Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Vicinie Homes (Stella) Limited Partnership
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNR, MNSD, SS, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by two agents for the landlord and the tenant.

While the parties acknowledged the exchange of evidence via email which is not an acceptable method of service under the *Residential Tenancy Act (Act),* they both have acknowledged they received each other's evidence packages.

The parties agreed that this included an additional letter submitted by the tenant from the original landlord dated December 7, 2016. The landlord confirmed receipt of these letters and was prepared to respond to them. These letters had not been received by me prior to the hearing. I ordered I would consider the letters and that the tenant could fax them to the Residential Tenancy Branch no later than the end of business on December 15, 2016. I received the documents on that date.

I note that the landlord's original claim was for an amount of $11,400.00 based on 6 months of lost revenue at a rate of $1,900.00 per month. At the outset of the hearing the landlord stated she wanted to reduce the claim for lost revenue by $3,325.00. She stated that they re-rented the unit effective August 15, 2016 for a rent amount of $950.00 per month.

The landlord also submitted a new Monetary Order Worksheet indicating that they were seeking lost revenue for a 7 month period for a total of $13,300.00 (instead of the 6 month period identified in the original Application) less $3,325.00 received from the new tenant as noted above).

Despite the landlord's failure to submit an Amendment to an Application for Dispute Resolution seeking to increase their claim by one extra month, I find that since the total amount of the landlord's claim is to be reduced to $9,975.00 from the original $11,400.00 claimed there is no prejudice to the tenant to accept both of these

amendments. I therefore amend the landlord's original claim for lost revenue to $9,975.00.

The landlord also sought to include a claim of $262.50 for cleaning of the residential property. While I acknowledge that the landlord submitted a new Monetary Order Worksheet to the Branch on December 8, 2016 including this amount they did not submit an Amendment to an Application for Dispute Resolution and since the original Application did not include any compensation related to the condition of the rental unit at the end of the tenancy I will not accept this requested amendment. The landlord remains at liberty to file a separate Application for Dispute Resolution to claim these amounts, pursuant to any limitations in the *Act*.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent and/or lost revenue; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 44, 45, 67, and 72 of the *Residential Tenancy Act (Act).*

Background and Evidence

Both parties submitted into evidence a copy of a tenancy agreement signed by the tenant and the previous owner of the residential property on November 9, 2015. This agreement stipulated that the tenancy began on January 1, 2016 as a 1 year fixed term tenancy for the monthly rent of $1,900.00 due on the 1st of each month with a security deposit of $950.00 paid.

I note that on page 6 of the tenancy agreement under clause 17 there is no indication of any additional terms or addendums to the tenancy agreement. However, the tenant has submitted two additional documents. One is entitled "Consent to Sublease" and was signed on the same dates as the tenancy agreement.

In this document clause 3 states:

> "This consent constitutes the entire agreement of the Landlord and the Tenant relating to its subject matter and replaces any prior negotiations, representations, agreements and understandings of the parties with respect to such matters oral or written. The Parties acknowledge that they have not relied on any promise, representation or warranty, expressed or implied, not contained in this Consent"

There is a final document signed on the same time by both parties that outlines the tenant's and the landlord's obligations in relation to maintenance of the property during the tenancy.

The landlord submits that the property was transferred from the previous owner to the respondent landlords on May 19, 2016. The landlord also submitted into evidence a

copy of a document entitled General Assignment of Leases signed by the landlord and the former property owner's agent and dated May 19, 2016. This document specifically speaks to the subject tenancy agreement in place for the residential property.

Relevant clauses to these issues include:

- Clause 3(b) – "there are no other leases, agreements to lease or rental agreements affecting the Properties";
- Clause3(e) – "none of the Leases (nor any of the rents, issues, profits, revenue, benefits and advantages accruing or payable under the Leases) have been assigned or otherwise encumbered by the Assignor";
- Clause 3(f) – "the Leases contain the entire agreements between the Assignor and the respective tenants relative to the premises demised under the Leases"; and
- Clause 3(h) – "the Leases do not contain any provision whereby a tenant may be entitled to occupy the premises demised on a rent-free or rent-reduced basis with respect to any period after the date of this agreement."

The tenant acknowledges she and the former owner of the property entered into the above noted tenancy agreement on November 9, 2015. The tenant stated that the other two agreements (Consent to Sublease and the maintenance agreement) were entered into on the same date.

The tenant asserts that on the same date the former landlord agreed verbally that should the tenant end the fixed term tenancy prior to the end of the fixed term she would not be held responsible for the payment of rent until the end of the fixed term. The tenant submits that the former landlord agreed that should this circumstance arise the tenant would only be required to forgo her security deposit.

In support of this assertion the tenant has submitted two unauthenticated letters from the former landlord. In the letter dated June 1, 2016 the former owner writes, in part:

> "As per our mutual understanding of the rental agreement for both (addresses rented by the tenant). It was agreed between myself and Sharon that when Sharon decided to break her lease. Her damage deposit will not be refundable; however, she will not be held responsible in continue with her rental payments." [reproduced as written with removal of addresses]

The letter dated December 7, 2016 reiterates the assertion noted above and offers for the current landlord to contact the former landlord for any further clarifications required.

The landlords submit that at no time until after the tenant failed to pay rent for the month of June 2016 were they made aware that the tenant intended to discontinue her fixed term tenancy. The tenant testified that she had informed the new landlords of her plans

when they took possession of the property on May 19, 2016 that she would be ending the tenancy at this address.

Both parties submitted a substantial volume of email correspondence between them regarding the tenancy. The first such dated communication is an email from the landlord on May 31, 2016 as a reminder for the tenant to pay the rents she owes for both properties she had rented for the month of June 2016 to the new landlord.

In response to that email and on the same day the tenant wrote:

> "I have spoken with the former landlord (Lily) whom I signed the contract with. I'm here to confirm with you that I have the right with her to not terminate my rental agreement at the cost of damage deposit. If conwest bought over the same contract, I'll have the same rights."

The parties agreed the keys for the residential property were returned to the landlord on June 3, 2016.

The tenant submitted that she ended the tenancy because her tenants were vacating the rental unit due to the landlord's plans to redevelop the property. However, the tenant submitted in her testimony and written submissions in relation to the landlord's obligation to try to re-rent the property that she had no trouble renting the next door property to a third party during this time period; for the same duration of time and at the same rent as she had previously been paying.

The landlord submitted that after they found out the tenant had ended her tenancy they advertised by way of "word of mouth". The landlord submitted that it was difficult to re-rent because of the short term nature of the rental. They submitted they were able to re-rent the unit effective August 15, 2016 at a rent of $950.00 per month for a month to month tenancy.

The landlord has submitted a copy of this new tenancy agreement and a Mutual Agreement to End a Tenancy signed by the new tenant to be effective December 31, 2016. The landlord confirms receiving $3,325.00 in rental payments from the new tenant for the period of August 15, 2016 to December 31, 2016. As noted above, the landlord seeks $9,975.00 in compensation for lost revenue.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**

4. Steps taken, if any, to mitigate the damage or loss.

Section 44(1) of the *Act* states a tenancy ends only if one or more of the following applies:

a) The tenant or landlord gives a 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; or
f) The director orders the tenancy is ended.

Section 45(2) stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy on a date is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and is the day before the day in the month that rent is payable under the tenancy agreement.

Section 45(3) states that if the 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.

A material term of a tenancy agreement is a term that is agreed by both parties is so important that the most trivial breach of that term gives the other party the right to end the tenancy, such as the payment of rent.

I find the tenant's inability to secure her own tenants for these address does not constitute a breach, on the part of the landlord, of any term of the tenancy agreement let alone a material term.

As there is no evidence before me that the tenant had identified to the landlord that she felt the landlord was in breach of a material term of the tenancy and that if they did not correct that breach she would vacate the property, I find the earliest the tenant could have ended to the fixed term tenancy to be compliant with the requirements under Section 45(2) would be the end of the agreed upon fixed term or December 31, 2016.

In regard to the tenant's assertion that she and the former landlord had agreed verbally on the same day they signed all three of their agreements related to this tenancy (tenancy agreement; consent to sublease; and maintenance agreement) that she would only have to forfeit her security deposit if she chose unilaterally to end her fixed term, I am not persuaded that such an agreement existed.

I find that, on a balance of probabilities, it is unlikely that parties who went to the extent of developing three written agreements to define their agreed upon relationship and the obligations of both parties as a result of that relationship would not include a written term that could potentially cause the landlord to lose the rent for the entire duration of the fixed term.

I find it is unreasonable that the parties would agree to a fixed term in writing and then agree, verbally, that if the tenant doesn't want it to be a fixed term the landlord would accept no more compensation than $950.00 when her potential loss would have been $22,800.00.

Even if I were to accept the tenant and the former landlord had made such an agreement there is no documentary evidence of such an agreement until after the landlord no longer had any legal authourity to make promises related to the tenancy. The only documentary evidence submitted by the tenant for such an agreement were the letters from the former later dated June 1, 2016 and December 7, 2016.

Based on the above, I find the tenant is obligated to pay the landlord compensation for any lost revenue as a result of her vacating the property prior to the end of the fixed term or December 31, 2016 subject to their obligation to mitigate their losses.

Section 7 of the *Act* states if a party to a tenancy does not comply with the *Act*, regulations or their tenancy agreement, the non-complying party must compensate the other party for any damage or loss that results.

The section goes on to state that the party who claims compensation for damage or loss that results from the other's non-compliance with the *Act*, regulation or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

With the exception of the month of June 2016, I find, from the landlord's own testimony that they failed to do whatever was reasonable. I find advertising by word of mouth solely and at the exclusion of all other types of advertising the availability of the rental unit was not sufficient.

Despite the landlord's submissions that a problem they faced with re-renting the unit is that it was only available to be rented until December 31, 2016 and the new tenant was required to move out at that time, I find it is unlikely that the landlord would have had such difficulty renting the unit if the property had been advertised using local media

and/or internet postings. I make this finding in consideration of the current rental market in the community where this rental unit is located.

As such, I dismiss the landlord's claim for compensation for lost revenue for the months of July, August, September, October, November, and December 2016.

However, in relation to the landlord's claim for lost revenue for the month of June 2016, I find there is no evidence before me that the tenant informed the landlord, prior to May 31, 2016 of her intent to end the tenancy earlier than the fixed term or specifically before the start of June 2016.

As a result, I find that it would be unreasonable to expect the landlord would have been able to take actions to re-rent the unit for any portion of the month of June 2016. Therefore, I find the landlord is entitled to compensation for lost revenue for the month of June, 2016.

Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **$2,000.00** comprised of $1,900.00 rent owed and the $100.00 fee paid by the landlord for this application.

I order the landlord may deduct the security deposit and interest held in the amount of $950.00 in partial satisfaction of this claim. I grant a monetary order in the amount of **$1,050.00**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be 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: January 11, 2017

Residential Tenancy Branch