



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NPR Limited Partnership
Northview Apartment Reit
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

This hearing was convened in response to an application by the Tenant and an application by the Landlord pursuant to the *Residential Tenancy Act* (the "Act").

The Tenant applied on May 27, 2016 for:

1. An Order for the return of the security deposit - Section 38.

The Landlord applied on June 7, 2016 for:

1. A Monetary Order for unpaid rent or utilities - Section 67;
2. A Monetary Order for compensation - Section 67;
3. An Order to retain the security deposit - Section 38; and
4. An Order to recover the filing fee for this application - Section 72.

The Tenants and Landlords were each given full opportunity under oath to be heard, to present evidence and to make submissions. Although the Tenants brought a Witness to the proceedings this Witness was never called to give evidence.

Preliminary Matter

It was noted that the Tenants named Landlord NAR as a Party and not Landlord NPR as named by the Landlord. The Landlord states that Landlord NAR and NPR are the same entities. As such I consider that the Tenants have correctly named Landlord NAR and that any order may be enforceable against either Landlord NAR or Landlord NPR.

Issue(s) to be Decided

Is the Landlord entitled to both lost rental income and liquidated damages?

Is the Tenant entitled to return of the security deposit?

Background and Evidence

The following are undisputed facts: The tenancy agreement provides that the tenancy started on September 1, 2015 for a fixed term to end August 31, 2016. The tenancy ended on April 30, 2016. Rent of \$780.00 was payable on the first day of each month. At the outset of the tenancy the Landlord collected \$390.00 as a security deposit. The Tenant provided its forwarding address by email on May 31, 2016. The Parties mutually conducted a move-in condition inspection with a completed report copied to the Tenants. The Landlord provided no opportunity to the Tenants to conduct a move-out inspection. The security deposit has not been returned. The Tenants provided notice to end the tenancy for April 30, 2016 by email sent to the Landlord on March 31, 2016.

The Landlord states that the tenancy agreement includes a liquidated damages clause and that \$390.00 is payable as liquidated damages if the Tenant ends the tenancy before the fixed term date. The Landlord confirms that this clause was not initialled by the Tenants. The Landlord states that this clause was specifically drawn to the Tenant's attention at signing. The Landlord claims \$390.00 for the Tenant ending the tenancy prior to the end of the fixed term.

The Tenant states that the Landlord was informed at the outset that the Tenants only wanted a tenancy for the term of the school year and that the Landlord verbally told the Tenants that they could end the tenancy with a month's notice.

The Landlord states that the Tenants did not provide sufficient notice to end the tenancy and that although the Landlord had a waiting list for new tenants the Landlord was not able to rent the unit until May 5, 2016. The Landlord states that this was due to no employees working over the week-end. The Landlord states that the new tenancy started with rent of \$799.00 per month. The Landlord claims lost rental income of \$125.81.

Analysis

Section 36 of the Act provides that the right of the landlord to claim against a security deposit for damage to residential property is extinguished if the landlord does not give the tenant two opportunities for a move-out inspection. Although at the hearing it was indicated that the Landlord's right to claim against the security deposit was extinguished due to the failure of the

Landlord to conduct a move-out inspection, upon further examination of the Act I determined that this finding was made in error. Only the Landlord's right to claim against the security deposit for damages to the unit was extinguished. The Landlord continued to have the right to claim against the security deposit for other damages. As a result the Landlord is not required to repay double the security deposit.

Section 45 of the Act provides that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than the date specified in the tenancy agreement as the end of the tenancy. Section 53 of the Act provides that if the effective date stated in a notice to end tenancy is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section. Although the Tenant argues that the fixed term does not apply given the Landlord's oral assurances of being able to end with a month's notice, given that the Tenant signed the written agreement with the liquidated damages clause present and noting that the Tenant did not dispute that the liquidated damages clause was pointed out at the time of signing, I do not accept the Tenant's evidence of an oral agreement to end the tenancy with a month's notice. As the Tenant could not end the tenancy before the end of the fixed term I find that Act automatically corrected the effective date to the end of the fixed term and the Tenants were liable for rents to the end of the tenancy.

Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. Although the Landlord characterizes the claim for lost rental income as arising from a failure to provide notice to end tenancy, the Tenant did provide such notice with the effective date being automatically corrected. I find therefore that the Landlord is in fact claiming both liquidated damages and lost rental income for the same breach: ending the tenancy before the fixed term date. As the Landlord cannot do both I resolve the conflict in favour of the Tenant and dismiss the larger of the two claims, the claim for liquidated damages.

Section 7 of the Act further provides that where a landlord claims compensation for loss the landlord must do whatever is reasonable to minimize the damage or loss. Given the Landlord's evidence of a waiting list from which to immediately obtain new tenants, considering that the Landlord waited for a period of time before moving to obtain the next tenant and given that

Landlord obtained a greater rental amount than was payable by the Tenant I find that the Landlord both failed to take reasonable measures to mitigate any lost rent for May 2016 and has failed to substantiate the amount of loss claimed. I therefore dismiss the Landlord's claim for lost rental income. As none of the Landlord's claims have been successful I find that the Landlord is not entitled to recovery of the filing fee and in effect the Landlord's application is dismissed.

As there is no basis for the Landlord to retain any portion of the security deposit I order the Landlord to return the \$390.00 to the Tenants forthwith.

Conclusion

The Landlord's application is dismissed.

I grant the Tenant an order under Section 67 of the Act for **\$390.00**. If necessary, this order may be filed in the Small Claims Court and enforced as an order 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: November 25, 2016

Residential Tenancy Branch