone conversations on April 3 and 4 wherein he told her that the unit looked great and she should come and have a look at it.

Although the parties gave conflicting evidence about their communications between April 1 and April 4 (not all details of their evidence on this is included in this decision)

they do agree that the tenant never came to the unit after the new floors were installed, never picked up the key, and never paid any more money to the landlord.

The tenant testified that she was able to extend her existing tenancy to April 15 and on April 11 she rented a different place.

The landlord made prompt efforts to re-rent the unit, including contacting people who had initially inquired about it. He was able to re-rent the unit as of May 15 for the same rent. However, on this agreement the rent included the parking spot.

Analysis

Section 16 of the *Residential Tenancy Act* states that the rights and obligations of a landlord and a tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit. Once the tenant signed the tenancy agreement she could only end the tenancy, and her obligations under the tenancy agreement, in compliance with the *Act*.

The effect of section 45(2) of the *Act* is that a tenant may not end a fixed term tenancy before the end of the term. The only exception is section 45(3) which does allow a tenant to end a tenancy before the end of the fixed term if the 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 landlord testified that the work was completed on the evening of April 2 and the unit was ready to move into April 3. The invoice filed by the landlord from the flooring contractor refers to work done on Monday April 1 and Tuesday, April 2 .The tenant never looked at the unit and cannot say whether it was or not.

Even if the installation of the new flooring was a material term of the tenancy agreement and she had given proper written notice of the breach – points on which no finding of fact is made – the breach was corrected within a few days of the start of the tenancy. The tenant had no grounds for ending the tenancy at this time.

As explained in *Residential Tenancy Policy Guideline 3: Claims for Rent and Damages* for *Loss of Rent*, a tenant is responsible for the rent until the end of the fixed term or until a tenant is found for the rental unit, whichever first occurs. The landlord has a legal responsibility to take all reasonable measures to mitigate the loss, usually by advertising as quickly and widely as possible and by asking for a reasonable rent. Also as explained in the *Guideline*, if the landlord re-rents the unit at a lower rental, the tenant is responsible for the difference for the balance of the fixed term. I find that the tenant is

responsible for the rent from April 1 to May 14, a total of $2782.50. In addition, the tenant is responsible for the $55.00 monthly parking fee which the landlord was not able to collect from the next tenant, a total of $330.00 ($55.00 X 6 months).

Although the tenant was not legally entitled to end the tenancy she was entitled to compensation for the days that the unit was not ready. Section 65(1) allow an arbitrator to make an order that past or future rent be reduced by an amount equivalent to a reduction in the value of a tenancy agreement. According to the landlord, the work was completed on the evening of April 2. Given the short notice, the tenant may not have been able to arrange to start her move for another day or two. Accordingly, I award the tenant compensation in the amount of $240.00 for April 1, 2, 3, and 4; calculated as $60.00 per day for four days.

The landlord claimed compensation for the cost of removing the carpet. Even if the tenant asked him to change the flooring – another point on which no finding of fact is made – he did not have to agree to do so. He could have decided to just clean the existing carpet and keep looking for another tenant. He chose to replace the carpet. The landlord also argued that replacing the carpet with hardwood reduced the number of people willing to rent this place. There is no evidence in support of that statement. Nothing will be allowed for the cost of replacing the flooring.

The landlord argued that he did not collect a security deposit but a separate non-refundable deposit to hold the unit. The applicable sections of *the Residential Tenancy Act* are:

- Section 2 – “Security deposit” means money paid, or value or a right given, by or on behalf of a tenant to landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property.
- Section 15 – A landlord must not charge a person for accepting an application for a tenancy, processing the application, investigating the applicant’s suitability as a tenant, or accepting the person as a tenant.
- Section 19(1) – A landlord must not require or accept either a security deposit or pet damage deposit that is greater than the equivalent of one half of one month’s rent.
- Section 20 (b) – A landlord must not require or accept more than one security deposit in respect of a tenancy agreement.
- Section 20(2e) – A landlord must not require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit, or the pet damage deposit at the end of the tenancy agreement.

If the payment made by the tenant was not a payment made “to be held as security for any liability or obligation of the tenant respecting the residential property”, which brings it within the definition of a security deposit, it was a fee for “for accepting an application for a tenancy, processing the application, investigating the applicant’s suitability as a tenant, or accepting the person as a tenant”, which is illegal and should never have been collected.

I find that the payment made by the tenant to the landlord of $900.00 was a security deposit. Section 72(2) provides that if an arbitrator orders a tenant to pay any amount to a landlord the amount may be deducted from any security deposit or pet damage deposit due to the tenant. Accordingly, I order that the security deposit paid by the tenant may be retained by the landlord in partial satisfaction of his claim.

Finally, as each party was only partially successful on their respective applications, no order with respect to the filing fee paid by each will be made.

Conclusion

I find that the landlord has established a total monetary claim of $3112.50. I order that the landlord retain the deposit of $900.00 in partial satisfaction of the claim and I grand the landlord an order under section 67 for the balance of $$2212.50. If necessary, this order may be filed in the Small Claims Court and 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: July 15, 2013

Residential Tenancy Branch