Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MNDC MNSD MNR FF

Introduction

This hearing was convened in response to an un-amended application by the landlord filed May 12, 2014 under *the Residential Tenancy Act* (the Act) for loss under the tenancy agreement or the Act in the amount of $5815.50 inclusive of the filing fee, and to retain the security deposit in partial satisfaction of the claim.

Both parties participated in the hearing with their submissions, document evidence and testimony during the hearing. The parties were also provided with opportunity to mutually resolve and settle this dispute and/or all matters of the tenancy to their finality. The tenant acknowledged receiving the evidence of the landlord. The tenant acknowledged they did not submit evidence to this hearing but that they relied on information provided into evidence by the landlord: the tenant's Notice of Claim in Provincial Court – Small Claims. Regardless, the landlord and tenant were given opportunity to orally provide their respective evidence and were given opportunity to respond to it. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Preliminary matters

At the outset of the hearing the tenant orally requested an adjournment for the reasons they were attending the conference call hearing during a business trip, and because matters before this hearing were also placed by them within an action before the Small Claims Court. They argued that an adjournment would not prejudice either party. The landlord opposed an adjournment as they would incur additional child care costs if adjourned and would inconvenience them. I found I did not receive information that an adjournment would contribute to the resolution of the matter or that an adjournment was required to provide a fair opportunity for a party to be heard; and, that both parties had

sufficient notice of the proceedings. I did not find sufficient reason to adjourn this matter. The tenant's request was denied.

However, it is relevant to this request that Section 58 of the Act, in relevant part, must be noted by both parties:

Determining disputes

58 (1) Except as restricted under this Act, a person may make an application to the director for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:

(a) rights, obligations and prohibitions under this Act;

(b) rights and obligations under the terms of a tenancy agreement that

(i) are required or prohibited under this Act, or

(ii) relate to

(A) the tenant's use, occupation or maintenance of the rental unit, or

(B) the use of common areas or services or facilities.

(2) Except as provided in subsection (4), if the director receives an application under subsection (1), the director must determine the dispute unless

(a) the claim is for an amount that is more than the monetary limit for claims under the *Small Claims Act*,

(b) the application was not made within the applicable period specified under this Act, or

(c) the dispute is linked substantially to a matter that is before the *Supreme Court*.

(3) Except as provided in subsection (4), a court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted for determination by the director under this Act.

Issue(s) to be Decided

Is the landlord entitled to the monetary amounts claimed?

Background and Evidence

The undisputed *relevant* evidence in this matter is as follows. The parties entered into a tenancy agreement February 19, 2014. The tenancy agreement states that the tenancy would start March 31, 2014, although the tenant claims they moved into the unit April

02, 2014. The agreement was a *fixed term tenancy agreement* for 6 months - ending 5 months early when the tenant vacated the following month on April 30, 2014. Under the agreement the monthly rent of $3500.00 was payable in advance. At the outset of the tenancy, the landlord collected a security deposit and pet damage deposit each in the respective amount of $1750.00, of which the landlord retains solely the security deposit of $1750.00 in trust. The landlord testified that at the start of the tenancy they authorized the outgoing tenant of the unit as their agents to conduct a mutual condition inspection of the unit with the respondent which, according to both parties of this matter, was uneventful and the unit was accepted as satisfactory. Days into the tenancy, in the early hours of April 04, 2014, the tenant sent the landlord an e-mail informing the landlord they were ending the tenancy because of what the tenant describes as a, "fundamental breach of contract", and as a result were vacating. The tenant testified that by the same e-mail they informed the landlord they had discovered a deficiency in the heating system of the unit whereby the heat remained ON in 3/4 of the unit if not manually adjusted, resulting in inconvenience, discomfort and poor sleep for the tenant. The landlord responded offering a temporary solution: to shut down and repair the heating system and meanwhile augment any need for heat by way of space heaters for the short term until repairs completed. The landlord argued the tenant knew they would, "get on it" quickly, while the tenant argued they did not know the landlord well enough to know if they would attend to the problem sooner than later as the tenant was of the mind that the problem had been ongoing. Despite the reason, timing and lack of a legal Notice to End the tenancy, the landlord acted on the tenant's e-mail notification and soon placed on-line advertisements to re-rent the unit for the same amount, ultimately without success at the same amount. The parties agree that the tenant also aided in attempts to re-rent the unit and co-operated with the landlord's efforts. Concurrently, the landlord acted to arrange for the required repairs – which ultimately were completed before the tenant vacated – albeit the repairs were over a period at some inconvenience to the tenant during the repairs. The landlord testified that had the tenant remained in the unit they would have willingly accommodated an abatement of rent in compensation for the inconvenience associated with the heating system repairs; however, the landlord thinks the tenant had a different agenda and insisted on vacating.

Without early success and confidence of re-renting the unit for May 01, 2014, the landlord contracted with a service to re-lease the unit and also reduced the rent with a view to quickly stem losses, resulting in an increase of applicants for the unit. Regardless, ultimately the landlord accepted a new tenant through the leasing service at $3140.00 per month starting May 01, 2014. The tenant argued that the landlord did

not need the leasing service to re-rent the unit as the reduced rent created a sufficient pool of applicants. The tenant claims that the landlord's cost of over $2000.00 for the leasing service was not necessary and it should not be passed on to them.

The tenant relies on **Section 32 of the Act – Landlord and Tenant obligations to repair and maintain.** They argue that the landlord knew the rental unit had a problem with the heating system but regardless rented the unit out. The landlord argued that they were alerted to a similar problem with the heating system 2 tenancies before: they attended to the problem and received no complaint of it from a tenant since.

In addition, the landlord claims $52.50 to disable a 'cellular phone/doorbell' feature dedicated to the tenant, as a result of them vacating - which the tenant did not dispute, and on which the tenancy agreement is silent.

Analysis

On preponderance of the relevant evidence in this matter, I have reached a Decision upon the following findings.

Section 16 of the Act states as follows,

> **Start of rights and obligations under tenancy agreement**
>
> **16** The rights and obligations of a landlord and 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.

I find the rights and obligations of the parties took effect on February 19, 2014.

I find that **Section 32** of the Act effectively places onus on the landlord to repair, maintain or otherwise resolve problems of the residential unit as they learn of them. I have not been provided with evidence the landlord failed to comply with the *health, safety and housing standards required by law*, nor displayed unwillingness, avoidance or procrastination to make the required repairs once alerted. In this matter I find the landlord acted to approach and resolve the heating problem in a reasonable manner. I find that the tenant's use of the term 'fundamental breach of contract' is effectively their way to describe that the landlord failed to comply with a *material term of the tenancy agreement* and therefore determining the agreement of no further effect. I have not been presented evidence the landlord failed in this regard and I prefer the landlord's evidence they acted with due diligence upon learning of the heating system problem.

Rather, I find the tenant ended the tenancy without providing the landlord with the prescribed Notice to End the tenancy in accordance with **Section 45** of the Act which, in relevant part to this matter, states as follows:

Tenant's notice

45 (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service 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.

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

I find the tenant failed to provide the landlord with legal notice to end the tenancy as required by Section 45. Even if I were to find the tenant's e-mail meets the requirements in respect to a *material term*, and *written notice,* and compliance with Section 52 of the Act, which I do not, I find that after their notification of a problem the tenant did not give the landlord a reasonable period for the landlord to correct the situation.

I find the Act does not attach a penalty for failing to provide a legal notice to end or automatically entitles the landlord to loss of revenue. However, **Section 7** of the Act does provide as follows:

7. Liability for not complying with this Act or a tenancy agreement

7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

The landlord's claim requires that it be established that the loss occurred, that the damages or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

As a result of the tenant's non-compliance with the tenancy agreement or the Act, I accept the landlord's evidence that under the circumstances with which they were presented the landlord took steps to deal with the heating system problem and also to minimize and avert future losses of revenue for themselves and possible greater liability for the tenant, which ultimately resulted in securing a new tenancy for May 01, 2014. On all the evidence provided in this matter I find the landlord has, in parts, met the above test for loss. However, having so established, I find that while contracting a leasing service to re-rent and manage the landlord's business and responsibilities may present convenience for the landlord it is not a cost incurred due to the conduct or neglect of the tenant in breach of the tenancy agreement or the *Act.* The tenant is not responsible for the landlord's choice to contract the leasing service when, on balance of probabilities, the evidence indicates that mitigation was achieved from a reduction in the advertised or ask amount for rent. I find that contracting with the leasing service was an extravagant response solely to minimize the loss. As a result, **I dismiss** the landlord's claim for $2163.00 for the *tenant placement fee and move in inspection* portion of their application.

A tenant who signs a fixed term tenancy agreement is responsible for the rent to the end of the term. The landlord's claim is subject to their statutory duty pursuant to Section 7(2) to do whatever is reasonable to minimize the damage or loss. I find that the landlord took some reasonable steps to minimize the loss in this situation. As a result, I find that the landlord has established a monetary claim comprised of the actual difference in rent between the tenant's fixed term agreement of $3500.00 per month and the remaining 5 months of the fixed term at the reduced amount of $3140.00 per month: resulting in a loss of revenue in the sum of **$1800.00.**

I find that the landlord is entitled to recover their cost to disengage the 'cellular phone/doorbell' feature dedicated to the tenant's cellular phone as a result of them vacating, in the claimed amount of **$52.50**.

The landlord is further entitled to recover their filing fee in the amount of **$100.00**. The security deposit in trust will be off-set from the award made herein.

Calculation for Monetary Order

Loss of revenue - total	$1800.00
Disable: tenant's 'cellular phone/doorbell' feature	52.50
Filing fee for this application	100.00
Less security deposit	*-1750.00*
Monetary Order to landlord	**$202.50**

Conclusion

The landlord's application, in part, has been granted.

I Order that the landlord retain the security deposit in the amount of $1750.00 in partial satisfaction of the claim and **I grant** the landlord an Order under Section 67 of the Act for the balance due of **$202.50**. If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

This Decision is final and binding on both parties.

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: September 17, 2014

Residential Tenancy Branch