



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MNDC, MNSD, OLC

Introduction

This hearing was convened in response to an application by the tenant under the *Residential Tenancy Act* (the Act) for a monetary order for loss under the Act: specifically for loss of use; and, for the return of their security deposit.

Both parties participated in the hearing with their submissions, document evidence and relevant testimony during the hearing. The parties were also provided with an opportunity to settle their dispute. Neither party presented witnesses nor requested an adjournment or a Summons to Testify. The tenant submitted document evidence which the landlord acknowledged receiving. The landlord submitted document evidence which they acknowledged not providing to the tenant; and, as a result the landlord's submission of document evidence has not been considered in this Decision. None the less, the landlord was given opportunity to provide their evidence orally in testimony and the tenant was given opportunity to respond. Prior to concluding the hearing both parties acknowledged presenting all of the *relevant* evidence they wished to present.

Issue(s) to be Decided

Is the tenant entitled to a Monetary Order in the amount claimed?

Background and Evidence

The tenant's document evidence is largely comprised of e-mail correspondence spanning March 10 to June 16, 2014. It is undisputed that the tenancy started July 01, 2013 as a 1 year *fixed term* written tenancy agreement with an effective end date of the *fixed term* as June 30, 2014. I have not been provided a copy of the written tenancy agreement; however, the parties agree that the subject property is a float home and that the tenant occupied the home as a *living accommodation* under which the Act applies. The parties additionally agree the monthly rent payable for the residential unit under the written agreement was \$2800.00. At the start of the tenancy the landlord collected a security deposit of \$1575.00 which the landlord retains in trust.

The tenant testified that they determined to vacate the rental unit and consequently moved all their belongings from the rental unit March 01, 2014, after informing the landlord of their plan to vacate 3 weeks prior. Early in the plan to vacate the unit the landlord informed the tenant, and from thereon periodically reminded the tenant, that they did not consider the contractual tenancy *agreement* at an end and that the tenant was accountable for the agreement to the end of the *fixed term*; and, the tenant testified they accepted that they were responsible for the rent to the end of the *fixed term* of the tenancy agreement. The parties agreed the landlord would try and re-rent the unit and the tenant supported efforts to do so. The tenant satisfied the rent for March 2014.

The landlord testified they informed the tenant they were trying to re-rent the float home and that they had 2 individuals or agents for the landlord tasked with this effort. It must be noted that the tenant's evidence is that they communicated with the landlord on March 10 and 11, 2014 that one of the 2 agents had contacted them with news they had, "*some interested tenants—she's going to show it (float home) tomorrow*", and "*The sooner you find an appropriate tenant, the better. And we appreciate your efforts to do so*". The landlord had also arranged to furnish the unit to lend market appeal.

It is undisputed that soon after the first week of March 2014 the landlord's son began staying in the float home. The e-mail evidence indicates the son's use of the float home ultimately lasted a period of approximately 3 weeks. The tenant provided an affidavit from a neighbouring occupant of the float home suggesting it may have been longer.

The landlord explained the arrangement was a trial. They informed the tenant their son's use of the float home was trial as their son was in medical recovery, and if the trial showed promise it was with a view to a possible ongoing tenancy. The e-mail evidence also indicates the landlord knew on March 12, 2014 the son was living there and communicated on April 01, 2014 the son would be returning to their home as the trial was not successful. The same e-mail stated the rental unit was advertised with the 2 agents, "and is available for rent immediately". The landlord negotiated the tenant's post-dated rent cheque for April 2014. Subsequently communication between the parties became mired in dispute and the tenant placed payment stops on subsequent cheques.

The tenant's evidence is that in mid-April 2014 the landlord contacted them that a prospective tenant would be seeking a reference: for which the tenant claims they provided, "a good reference" to assist re-renting the unit.

The evidence is that the parties had ongoing correspondence to April 29, 2014 which then spiralled in an abundance of e-mails over the parties' obligations under the *fixed-term* agreement and proposals to end the contractual relationship – to no avail. In an e-mail on April 29, 2014 the tenant provided the landlord with their request for the return of the security deposit along with their forwarding address.

The tenant argues that after they vacated and no longer occupied the float home, to their thinking, for as long as they were paying the rent they had possession of the home and exclusivity to visit, occupy, lend or otherwise use the float home at their discretion. They testified that, "for as long as (they) paid rent, it's my place". The tenant testified they would have liked to utilize the float home occasionally or for one of their sons to temporarily live in the float home in the later portion of the *fixed term* agreement, but that the landlord's actions removed that possibility and any other plan to continue using the float home. As a result of the above, the tenant argues the landlord fatally breached the tenancy agreement, and "repudiated" their contractual duty to them: when the landlord allowed their son to occupy the float home and therefore denying the tenant its use. The tenant argues that upon this occurrence the contract / tenancy agreement

immediately terminated and thus released the tenant from any further obligations under the *fixed term* agreement. The tenant claims the landlord's action, "amounted to a fundamental breach of the contract". As a result of all the above the tenant seeks return of the rent they satisfied for the period in dispute: \$5600.00 for March and April 2014. The tenant additionally seeks the return of the security deposit, which was not administered at the end of the tenancy according to the Act.

The landlord argues that the tenant chose to move out from the float home earlier than the end of the *fixed term* agreement and that he looked to the tenant to fulfill their legal obligation to the end of the *fixed term* or until they found a new tenant. And, his ongoing efforts to re-rent the float home were unwavering so as to end the ongoing dispute with the tenant as soon as possible. The landlord claims they made continuous efforts toward re-renting the float home after the tenant moved out and were successful in re-renting the float home for June 15, 2014. The landlord testified they were always in favour of providing some compensation to the tenant for their son's use of the float home.

Analysis

On preponderance of the evidence I have reached a Decision. Not all evidence presented is relevant, and I have only considered the relevant evidence in this matter. The burden of establishing their claim on the balance of probabilities rests with the applicant of this matter.

Tenant's claim for loss

Section 7 of the Act is relevant and it states as follows;

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.*

(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.

I find that a tenant, who signs a *fixed term* tenancy agreement, is responsible for the rent to the end of the *term*, or duration of the agreement, even if they do not reside in the unit. And, that a landlord accepting compensation to the end of the term is subject to the statutory duty pursuant to Section 7(2) of the Act to do what *is reasonable to minimize the loss*: commonly referred to as mitigation.

I find that **Section 44** of the Act states *how a tenancy ends*, as follows (**relevant emphasis**);

How a tenancy ends

44 (1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives 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;

(f) the director orders that the tenancy is ended.

(2) [Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 44(1)(d) prescribes that when a tenant vacates the rental unit *the tenancy ends*. Having ended, possession of the unit reverts back to the landlord. I find that contrary to the tenant's thinking, unless the parties mutually agree, once a tenant vacates they are not entitled to continue treating the rental unit as if they had never vacated and still in possession of the unit. I find the tenant moved their belongings and vacated on March 01, 2014 and as a result the tenancy ended March 01, 2014, with possession of the rental unit now with the landlord.

The tenant seeks compensation for loss of use, claiming the landlord breached the tenancy agreement by *repudiating* their obligation and duty to the tenant under the agreement to allow the tenant free access / use of the float home once having moved from the float home. I do not accept the tenant's argument the landlord's actions amounted to a *fundamental breach of the contract* warranting immediate termination of it, or that the landlord *repudiated* or reneged on a duty to the tenant. As a result, I dismiss the tenant's claim based on a *loss of use*.

However, I find that the landlord's use of the rental unit for his son was, for a period, incompatible with the landlord's duty to mitigate or make reasonable effort to re-rent the unit at a time the landlord should have been active in trying to re-rent it as intended by the parties. I accept the landlord's evidence that behind the scenes the landlord tasked others to market the rental unit and that their son's *trial* in the rental unit may potentially have resulted in a lasting tenancy to the benefit of the tenant. I have already found the landlord's conduct was insufficient to constitute repudiation. However, I find the tenant should not have borne the risk for the period in which the suitability of the landlord's son in the rental unit was being considered or tested. I accept the tenant's argument the landlord son's trial in the rental unit disrupted efforts to permanently re-rent the unit. However, I further accept the evidence that the landlord returned the rental unit to full market availability April 01, 2014. As a result of the above, I award the tenant the equivalent of 1 month's rent for the period in dispute in the amount of **\$2800.00**.

Tenant's claim for return of security deposit

I find that the tenancy ended March 01, 2014 when the tenant vacated and no longer occupied the rental unit; at which time, the landlord was obligated to administer the security deposit as prescribed by **Section 38** of the Act.

Section 38(1) of the Act provides as follows, **(relevant emphasis)**

Return of security deposit and pet damage deposit

38(1) Except as provided in subsection (3) or (4) (a), **within 15 days after the later of**

38(1)(a) the date the tenancy ends, and

38(1)(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord **must** do one of the following:

38(1)(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

38(1)(d) file an application for dispute resolution to make a claim against the security deposit or pet damage deposit.

I find the evidence is that the primary method of communication between the parties in this matter was by e-mail, therefore I accept e-mail correspondence and *in writing* as the same value and effect for this matter. I find the landlord received the tenant's forwarding address April 29, 2014.

I find that the landlord failed to repay the security deposit in full, or to make an application for dispute resolution within 15 days of receiving the tenant's forwarding address in writing and is therefore liable under Section 38(6) which provides:

38(6) If a landlord does not comply with subsection (1), the landlord

38(6)(a) may not make a claim against the security deposit or any pet damage deposit, and

38(6)(b) **must** pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

The landlord was obligated under **Section 38** to return the entire original amount of \$1575.00. The amount which is *doubled* is the original amount of the deposit. As a result, I find the tenant has established an entitlement claim of **\$3150.00**.

Calculation for Monetary Order:

compensation for loss	2800.00
double security deposit	3150.00
total monetary award to tenant	5950.00

Conclusion

The tenant's claim on application, in part, has been granted.

I grant the tenant a Monetary Order under Section 67 of the Act for the amount of **\$5950.00**. 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: November 12, 2014

Residential Tenancy Branch