



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Kingsgate Gardens Corporation
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNSD, MND, FF

Introduction

In the first application, by file number, the landlord applies to recover the remainder of rent due under a fixed term tenancy ended early by the tenant as well as reimbursement for expenses incurred in cleaning and repairing the premises and for key replacement..

In the second application the tenant seeks to recover his security deposit as well as a significant expense incurred in hiring a private investigator to determine whether or not the landlord had re-rented the premises.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that either party is entitled to any of the relief requested?

Background and Evidence

The rental unit is a one bedroom plus den townhouse style apartment. The tenant first moved in January 1, 2014 under a fixed term tenancy for one year. That tenancy agreement was replaced by one showing the latest tenancy to have started January 1, 2015 for a fixed term ending May 31, 2015 at a monthly rent of \$1150.00. The landlord holds a \$575.00 security deposit.

The tenant's work caused him to have to relocate earlier than May 31st. On January 16th he notified the landlords that he would be leaving at the end of February.

He attempted to assist in finding a replacement tenant. He found a Ms. F.A. who wanted to assume the remainder of his tenancy and proposed her to the landlord as his subtenant.

The landlord refused her because she had a pet and pets were not allowed in this rental unit. The tenant knew Ms. F.A. had a small dog and says that the landlord's representative Mr. R.P. said it would cost an extra \$200.00 in rent. Mr. R.P. did not rebut this statement at hearing.

The tenant presented a letter from Ms. F.A. indicating that she had been declined as his subtenant because the landlord was seeking a tenant for a one year term and not the three months remaining in the tenant's fixed term.

In early March the landlord found a new tenant for March 15, for, I understand, a one year fixed term. At hearing the landlord reduced its claim for unpaid rent from three months to one-half month.

The landlord's representative Mr. T. testifies that a move-out inspection was done with the tenant but the tenant refused to sign the inspection report. He says the tenant had not signed the move-in report either. The landlord submitted a condition inspection report of the premises indicating the result of a move-in inspection. It is signed on behalf of the landlord but not by the tenant. It does not contain any comment about the condition of the premises at move-out nor is it signed by either the landlord or the tenant in the box noted for their "move-out" signatures. It does not indicate the tenant's forwarding address.

The tenant agrees he did not sign the move-in report but says that he conducted the move-out inspection with the landlord's caretaker on February 13th and that he signed the inspection report and wrote his forwarding address on it. He says that awhile later he received photographs from the landlord by mail to that forwarding address.

Mr. P. for the landlord acknowledged that he sent the tenant some photos of the rental unit after the tenant left and that he likely got the tenant's address from the caretaker.

It appears that the tenant was not sent a copy of either the move-in or move-out inspection reports until he received the material for this hearing.

The landlord submitted a list of photographs alleged to show the state of the premises after the tenant left. The landlord hired a contractor to attend to all the alleged deficiencies and paid the contractor \$1165.50 as per the invoice submitted.

The tenant says his employer paid for professional cleaners to clean before he left and that the premises were clean. He says that the premises are about two and one-half years old and that any repairs were to damage that was normal wear and tear and for

which he is not responsible. He produced some muddy photographs he took at move out. They were of limited, if any, assistance.

Analysis

Breach of Fixed Term Tenancy

A tenant who unilaterally terminates a fixed term tenancy before its end for reasons of his own is in fundamental breach of the agreement.

Residential Tenancy Policy Guideline 3 “Claims for Rent and Damages for Loss of Rent” sets out the general rules in event of such a breach,

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

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.

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. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

In this case I find that the landlord made it clear to the tenant that it would look for other tenants to replace him but that he would be responsible for any rent loss for the remainder of the term. If there was any doubt, that notice was satisfied by the landlord's early application for damages for loss of rental income, made March 9, 2015.

A tenant faced with having to move elsewhere during a fixed term tenancy is at liberty to sublet the premises for the remainder of the term. Section 34 of the *Act* provides:

Assignment and subletting

34 (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.

(2) **If a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).**

(3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

In this case the evidence is divided about why Ms. F.A. was refused as a tenant. She herself has indicated that it was because the landlord wanted a tenant for a longer term than the three months remaining in this tenant's fixed term. I accept this evidence. Ms. F.A. was rented a different townhouse rental unit in the same complex and so her written statement could have been checked by the landlord. She was a compellable witness at this proceeding. I have no reason to suspect that her statement is not true.

However, the tenant's fixed term was for five months; January to May inclusive, and so he could not rely on s. 34, above, to require the landlord to accept a reasonable subtenant.

In all the circumstances I find that the landlord did have grounds for refusing to permit the tenant to sublet the remainder of his term to Ms. F.A. whether it was because of a pet or because the landlord wanted a longer term tenancy.

I find the landlord has lost one-half month's rent as a result of the tenant's breach of the fixed term tenancy and I award it \$575.00.

Cheque Bounce Fee

The landlord claims \$45.00 for having to negotiate the tenant's post dated March 2015 rent cheque, dishonoured by the tenant's bank. I dismiss this item. The landlord had accepted the end of the tenancy with a right to claim damages. There was no tenancy in existence on May 1st. It had no ground to attempt to negotiate a cheque given for rent that tenancy.

Cleaning and Repair

I award the landlord \$5.00 for changing a light bulb. The tenant does not dispute the claim, only the \$15.00 amount charged. Without a receipt for the bulb, I consider \$15.00 to be excessive, even for a "halogen" bulb. Such a job can be performed by anyone, the landlord's caretaker for example. It was not shown to be necessary for the landlord to hire a professional contractor to perform this service.

I dismiss the landlord's claim regarding broken kitchen cabinet handles. The tenant's correspondence makes it plain that from earlier on in the tenancy the handles had been malfunctioning and that he had been requesting the landlord to conduct repairs. I cannot determine that the handles were broken or had simply failed as a result of use.

I dismiss the landlord's claim for cleaning of the floors, washrooms, freezer and stove. Under s. 37 of the *Act* it is the tenant's responsibility to leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. As one may suspect, the concept of "reasonably clean" can differ dramatically between a landlord and a tenant.

Based on the evidence presented, I find that the premises were left reasonably clean.

I grant the landlord its cost for shampooing the carpets and I consider \$150.00 to be reasonable for that service. Policy Guideline 1 "Landlord and Tenant – Responsibility for Residential Premises" notes that at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year.

I grant the landlord's claim of \$40.00 for a broken light fixture. The tenant says it failed on its own. There is no evidence that he reported it to the landlord. I find it more likely that the fixture was damaged as a result of some activity in the rental unit and for which the tenant is responsible.

The landlord advances a considerable claim, \$485.00 to paint the scratches on the walls. The work done however was far more than merely painting the scratches. The amount sought covers the entire repainting of the interior walls. Mr. A.T. for the landlord says that the wall paint colour could not be matched satisfactorily.

The landlord's photos of the location of alleged damage show that the areas have been puttied over. It appears that the photos were taken after repair work had been undertaken by the landlord's workmen and so the actual damage alleged cannot be observed.

It is worth noting that Policy Guideline 1 provides “

Most tenants will put up pictures in their unit. The landlord may set rules as to how this can be done e.g. no adhesive hangers or only picture hook nails may be used. If the tenant follows the landlord's reasonable instructions for hanging and removing pictures/mirrors/wall hangings/ceiling hooks, it is not considered damage and he or she is not responsible for filling the holes or the cost of filling the holes.

This is indicative of the expectation that a landlord renting residential premises must be prepared to attend to some repair of minor marring and damage to walls. One may infer that a reasonable landlord would have touch up paint on hand and would not go to the trouble and expense of repainting an entire room or even an entire wall after filling and sanding a picture nail hole.

In my view the location and size of the patching shown in the landlord's photos are equally consistent with picture mounting holes and bumps and nicks consonant with normal living as they are with damage over and above normal wear and tear.

For these reasons I dismiss the landlord's claim for painting interior walls.

I dismiss the landlord's claim for repairing and painting a scratched exterior frame. The evidence presented during the hearing did not establish that claim.

I dismiss the landlord's claim for key replacement in the face of the tenant's competing evidence that he returned the necessary keys and his correspondence regarding caretakers taking and not returning keys. The burden of proof on this question initially falls to the landlord and it has not satisfied that burden.

In result, I award the landlord \$770.00 in total

Tenant Private Investigator Cost

The tenant was served with the landlord's application in early March and thereby notified that the landlord was seeking three months rent loss. The tenant had moved far away and so hired a private investigator who confirmed and provided video evidence to show that someone was living in the rental unit after March 15th.

Whether or not I consider this expense to be a reasonable one, it is in the nature of "fees and disbursements" incurred in the dispute resolution process, as are similar fees such as process server fees or the attendance fees for witnesses or the cost of experts. My power to award fees and disbursements is limited to awarding recover of the filing fee and so I do not grant the tenant recovery of this expense.

Double Security Deposit

At hearing the tenant raised the issue of whether the landlord was in violation of s. 38 of the *Act* requiring a timely repayment of or application against a tenant's security deposit and a resulting doubling of the deposit for a failure to comply. The section requires that

a landlord either repay the deposit or make an application for dispute resolution against it within fifteen days after the later of 1) the end of the tenancy, and 2) receipt of a tenant's forwarding address in writing.

The first issue is the question of when the tenant provided the landlord with his forwarding address in writing. The evidence of the tenant is that he put it on the move-out report with the caretaker on February 13th. The landlord says there was no such move out. While there is reason to accept either version, I find that the evidence on this point is equally plausible. The onus of proving that a forwarding address in writing has been given falls to the allegor; in this case, the tenant. He has not satisfied that burden.

I find the tenant has not proven a right to double the deposit under s. 38 of the *Act*.

Conclusion

As each side has had limited success, I offset each filing fee.

I awarded the landlord the amount of \$770.00 and authorize it to retain the security deposit of \$575.00 in reduction of the award. The landlord will have a monetary order against the tenant for the remainder of \$195.00

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 17, 2015

Residential Tenancy Branch

