



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF, SS

Introduction

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

- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to recover his filing fee for this application from the tenant pursuant to section 72 and
- an order to be allowed to serve documents or evidence in a different way than required by the *Act* pursuant to section 71.

Both 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 confirmed that on or about December 27, 2014, he received an email followed by a hand delivered notice from the tenant advising him that the tenant had vacated the rental unit by December 24, 2014.

The tenant confirmed that she received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on June 13, 2015. The tenant also confirmed that she received a copy of the landlord's written evidence package and compact disk containing photographs well in advance of this hearing.

As the tenant confirmed that she received all of the landlord's documents, the landlord agreed that there was no need to consider his application to serve the documents or evidence in a different way than required by the *Act*. This portion of the landlord's application is withdrawn.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for losses in rent arising out of this tenancy? 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, including photographs, miscellaneous letters and e-mails, 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.

On July 12, 2014, the tenant signed this one-year fixed term tenancy agreement, which was intended to cover the period from August 15, 2014 until August 14, 2015. According to the terms of their Residential Tenancy Agreement (the Agreement), \$2,050.00 in monthly rent for this rental unit in a strata building was to be paid in advance on the first of each month.

Although the tenant paid a \$1,025.00 security deposit on July 18, 2014, a decision was made by Arbitrator AM on April 29, 2015 (the original decision) whereby the landlord was allowed to keep that security deposit. On that date, Arbitrator AM (the original Arbitrator) also issued a monetary award of \$2,253.75, which covered the landlord's loss of rent from January 15, 2015 until April 9, 2015, as well as the landlord's application for liquidated damages for this tenancy.

In her April 29, 2015 decision, Arbitrator AM also dismissed the remainder of the landlord's application for a loss of rent for the period from April 9, 2015 to August 14, 2015, with leave to reapply.

The current application from the landlord is for a monetary award of \$3,485.00 for the landlord's loss of rent for the period from April 10, 2015 until May 31, 2015. This application included a request for a pro-rated monetary award of \$1,435.00 for the landlord's loss of rent for the period from April 10, 2015 until April 30, 2015, as well as an application for \$2,050.00 in lost rent for the month of May 2015.

The landlord testified that he sold this property to his brother on or about June 3, 2015. Although he was not certain, the landlord said that he believed that a new tenant was located in June. He understood that this new tenant took possession of the rental unit in mid-July 2015. He said that the availability of the rental unit was advertised on a popular rental website as well as his own social network site for the same monthly asking rent of \$2,050.00. He entered contested written evidence of a screen shot of the rental website listing, which he maintained was listed and refreshed every 36-48 hours from April 5, 2015 to at least May 15, 2015. He said that the initial listing of this rental unit was entered in December 2014.

The landlord testified that the rental unit underwent repairs stemming from a flooding incident in December 2014, which were not completed in full until mid-May 2015. He maintained that the rental unit was "liveable" during this period of repair. He said that after receiving the original decision in mid-May of 2015, he had the rental unit re-painted, work that took approximately two or three days.

During the course of the hearing, the tenant's advocate questioned a number of aspects of the landlord's claim. He maintained that the rental unit was not truly available for rent for much of the period claimed by the landlord in this application because the repairs were ongoing until mid-May 2015. He disagreed with the landlord's claim that the premises were liveable while these repairs and renovations were being undertaken. He maintained that the landlord had not taken sufficient steps to mitigate the tenant's exposure to the landlord's loss of rent because of the delays in ensuring that the repair work was completed by the strata corporation or the

landlord. The tenant's advocate also challenged the landlord's failure to reduce the asking rent of the premises, even though the premises were not being rented at the \$2,050.00 asking rent. The tenant's advocate also alleged that the landlord had received compensation from an insurance company for the landlord's loss of rent from the tenant.

At the hearing, the landlord confirmed that there were delays in getting these flooding repairs completed, most of which he attributed to the strata corporation. He confirmed that he did receive a payment from his insurance company in the amount of \$3,438.73, for two month's loss of income. He testified that this payment was to cover the landlord's loss of income from March 24, 2015 until May 15, 2015. Although he received this payment equivalent to an allowance of \$1,719.36 for each of the two months, he noted that he had to pay the \$1,000.00 insurance deductible in order to obtain this payment. He clarified this statement when he agreed that this deductible payment was also required in order to obtain authorization from the insurance company to pay between \$2,000.00 and \$5,000.00 in repairs to the rental unit.

Analysis

Section 67 of the *Act* establishes that losses result from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the loss claimed by the landlord.

As noted at the hearing, the findings reached by the original Arbitrator with respect to this tenancy are final and binding. The legal principle of *res judicata* prevents me from rehearing any of the issues that were subject to her final and binding decision. Although the original Arbitrator dismissed the landlord's application for a monetary award for loss of rent for the period from April 10, 2015 to August 14, 2015, with leave to reapply, I am bound by some of her substantive findings regarding this fixed term tenancy. For example and in accordance with subsection 45(2) of the *Act*, the original Arbitrator found that the tenant contravened the terms of her Agreement by ending her tenancy prior to August 14, 2015.

Other portions of the original decision are limited to the landlord's actions until April 9, 2015, the period covered in the decision regarding the landlord's claim. The original Arbitrator's decision took into account the extent to which the landlord had attempted to mitigate the landlord's exposure to losses arising out of this tenancy pursuant to his duty to do so in accordance with section 7(2) of the *Act*. I am not bound by her substantive findings on these matters because I must consider the extent to which the landlord met the duty to mitigate losses from April 10, 2015 until May 31, 2015, the period identified in the landlord's current application.

In considering this matter, I have taken into account the extent to which the landlord incorporated the feedback provided in the original decision with respect to the landlord's subsequent attempts to mitigate the tenant's exposure to the landlord's further losses in rent from April 10, 2015 until May 31, 2015. The original Arbitrator made the following findings, which gave the landlord some guidance as to the measures he might need to take in order to fully satisfy the requirement under section 7(2) to mitigate losses:

...The landlord posted online rental advertisements two days after receiving notice from the tenant and provided copies of these advertisements. However, I find that the landlord has not attempted to fully minimize his losses. The landlord only advertised on one website and on a personal online social networking site which has limited access to select people. The landlord has not reduced the rental price of the rental unit or offered a shorter fixed term lease or a month to month tenancy, as incentives to try to attract potential tenants. The landlord also stated that he was willing to wait until the summer months, when he was confident that potential tenants will want to rent the unit when the rental season is busier, a delay well into the future as of the date of this hearing. The landlord turned down potential tenants who only wanted to rent the unit until June 2015. The landlord has also been performing a number of repairs and renovations, which would likely detract the number of potential tenants, given that the work needs to be completed and potential tenants may be wary of various problems with the rental unit. As such, I find that the landlord has failed to fully mitigate his losses under section 7(2) of the Act...

Based on the above reasoning and because she found that landlord had not fully mitigated the rental losses, the original Arbitrator limited her monetary award for the period from March 1, 2015 until April 9, 2015, to one quarter of the monthly rent that would normally have been found owing.

At this hearing, the landlord maintained that he did not receive the April 29, 2015 decision until mid-May 2015. He testified that he did not advertise on any additional rental websites nor did he choose to reduce the monthly asking rent for this rental unit. He said that the only action he took to make the rental unit more attractive to potential renters after receiving the original decision was to have the rental unit freshly painted, a process which took two or three days. I also note that the repairs and renovations cited in the original decision extended from the end of this tenancy in December 2014 until mid-May 2015, when the landlord said this work was completed.

The involvement of two different insurance companies, the strata corporation and the landlord no doubt led to understandable delays in restoring and repairing the rental unit after the flooding incident noted in the original decision. However, I find that these repairs and renovations should not have taken 5 ½ months to complete. Given that the premises were re-rented shortly after these repairs, renovations and the repainting were completed, I find that the delays in finishing this work likely impacted the landlord's ability to re-rent the premises to new tenants. Even after

the landlord received the original decision, he did little to correct the deficiencies in his efforts to mitigate the tenant's exposure to rental losses identified in that decision. Two weeks after he received that decision, he sold the property to his brother. Within a few weeks, his brother was able to find a new tenant.

The above ongoing deficiencies in the landlord's actions to mitigate the tenant's exposure to the landlord's loss of rent alone may have been sufficient for me to dismiss the landlord's application for a monetary award for loss of rent from April 10, 2015 until May 31, 2015. However, in addition to the above reasons, I find that the landlord received a \$3,438.73 payment from his insurance company to cover his loss of rental income from this rental unit for period from March 24, 2015 until May 15, 2015. I attach little weight to the landlord's testimony that this payment he received should be reduced by the amount of his \$1,000.00 deductible payment. The landlord would still have had to pay this deductible payment in order to obtain the repairs to the damage done, which certainly exceeded \$1,000.00.

The first 17 days of this insurance company payment covered a period which is not before me, but which was included in the monetary award issued by the original Arbitrator until April 9, 2015. However, the remaining 36 days of this payment, amounting to a pro-rated payment of \$2,270.80, compensated the landlord for losses that he is claiming as part of his overall claim of \$3,485.00 in the current application. On this basis and for the reasons cited above, I find that the landlord has failed to demonstrate actual losses for the period from April 10, 2015 until May 15, 2015, and has provided insufficient evidence of having met the duty to mitigate the tenant's exposure to any losses that may have occurred, due to the delays in completing the renovations and repairs.

I have also considered the landlord's claim for loss of rent from May 15, 2015, until May 31, 2015. By mid-May 2015, the renovations and repairs had been completed. However, by mid-May 2015, the landlord had received the original decision. I find that the landlord did little to address the deficiencies that led to the original Arbitrator's decision to limit the landlord's entitlement to loss of rent for the period immediately preceding April 10, 2015 to one-quarter of the monthly rent. Given the time that the premises remained unrented, with no additional steps taken by the landlord to either reduce the asking rent or to increase the advertising of the availability of this rental unit, I find that the landlord has not demonstrated that he met the requirements of section 7(2) of the *Act* to mitigate the tenant's exposure to rental losses. The landlord's sale of the property to his brother a few weeks later also seems to confirm the landlord's inattention to prioritizing the re-rental of these premises. As such, I dismiss the landlord's application for a monetary award for period from May 15, 2015 until May 31, 2015.

As the landlord's application for a monetary award has been unsuccessful, the landlord is not entitled to recover his filing fee from the tenant.

Conclusion

The landlord's application for a substituted service order is withdrawn.

I dismiss the landlord's application for a monetary award for loss of rent and for recovery of the filing fee without leave to reapply.

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 20, 2015

Residential Tenancy Branch

