



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MARLBOROUGH HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPN 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 the filing fee for this application from the tenant pursuant to section 72. At the outset of the hearing, she withdrew her application for an Order of Possession for the rental unit.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. Both parties confirmed receipt of the other's evidentiary submissions for this hearing. I note that the tenant exited the teleconference line at 1:49 pm for this 1:30 pm hearing. He did not return before the hearing concluded at 1:59 pm. I have taken the tenant's testimony and written submissions into account in making my decision.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for rental loss and other monetary loss?

Is the landlord entitled to retain the tenant's security deposit?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

This tenancy was scheduled to begin on February 1, 2016 as a one year fixed term. The tenant viewed the residence in the evening of January 8, 2016 and, shortly thereafter, he sent an email message to the landlord to indicate he would like to rent the unit. On consensus of the parties, a residential tenancy agreement was signed on January 11, 2016. A copy of the agreement was submitted as evidence for this hearing. While the

tenant never moved in to the rental unit, the landlord continues to hold a security deposit in the amount of \$465.00 paid by the tenant at the outset of the tenancy.

The tenant testified that because of health and safety concerns, he chose not to move in to the rental unit. The landlord testified that the tenant notified her on the eve of the scheduled move-in day of the tenancy (January 31, 2016) that he would not move in and returned the key for the rental unit on February 2, 2016. She sought to retain the \$465.00 security deposit provided by the tenant as well as an additional \$225.00 in additional expenses for a total amount of \$690.00.

The tenant testified that he viewed the rental unit at night with the previous tenant's belongings still in the rental unit. He testified that he immediately emailed the landlord to indicate that he wanted to rent the unit. He testified that he did not return to view it in the day light. He testified that he attended to conduct a condition inspection on the day before move-in (January 31, 2016). At that time, the tenant testified that he realized that the rental unit was not habitable. He testified that he was not comfortable saying anything to the landlord at the time. The tenant testified that he signed a condition inspection form on January 31, 2016 but it was blank and he believed it was a formality. He testified that he emailed her later that day (approximately 4:00 pm) to say he would not move in to the rental unit.

The tenant submitted a copy of email correspondence with the landlord including an email from the scheduled move-in day, February 1, 2016 stating,

I don't believe [the rental unit]... meets the "reasonably comfortable to live in" standards and I have concerns about the living conditions as it pertains to health and safety...

He further writes that, after his original contact with the landlord, he has now noted further repair issues including exposed flooring and wiring as well as mold around the shower and ceiling fan and a "significant gap between the frame and window in the bedroom so air/moisture/etc. can always get in." In his correspondence with the landlord, the tenant refers to photographs that he sent to the landlord. The tenant submitted photographic evidence of the rental unit. The photographs showed a very, very unclean rental unit. The photographs also showed some cracks in the walls/ceiling of the rental unit and a crack or space above the window frame.

The tenant submitted that the landlord acknowledged that the unit was not acceptable to live in because they immediately offered to make all of the repairs that were needed. The landlord testified that she agreed to fix up the rental unit so that the tenant would

meet his commitment to move in to the rental unit. She testified that she tried her best to accommodate the tenant. The tenant refused to consider moving into the rental unit.

The landlord testified that she was able to re-rent the unit for February 15, 2016 for \$930.00 a month, pro-rated for February 2016. The landlord sought to retain the tenant's security deposit towards her ½ month's rental loss as well as an additional \$200.00 as an administrative fee for breaking the lease and the cost of a returned cheque as follows,

Item	Amount
Rental Loss	\$465.00
Tenant's Stopped/Returned Cheque	25.00
Re-rent admin fee/Lease break fee	200.00
Less Security Deposit	-465.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Sought by Landlord	\$325.00

The tenant submitted that he should not have to pay any amount to the landlord.

Analysis

Section 17 of the Act allows for the provision of a security deposit at the outset of a tenancy to an amount totalling half of one month's rent. That security deposit may be retained by the landlord, after application to the Residential Tenancy Branch, for unpaid rent or other damage at the end of tenancy. Section 38(4)(a) of the Act also allows a landlord to retain an amount from a security deposit if "at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant." In this case, there is no evidence that the tenant gave the landlord written authorization to retain any portion of his deposit. The landlord applied, within 15 days of the tenant advising that he would not move in to the rental unit, to retain his security deposit.

This tenancy ended February 2, 2016. The tenant provided insufficient notice to end the tenancy pursuant to section 45 of the Act. Section 45(3) provides that,

[if] a 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.

The tenant advised the landlord of the need for repairs on January 31, 2016 and, at that time, the landlord advised that she would make every effort to make the repairs that the tenant claimed were needed. After reviewing all of the evidence, including the photographic evidence, I find that the condition of the unit did not constitute a breach of a material term of the tenancy agreement on the part of the landlords. It was dirty and needed to be cleaned. There were some repairs to be done to the unit but I find that it was not uninhabitable. I note that the tenant viewed the unit prior to agreeing to the tenancy and again prior to his move-in date for the minimal condition inspection. Further, I note that the tenant did not allow the landlord an opportunity to make repairs on the rental unit in accordance with section 45(3) of the Act as provided above.

I have considered the submissions by the tenant as well as the testimonial and documentary evidence submitted by the tenant. I find that the tenancy began on the day that the parties signed the tenancy agreement. I find that the tenant breached the tenancy agreement by failing to move in after both signing the residential tenancy agreement and signing off on the condition inspection report. The tenant is at liberty to choose not to move in to the unit. However, that choice has consequences for the landlord who relied on the tenant's commitment that he would move into the rental unit.

I find that the landlord mitigated the loss that she incurred by re-renting the unit for February 15, 2016. Therefore, the landlord's loss, with respect to rent, totaled \$465.00. The landlord also sought to recover a "lease break fee", an administrative fee for the administrative steps to re-rent the unit. Finally, the landlord sought to recover the \$25.00 that she was charged by her bank when the tenant put a stop payment on his first month's rent cheque.

The tenant did not advise the landlord until the day of scheduled move-in that he would not move in to the rental unit. As a result of the tenant's actions, the landlord incurred monetary loss. The landlord was unable to collect rent for ½ month. The landlord incurred a \$25.00 fee for the tenant's stopped cheque. I find that the landlord is entitled to retain the tenant's \$465.00 security deposit to compensate for ½ month's rental loss. I find that the landlord is entitled to recover the \$25.00 for the tenant's stopped cheque.

With respect to the landlord's claim to recover \$200.00 lease break fee or administrative fee, the landlord testified that this amount is intended to cover losses incurred by the landlord in re-renting the unit. It is important to note that such a fee is not intended to be a penalty but merely to ensure that the applicant, in this case the landlord is not out of pocket for expenses incurred as a result of the actions of the tenant.

The landlord's residential tenancy agreement does not have a provision for an administrative fee if a lease is broken. Handwritten on the bottom of the agreement is "penalty fee for breaking lease" but it does not provide an amount. I find that the landlord has not proven the lease break or administrative fee represent a particular amount of loss or cost. I find that the administrative fee sought is simply a penalty. Therefore, I decline to award this \$200.00 fee.

Pursuant to section 72(2), I allow the landlord to retain the tenant's \$465.00 security deposit towards the landlord's monetary award.

As the landlord was successful in her application, I find that she is entitled to recover the filing fee for this application.

Conclusion

I issue a monetary order to the landlord as follows,

Item	Amount
Rental Loss	\$465.00
Tenant's Stopped/Returned Cheque	25.00
Less Security Deposit	-465.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order to the Landlord	\$125.00

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: October 11, 2016

Residential Tenancy Branch