



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ALLISON APARTMENTS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for unpaid rent pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

This teleconference hearing was scheduled to convene at 1330. It did not convene until 1349 as I had entered the wrong teleconference codes. When I arrived at the hearing, I apologized to the parties for appearing late. I reiterate my apology. Shortly after I connected with this hearing, the occupant joined the hearing.

All parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord was represented by its agent.

The agent testified that he served the tenant with the dispute resolution package on 15 August 2014 by registered mail. The landlord provided me with a Canada Post customer receipt that showed the same. On the basis of this evidence, I am satisfied that the tenant was deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

The landlord acknowledged receipt of the tenant's evidence.

Preliminary Issue – Is RR a Tenant or an Occupant?

RR was not listed as a tenant on the tenancy agreement. The parties agreed that RR was present at the signing of the tenancy agreement but did not sign. DR asked the landlord to arrange for a new tenancy agreement with both of them, but the landlord never did. All parties agreed that RR was an occupant.

As the parties agree that RR is an occupant, I honour that intention and find that RR is an occupant and not a tenant. Accordingly, he is not a party to this application.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around each are set out below.

This tenancy began 1 September 2013. I was provided with a written tenancy agreement that was signed by the tenant and the landlord on 22 July 2013. The tenancy was for a fixed term of twelve months after which it would continue as a month-to-month tenancy.

The tenant testified that he had a conversation with the landlord in the spring that the tenant and occupant intended to vacate the rental unit. The tenant testified that the landlord told him that it was best if the tenant tried to find a new tenant. The tenant decided that he was going to move out for the end of July. At the end of June, in anticipation of posting an internet advertisement, the tenant asked the landlord for clarity about how the terms of the tenancy would transfer to the new tenant. The landlord told the tenant that he would find a new tenant. The landlord testified the tenant told the landlord to rent out the unit for August if he could, but that they would like to leave earlier. The landlord understood that if he could not find tenants for the unit then the tenant would stay. The tenant said that he understood he would be liable for the monthly rent for August if the landlord could not find a new tenant.

The landlord began showing the suite in July 2014. The landlord entered into a new tenancy agreement with a new tenant on 12 July 2014. The new tenancy commenced 1 September 2014.

The landlord testified that he tried to rent the rental unit for August 2014, but submitted that because of the rental unit's close proximity to a local university, most prospective tenants sought to begin a tenancy 1 September 2014.

The landlord testified that he received a call from the tenant in late July or early August stating that he was or had moved out. The landlord testified that he received a notice on 1 August 2014 from the tenant providing a forwarding address for return of the tenant's security deposit. The landlord testified that he never received written notice from the tenant. The tenant admits that he did not provide written notice and stated that he was unfamiliar with the written notice requirements under the Act.

The landlord testified that August's rental payment from the tenants remained unpaid as the tenant and occupant had both placed stop payments on their cheques.

The tenant submits that the landlord did not make his best efforts to find a new tenant and that is why the rent cheques for August were cancelled. The landlord provided me with a printout of various internet advertisements that he has placed. The parties and I attempted to identify which advertisement related to this rental unit. There was consensus that the only advertisement was placed 24 June 2014. I was not provided with a full copy of the advertisement. The heading of the advertisement reads "Apartments on [university] Campus – Sept. 1, 2014". The landlord testified that he had ten vacant units that he was trying to rent at that time. The tenant submitted that none of the advertisements provided by the landlord show a listing advertised for 1 August 2014. The landlord testified that if any of the prospective tenants coming to look at the ten different units asked for a unit for August he would have filled the tenant's unit. The landlord testified all prospective tenants were looking for accommodations as of September 2014.

The landlord testified that the tenant and occupant knew the new tenants and communicated. The tenant testified that he did not know the new tenants, but that the occupant met the new tenants at a showing. The occupant testified that he offered some of his and the tenant's furniture to the new tenant. The occupant testified that he asked if the new tenant was interested in moving in for August and was told that the new tenant did not know that the rental unit was going to be available for then. The occupant testified that the new tenant said he would have taken the unit for 1 August

2014 had he known at the time he saw the posting, but as of 12 July 2014, the new tenant had made alternate arrangements.

The tenant submitted that on 12 July 2014 when the landlord signed the new tenancy agreement, there was still time to find a tenant for 1 August 2014, and that this shows a lack of mitigation.

Analysis

The landlord has claimed for August's rental loss. Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

I find that the landlord and tenant entered into a fixed term tenancy for the period 1 September 2013 to 31 August 2014.

Subsection 45(2) of the Act sets out how a tenant may end a fixed term tenancy:

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.

This means that a tenant cannot give notice to end the tenancy before the end of the fixed term. In this case, the tenant vacated the rental unit before the completion of the fixed term. The tenant has breached the Act and as a result the landlord experienced a loss.

I then must consider whether the landlord has sufficiently mitigated his damages. The landlord's advertisement indicates that the rental unit was available for 1 September

2014. I find that prospective tenants were not alerted to the earlier availability of the rental unit. The landlord entered into a tenancy agreement on 12 July 2014 with the new tenants. I find that by entering into an agreement at this time and failing to alert prospective tenants that the rental unit was available for August the landlord failed to mitigate his damages and is thus not entitled to recover any amount from the tenant.

As the landlord has not been successful the landlord is not entitled to keep the tenant's security deposit.

As the landlord has not been successful the landlord is not entitled to recover its filing fee from the tenant.

Conclusion

The landlord's application is dismissed without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: February 06, 2015

Residential Tenancy Branch

