File #16805

IN THE MATTER between **EL and MFL**, Applicants, and **TN and DN**, Respondents.

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act");

AND IN THE MATTER of a hearing before **Adelle Guigon**, Rental Officer;

BETWEEN:

EL and MFL

Applicants/Tenants

-and-

TN and DN

Respondents/Landlords

REASONS FOR DECISION

Date of the Hearing: **January 15, 2020**

Place of the Hearing: **Yellowknife, Northwest Territories**

Appearances at Hearing: **EL, Applicant**
MFL, Applicant
DN, Respondent

Date of Decision: **February 20, 2020**

REASONS FOR DECISION

An application to a rental officer made by EL and MFL as the Applicants/Tenants against TN and DN as the Respondents/Landlords was filed by the Rental Office November 21, 2019. The application was made regarding a residential tenancy agreement for a rental premises located in Fort Simpson, Northwest Territories. The filed application was served on the Respondents by registered mail signed for January 2, 2020.

The Tenants alleged the Landlord had failed to return the security deposit, had failed to maintain the rental premises in a good state of repair, and had harassed the Tenants. An order was sought for the return of the security deposit, compensation for maintenance costs, compensation for pain and suffering, and compensation for increased rent.

A hearing was held January 15, 2020, by three-way teleconference. EL and MFL appeared as the Applicants. DN appeared as Respondent and on behalf of TN.

Tenancy agreement

The parties agreed and evidence was presented establishing a residential tenancy agreement between them for a fixed-term from April 1, 2019, to March 31, 2020. The Tenants vacated the rental premises and returned possession to the Landlord on October 31, 2019. I am satisfied a valid tenancy agreement was in place in accordance with the *Residential Tenancies Act* (the Act).

Security deposit

The parties agreed that a security deposit of $1,300 was paid by the Tenants at the beginning of the Tenancy.

Relevant sections of the Act respecting security deposits are:

> 15. (1) A landlord or his or her agent shall
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> (a) conduct an inspection of the condition and contents of rental premises at the beginning of a tenancy; and
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> (b) offer the tenant reasonable opportunities to participate in the inspection.
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> 15. (3) Without delay on the completion of an inspection, the landlord or his or her agent shall
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> (a) prepare an entry inspection report;
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> (b) sign the entry inspection report; and
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> (c) provide the tenant with the opportunity to include comments in the entry inspection report and sign it.

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17.1 (1) A landlord or his or her agent shall

(a) conduct an inspection of the condition and contents of rental premises vacated by a tenant at the end of a tenancy; and

(b) offer the tenant reasonable opportunities to participate in the inspection.

17.1 (3) Without delay on the completion of an inspection, the landlord or his or her agent shall

(a) prepare an exit inspection report;

(b) sign the exit inspection report; and

(c) if the tenant participated in the inspection, provide the tenant with an opportunity to include comments in the exit inspection report and to sign it.

18. (3) Subject to this section, a landlord who holds a security deposit, a pet security deposit or both shall, within 10 days after the day a tenant vacates or abandons the rental premises, ensure that

(a) the deposit is returned to the tenant; and

(b) the tenant is given an itemized statement of account for the deposit or deposits.

18. (4) A landlord may, in accordance with this section, retain all or a part of a security deposit, a pet security deposit or both for arrears of rent owing from a tenant to the landlord in respect of the rental premises, and for repairs of damage to the premises caused by the tenant or a person permitted on the premises by the tenant.

18. (5) A landlord may not retain any amount of a security deposit or pet security deposit for repairs of damage to the rental premises if the landlord or his or her agent

(a) fails to complete an entry inspection report and an exit inspection report; or

(b) fails, without a reasonable excuse accepted by a rental officer, to give a copy of each report to the tenant.

18. (7) A landlord who intends to withhold all or a portion of a security deposit, a pet security deposit or both shall, within 10 days after the day a tenant vacates or abandons the rental premises,

(a) give written notice to the tenant of that intention; and

(b) subject to subsection (9), return the balance of the deposit or deposits to the tenant.

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18. (8) A notice must include

(a) an itemized statement of account for the deposit or deposits;

(b) a final itemized statement of account for any arrears of rent that the landlord is claiming; and

(c) subject to subsection (9), a final itemized statement of account for any repairs that the landlord is claiming.

The entry inspection report required under subsection 15(3) of the Act was not completed by the Landlord. The exit inspection report required under subsection 17.1(3) of the Act was not completed by the Landlord. The Tenants did not have any rental arrears as of October 31, 2019. The notice required under subsection 18(7) was not completed by the Landlord.

For clarity respecting subsection 18(4) as it relates to retaining the security deposit against rental arrears: The rental arrears are any rent that is already past due when the tenancy ends. Future rent is not rental arrears because future rent is not due until the day agreed to in the tenancy agreement. In this case, the rent was due on the first of each month. Therefore, the November rent was not due until November 1st so it cannot be considered rental arrears on October 31st, and the security deposit cannot be retained against the November rent.

I find the Landlord failed to comply with his obligations respecting preparing entry and exit inspection reports, and respecting notification of intention to retain the security deposit. I find the Landlord retained the security deposit contrary to the Act. The Landlord must return the security deposit, including interest, to the Tenants in the amount of $1,300.38.

Maintenance

Painting

Prior to the Tenants moving into the rental premises they asked the Landlord for permission to paint the interior of the premises, asking only that the Landlord pay for the paint. The Landlord made additional efforts to do additional painting and granted the Tenants permission to complete the painting. Upon request, the Landlord provided additional cans of paint, and later in April the Tenants confirmed their offer to paint the house at no cost to the Landlords except for paint. At no time during the tenancy did the Tenants claim costs for labour from the Landlords to repaint the interior of the premises, nor does it appear there was an expectation to do so. In their application, the Tenants claimed recovery of costs of labour to paint the interior of the rental premises in the amount of $3,360. This monetary claim was supported with an estimate from a local contractor for the value of the work performed by the Tenants.

The Landlord disputed the rental premises was not adequately painted by the time the Tenants moved into the rental premises. He claimed the premises had already been painted in March and that his wife had consented to the re-painting only as an accommodation to the Tenants' request.

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This scenario is a perfect example of why the entry inspection report is required. Had the report been completed it would have documented the condition of the rental premises, including whether or not the walls were adequately painted. As it stands, given the parties have opposing views on the matter, there is no substantive evidence to tip the balance in either direction. There is, however, an agreement between the parties that the Tenants could paint the interior of the premises at no cost to the Landlord except for the paint.

I cannot be satisfied that the Landlords failed to provide and maintain the rental premises in a good state of repair respecting the interior painting. Given the agreement between the parties, the Tenants' claim for labour costs associated with painting the rental premises are denied.

Crawl space mildew

In their application, the Tenants claimed that they could no longer live in the rental premises because of their discovery of a powdery mildew in the bathroom crawl space. Photographs of the crawl space interior were provided which do appear to show a whitish substance on the surfaces of the underground crawl space. However, the Tenants did not notify or complain to the Landlord about the substance until October 30, 2019 – the day before they were scheduled to vacate the rental premises. The tenants referenced in that letter that the "presence of fungus in the house has been a growing concern for our health and we think this situation is not suitable for human habitation." In further submissions received after the hearing reference was made to a "putrid stench" coming from the crawl space. There is no evidence to suggest that any effort was made by the Tenants to raise the alleged issues with the Landlord so that he could respond to it during the tenancy. Additionally, no evidence was presented to establish what the substance found in the crawl space actually was and whether it was actually harmful or creating an unsafe environment.

The Landlord admitted to the Tenants and at hearing that he was aware the substance was present in the crawlspace, but that it had been there for many years and none of his previous tenants had complained to him about it.

Given the lack of supporting substantive evidence, I am not satisfied the substance in the crawl space created an uninhabitable premises, nor am I satisfied the Landlord was given adequate notice to remedy the problem. Additionally, I am not satisfied the Tenants suffered any demonstrable losses as a direct result of the condition of the crawl space. The Tenants' claim for compensation and termination of the tenancy agreement is denied.

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Pain and suffering

In their application, the Tenants requested compensation for "moral damages" due to the "inconvenience of having to move after only 7 months, and the stress, hateful messages and threats that we have suffered from". Pain and suffering is not a compensable remedy under the Act; only demonstrable monetary losses suffered as a direct result of a breach are. The Tenants' claim for compensation for pain and suffering is denied.

Termination of the tenancy agreement and lost future rent

The Landlord made a claim against the Tenants for additional retroactive rent, lost future rent and utilities.

Retroactive rent

The written tenancy agreement established the rent at $1,350 per month. The Landlord claimed that the rent was usually $1,550 for this property and that he only agreed to the lower rent amount because the Tenants agreed to sign the one-year lease. Because the Tenants broke the lease, the Landlord claimed the extra $200 per month for the seven months the Tenants occupied the rental premises, amounting to $1,400.

The terms of the written tenancy agreement are clear that the agreed upon rent is $1,350 per month. There is no reference anywhere in the agreement to the $200 'discount' being claimed by the Landlord, and even if there were it would be an invalid charge against the Tenant as it would constitute a penalty. Penalties are prohibited under section 13 of the Act. The Landlord's claim for retroactive rent is denied.

Termination of the tenancy agreement

The Tenants gave the Landlord written notice on September 27, 2019, that they would be breaking the lease and vacating the rental premises by October 31, 2019. In that letter they did not give reasons for breaking the lease. The Tenants referred to the lease contract providing for early termination if 30 days' advance notice was given, and cited that provision as being met.

The form of the tenancy agreement used is from the template provided for under the *Residential Tenancies Regulations*. Section 13 of the written tenancy agreement provides that the tenancy agreement may be terminated by the Tenant giving written notice at least 30 days before "the end of the rental term." It also included reference to subsection 51(1) of the Act. This is consistent with the requirements under that subsection, which says:

> 51. (1) Where a tenancy agreement specifies a date for the termination of the tenancy agreement, the tenant may terminate the tenancy on the date specified in the agreement by giving the landlord a notice of termination not later than 30 days before **the termination date**." [emphasis mine]

As previously mentioned, section 3 of the written tenancy agreement establishes the fixed-term of the tenancy as beginning on April 1, 2019, and ending on March 31, 2020. The "termination date" specified in this written tenancy agreement is March 31, 2020. The earliest the Tenants could have terminated this tenancy agreement without further obligations was March 31, 2020, by giving written notice to the Landlord no later than March 1, 2020. Clearly the Tenants misunderstood the meaning of section 13 of the written tenancy agreement, but that does not negate their responsibility to refer to the Act in order to understand their rights and obligations as Tenants in the Northwest Territories.

Lost future rent

The Landlord claimed lost future rent for the remaining five months of the fixed-term at the increased rent amount of $1,550 per month, amounting to $7,750.

Where a Tenant does vacate a rental premises and end a fixed-term tenancy agreement early (i.e. break a lease), the Tenant could remain responsible for future rent either until the end of the fixed-term period or until the Landlord secures a new tenant, whichever comes first. However, the Landlord is obligated to mitigate his losses by re-renting the rental premises as soon as possible and if he does not take all reasonable efforts to find a new tenant then the Landlord could forfeit his right to lost future rent. Subsection 5(2) of the Act says:

> 5. (2) Without limiting subsection (1), where a tenant terminates a tenancy agreement, contravenes a tenancy agreement, or **vacates or abandons a rental premises, other than in accordance with this Act or the tenancy agreement**, the landlord **shall** rent the rental premises again as soon as is practicable and at a reasonable rent in order to mitigate the damages of the landlord. [emphasis mine]

The Tenants claimed that the Landlord had found a new tenant who moved into the rental premises November 1, 2019. They testified they had been interacting with the new tenant prior to his moving in to permit him to view the rental premises, and had assisted the new tenant with moving some of his belongings into the rental premises on October 31, 2019.

The Landlord conceded that the new tenant may have considered renting the property, but disputes that the new tenant actually took possession. The Landlord acknowledged that the new tenant was permitted to store some personal belongings in the rental premises, but denied that the new tenant actually lived there.

Many allegations of what the new tenant's intentions were and reasons he did not choose to stay in the rental premises more than a week were bandied about, but given the differing beliefs the parties submissions on the matter constitute hearsay. The new tenant's reasons are frankly irrelevant to the issue at hand, which is whether the Landlord and new tenant entered into a tenancy agreement which would effectively render the Tenants responsibilities for the rental premises ended.

The Landlord argued that a legally binding contract had not been entered into between himself and the new tenant. He claims that while there was an offer and consideration of the offer, there was "no deal".

The Landlord provided a customer account summary from the Northwest Territories Power Corporation showing that the electricity account had been returned to his own name November 14, 2019; he suggested this was proof that the new tenant did not enter into a tenancy agreement and did not take possession of the rental premises because the electricity account was never transferred to the new tenant's name. This statement does not show whose name the account was under between November 1st and November 14th.

The Tenants provided copies of a text message exchange between them and the new tenant dated October 31st in which the new tenant agreed to accept the keys to the rental premises directly from the Tenants. Ultimately the keys ended up getting returned to the Landlord later that day, but the new tenant's admittedly brief positive reply implies his intention to access the rental premises.

Subsection 2(4) of the Act says that a tenancy agreement takes effect on the date the tenant is entitled to occupy the rental premises.

Subsection 9(1) of the Act recognizes that a tenancy agreement may be oral, written or implied.

Regardless of how long he ended up staying there, I am satisfied the new tenant did take occupancy of the rental premises on November 1st. Effectively, the rental premises was no longer available for rent as of November 1st because someone was occupying the premises.

Despite being given an opportunity to do so, the Landlord did not provide any demonstrable evidence of advertising the rental premises as available for rent, either before the Tenants vacated or after. The Landlord's arguments that "there was no other potential tenants looking before or after October 2019" and his stated expectation that the unoccupied rental premises "will probably remain that way until spring when the renter market starts to pick up again" reinforces to my mind that the Landlord likely did nothing more than keep an ear and eye open for anybody mentioning that they were looking for a place. By failing to actively advertise the availability of the rental premises for rent, the Landlord failed to take all reasonable actions to mitigate the loss of rent in accordance with subsection 5(2) of the Act. Consequently, the Landlord's claim for lost future rent is denied.

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Utilities

Where section 5 of the written tenancy agreement lists the services and facilities that are the responsibility of the Tenant it simply says: "All services and facilities are available to the house and ready for use." It does not define those services and facilities, but it was clearly agreed between the parties that heating fuel is one of those services that the Tenant was responsible for.

The Tenants acknowledged that the heating fuel tank was three-quarters full when they moved in and had the heating fuel tank refilled to three-quarters full when they vacated.

The Landlord said he knew the heating fuel tank was full when they signed the tenancy agreement and claimed the costs of topping up the heating fuel tank at the end of the tenancy. An invoice from a local fuel delivery company was provided referencing a delivery on December 16, 2019.

There is no evidence documenting how full the heating fuel tank was when the Tenants moved in or when it was last filled before the Tenants moved in. Again, this is an example of the value of completing an entry inspection report. There is no evidence of the capacity of the heating fuel tank. There is no evidence of how much of the December 16th fuel delivery was to replace fuel used since November 1st.

I cannot be satisfied that the fuel tank was full when the Tenants moved in. The Tenants did take responsibility for ensuring the amount of fuel they used during their tenancy was paid for by them, and returned the rental premises with a heating fuel tank filled to the capacity they believe they received it in. Without evidence proving that the heating fuel tank was filled to any particular capacity when the Tenants moved in, I am satisfied that the Tenants complied with their obligation to pay for heating fuel. The Landlord's claim for heating fuel costs is denied.

Order

An order will issue requiring the Landlord to return the security deposit to the Tenants in the amount of $1,300.38.

Adelle Guigon
Rental Officer