Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MNR, FF
Tenant: OLC, MNDC, FF

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 female landlord and the tenant.

While the tenant had originally submitted an Application for Dispute Resolution on September 6, 2016 seeking a monetary order solely for the return of some rent he later, on November 2, 2016 submitted an Amendment to an Application for Dispute Resolution seeking to increase his claim from 217.74 to $1,667.74 which would include return of double the security deposit.

The landlord's Application for Dispute Resolution indicated she sought a monetary order in the amount of $1,350.00 or 1 month's lost revenue. However, her Monetary Order Worksheet indicated that she was seeking compensation for 1 month's rent in the amount of $1,200.00 plus hydro of $150.00; $3.60 for the cost of copies; and the $100.00 filing fee. The landlord could not explain at the outset of the hearing for the notations in the Worksheet. The landlord verbally confirmed that she was seeking $1,350.00 for lost revenue.

At the outset of the hearing the parties each provide a different file number. The landlord provided a file number for a hearing that had been scheduled to have been heard on March 13, 2017. The tenant provided another file number for a hearing that had not been scheduled. I confirmed through a review of the electronic record that both of those files were considered cancelled and closed and that this hearing is the only hearing currently scheduled between these two parties.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for lost revenue or unpaid rent and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 45, 67, and 72 of the *Residential Tenancy Act (Act).*

It must also be decided if the tenant is entitled to a monetary order for return of some rent; for return of double the amount of the security deposit and to recover the filing fee

from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 44, 67, and 72 of the *Residential Tenancy Act (Act).*

Background and Evidence

Both parties submitted copies of a tenancy agreement signed by them on December 8, 2015 for a 1 year fixed term tenancy beginning on December 15, 2015 for a monthly rent of $1,350.00 due on the 1st of each month. The parties confirmed that at the start of the tenancy the tenant paid the landlord ½ month's rent for the period of December 15, 2015 to December 31, 2015; a security deposit of $675.00; and $1,350.00 for the "last month's rent".

The landlord explained she has been advised by other landlords to charge tenants the last month's rent at the start of the tenancy to ensure they don't suffer a loss if the tenant moves out before the end of the tenancy.

The parties agreed the tenant provided the landlord with a Notice to End Tenancy dated July 27, 2016 to be effective August 31, 2016 but he vacated the rental unit on August 10, 2016.

The landlord wrote in their Application for Dispute Resolution:

> "Mr. Walker. had signed a one year lease agreement on Dec 8, 2015 for the unit [dispute address]. We received and accepted a "Notice to End Tenancy Early" on July 28, 2016 to be effective on August 31, 2016. The tenant vacated the unit on August 10, after a move-out inspection, that was signed and agreed on, except one furniture item that was missing and not been recovered yet. We have not found a suitable tenant yet, nor has Mr. Walker provided a suitable new tenant, therefore, he is still responsible for the outstanding rent for the month of September 2016."

The documentary evidence submitted by both parties includes a substantial volume of electronic correspondence that shows as early as June 30, 2016 the tenant was seeking approval from the landlord to assign his tenancy to a new tenant. The correspondence shows despite repeated attempts to gain the landlord's approval the landlord refused to allow the tenant to assign the tenancy.

In one of the landlord's responses she told the tenant that the process is that he must submit his notice to end the tenancy and vacate the rental unit before she would consider a request to assign the tenancy. In other responses she simply stated that because there was less than six months left in the fixed term she did not have to approve any request for assignment.

In a response dated July 30, 2016 the landlord wrote:

> "Keep in mind that this is an early end to an existing lease contract that is valid less than 6 month, and therefore, not a re-assigning lease as previously mentioned. This kind of re-assigning lease is only valid if the fixed term lease is valid for more than 6 month. The new tenant entering into a completely new lease agreement, with move in inspection, etc as we have done with you as well."

The landlord submitted that she had accepted an applicant put forward by the tenant to take over the tenancy but when the landlord advised him that she would be limiting his number of roommates to 1 when this tenant was allowed to have 2 he declined to accept the tenancy.

The landlord submitted into evidence, in the form of an email confirmation from a local newspaper that she posted her first advertisement to re-rent the property on August 24, 2016. She testified that the tenant did not want her to advertise using any media which she respected until he had vacated the property.

The landlord testified she entered into a new tenancy agreement on September 20, 2016 with the new tenancy to begin October 1, 2016. The landlord seeks $1,350.00 for lost revenue for the month of September 2016.

The tenant submitted that when he was attempting to show the rental unit to a prospective tenant on August 26, 2016 the landlord would not provide him a key to the rental unit that he had already returned when he vacated the property on August 10, 2016.

The tenant submitted into evidence a copy a letter he wrote to the landlord on August 26, 2016 informing her that he believed she was failing to comply with a material term of their tenancy agreement by failing to allow him access to the rental unit that he had paid rent on for the full month of August 2016. He allowed the landlord 24 to 48 hours to correct the breach or he would be ending the tenancy.

The tenant seeks compensation on a per diem basis of $43.54 for 5 days or a total claim of $217.74 for being refused access to the rental unit for the duration of August 2016, after this refusal.

The tenant submitted that he provided his forwarding address to the landlord by email on September 4, 2016 but that he never received confirmation from the landlord as to whether or not she had received it. He testified that because of this he send a letter by mail on September 30, 2016 providing his forwarding address.

The landlord testified she did not receive his forwarding address until she received the tenant's Application for Dispute Resolution sometime in mid-September 2016. I note that in the landlord's evidence is an email from the tenant dated September 4, 2016 providing his forwarding address.

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(2) stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy on a date is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and is the day before the day in the month that rent is payable under the tenancy agreement.

Section 45(3) states that 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 tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

A material term of a tenancy agreement is a term that is agreed by both parties is so important that the most trivial breach of that term gives the other party the right to end the tenancy, such as the payment of rent.

While I accept that the tenant provided the landlord with a breach of a material term letter that would have been compliant with the requirements under Section 45(3) to end a tenancy I find he invoked this right after the tenancy was ended.

Section 44(1) of the *Act* states a tenancy ends only if one or more of the following applies:

a) The tenant or landlord gives a notice to end the tenancy in accordance with one of the following:
    i. Section 45 (tenant's notice);
    ii. Section 46 (landlord's notice: non-payment of rent);
    iii. Section 47 (landlord's notice: cause);
    iv. Section 48 (landlord's notice: end of employment);
    v. Section 49 (landlord's notice: landlord's use of property);
    vi. Section 49.1 (landlord's notice: tenant ceases to qualify;
    vii. Section 50 (tenant may end tenancy early);
b) The tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
c) The landlord and tenant agree in writing to end the tenancy;
d) The tenant vacates or abandons the rental unit;

e) The tenancy agreement is frustrated; or
f) The director orders the tenancy is ended.

Regardless of the circumstances that lead to the tenant vacating the rental unit and as the tenant vacated the property and returned the keys and therefore possession of the rental unit to the landlord on August 10, 2016, I find this tenancy ended pursuant to Section 44(1)(c) on that date.

As a result, I find the tenant remains responsible for the payment of rent for the duration of the fixed term, including the full months of August through to mid December 2016 subject only to the landlords' obligation to mitigate their losses.

Therefore, I find the landlord was not obligated to allow the tenant access at any time after he vacated the rental unit and returned the keys. I dismiss the portion of the tenant's Application seeking compensation for being refused access to the rental unit.

I accept, in the absence of any evidence to the contrary, that the landlord entered into a new tenancy agreement effective October 1, 2016 with new tenants and as such has reduced the tenant's obligations for rent to the month of September 2016.

Section 34(1) of the *Act* states that unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit. Section 34(2) states that if a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).

Residential Tenancy Policy Guideline 19 states under s. 34 of the *Residential Tenancy Act*, a tenant must not assign a tenancy agreement unless the landlord consents in writing. A landlord must not unreasonably withhold consent if the tenancy agreement is for a fixed term of six months or more. (By implication a landlord *has* the discretion to withhold consent, without regard to reasonableness, in the case of a fixed-term tenancy with less than six months remaining).

Section 7 of the *Act* states if a party to a tenancy does not comply with the *Act*, regulations or their tenancy agreement, the non-complying party must compensate the other party for any damage or loss that results.

The section goes on to state that the party who claims compensation for damage or loss that results from the other's non-compliance with the *Act*, regulation or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

While I accept the landlord, according to the Guideline, may not be obligated to consider reasonableness when refusing to accept a tenant's request for assignment before the end of a 1 year fixed term tenancy that has less than 6 months left, I find that if the landlord wishes to claim a loss as a result of the tenant ending a tenancy early when the

landlord has refused to allow assignment for no other reason than there is less than 6 months left in the tenancy, speaks to the landlord's attempts to mitigate her losses.

In addition, despite the landlord's testimony that she didn't advertise using her normal methods because the tenant didn't want her to do so when he was living in the property does not explain why she did not start advertising earlier in August 2016, immediately after he vacated. Or for that matter the landlord has provided no explanation why she would consider such a request when she denied his requests for assignment without any explanation.

Furthermore, even when the landlord was willing to accept an applicant put forward by the tenant the landlord changed the terms of the tenancy agreement. I find that when I look at the totality of these actions, the landlord did not take any reasonable steps to mitigate her losses. In fact, I find the landlord's action contributed to the tenant's inability to find a replacement tenant for the duration of the tenancy and mitigate her own losses.

As a result, I find the landlord failed to comply with the requirements set forth in Section 7 of the *Act* to take reasonable steps to mitigate losses when claiming a loss against the tenant for a violation of the *Act* regulation or tenancy agreement. Therefore, I dismiss the landlord's claim in its entirety.

Section 1 of the *Act* defines a security deposit as money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

> (a) post-dated cheques for rent;
> (b) a pet damage deposit;
> (c) a fee prescribed under section 97 (2) (k) [regulations in relation to fees];

I accept that at the start of the tenancy the landlord collected a security deposit in the amount of $675.00 from the tenancy. I also note that the landlord collected an additional $1,350.00 that she has identified as "last month's rent".

However, from her testimony she collected this money in case the tenant did not pay the last month's rent as such, I find the landlord collected this money as a security for the liability of the tenant's obligation to pay rent for the residential property for the last month of the tenancy. Therefore, I find the landlord had collected an additional security deposit of $1,350.00 for a total security deposit held for this tenancy in the amount of $2,025.00.

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.

Despite the landlord's testimony, I find her documentary evidence confirms that she had received the tenant's forwarding address when she received the September 4, 2016 email from the tenant. As such, and in consideration I found the tenancy ended on August 10, 2016, I find the landlord had until September 19 to submit an Application for Dispute Resolution seeking to retain the security deposit.

There is no evidence before me that the landlord has submitted an Application for Dispute Resolution seeking to retain the security deposit. While landlords' Application for this hearing was a monetary claim, the landlord provided no indication on her Application; Monetary Order Worksheet; or evidence that she was seeking to retain the security deposit held.

As a result, I find the landlord has failed to comply with her obligations to either return the deposit or file a claim against the deposit within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, pursuant to Section 38(1). In accordance with Section 38(6) I find the tenant is entitled to double the amount of the security deposit held as determined above.

Conclusion

I find the tenant is entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **$4,150.00** comprised of $4,050.00 double the security deposit held and the $100.00 fee paid by the tenant for this application.

This order must be served on the landlord. If the landlord fails to comply with this order the tenant 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: March 10, 2017

Residential Tenancy Branch