Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied 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;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Preliminary Issue

At the outset a scheduling conflict occurred in which the same teleconference codes were used for two different hearings. At 9 minutes past the start of the scheduled hearing the landlord was directed to exit and call back in using a different set of codes. The second arbitrator was directed to have any other parties calling into the hearing redirected using the same code as the one provided to the landlord. A review of the second arbitrator's hearing showed a duration of 10 minutes and that no further participants calling in.

At 15 minutes past the start of the scheduled hearing time the hearing was commenced.

The landlord attended the hearing via conference call and provided undisputed affirmed testimony. The tenant did not attend. The landlord stated that the tenant was served with the notice hearing package via Canada Post Registered Mail on February 9, 2018. The landlord also provided undisputed affirmed testimony that the tenant was served with 3 separate evidence packages (two on June 29, 2018 which were returned as unclaimed and the third package sent on August 5, 2018 and received on August 7, 2018). I accept the undisputed affirmed evidence of the landlord and find that the tenant was properly served as per sections 88 and 89 of the Act. Although the tenant did not claim the first two evidence packages, I find that the tenant is deemed served as per section 90 of the Act.

During the hearing the landlord disputed that she was not served with the tenant's application for dispute nor was she aware of the issues. I accept the undisputed affirmed evidence of the landlord and find that the tenant has failed to serve the landlord with the tenant's application for dispute. As such, the tenant's application is dismissed with leave to reapply. Leave to reapply is not an extension of any applicable limitation period.

The hearing proceed on the landlord's monetary claim only.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for money owed or compensation and recovery of the filing fee?
Is the landlord entitled to retain all or part of the security deposit?

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 applicant's claim and my findings are set out below.

This tenancy began on August 1, 2017 on a fixed term tenancy ending on August 1, 2018 and then thereafter on a month-to-month basis as shown by the submitted copy of the signed tenancy agreement dated July 20, 2017. The monthly rent was $3,500.00 payable on the 1st day of each month and a security deposit of $3,500.00 was paid on July 22, 2018.

The landlord seeks a clarified monetary claim of $21,100.00 which consists of:

$21,000.00	$3,500.00@ 6 months (February 1, 2018- August 1, 2018)
$100.00	Recovery of Filing Fee

The landlord also seeks to retain the $3,500.00 security deposit in partial satisfaction of the claim.

The landlord claims that the tenant breached the fixed term tenancy by pre-maturely ending the tenancy by giving verbal notice to end the tenancy on January 10, 2018 for February 15, 2018. The landlord stated that the tenant abandoned the rental premises on or before January 31, 2018 without any notice. The landlord confirmed that she had control and possession of the rental premises on January 31, 2018. The landlord stated that she received formal written notice on February 1, 2018 from the tenant that the tenancy had ended and the tenant's forwarding address in writing for return of the security deposit.

The landlord stated that because of strata bylaws, the landlord has been unable to re-rent the rental premises and has suffered a loss of rental income totalling, $21,000.00. The landlord clarified that the tenant was informed that because there is a limit to the number of allowed rentals in the building the landlord would not be able to re-rent the premises for up to 1 year. The landlord claims that as of the date of this hearing the landlord is still on the waiting list to be an authorized rental and the rental premises remains vacant.

The landlord stated that a notice/request for the tenant to comply with the Residential Tenancy Act, Regulations or Tenancy Agreement dated January 18, 2018 was sent to the tenant detailing the circumstances, the strata bylaw and notice that the landlord seeks compensation for the remaining 6 months of loss of rental income due to the tenant ending the tenancy before the end of the fixed term. A copy of the letter was submitted in support of this claim which states in part,

> *…Because you are the one who broke the fixed term tenancy agreement, and based on the bylaw, I can't rent out my unit for at least one year from now on, we have severe anxiety and financial loss since the rental income is our main family income. Hereby I request you must pay the remaining 6 months' rent, which is CAD$21,000, and the deposit is non-refundable.*

The landlord provided a copy of the local Strata Bylaws, Section 43 states in part,

> *Rentals*
> *43. Residential rentals*
>
> *43.1 No more than 4 units may be rented.*
>
> *43.2 An owner wishing to rent a strata lot must apply in writing to the council for permission to rent. Upon conclusion of the term contained within the granted rental agreement under this bylaw, the Owner must re-apply to rent their unit, and the provision of bylaw 43.3 and 43.4 shall apply.*
>
> *43.3 If the number of strata lots rented at the time an owner applies for permission to rent has reached the limit stated in bylaw 43.1, excluding exempt strata lots pursuant to sections 143 and 144 of the Act and section 17.15 of the Regulations, the council must refuse permission and notify the owner of the same in writing, as soon as possible stating that he limit has been reached or exceeded, as the case may be, and place the owner of the strata lot on a waiting list to be administered by the council based on the date of the request for permission to rent.*
> *43.4 If the limit stated in bylaw 43.1 has not been reached at the time the owner applies for permission to rent a strata lot, excluding exempt strata lots pursuant to sections 143 and 144 of the Act and section 17.15 of the Regulations, the council shall grant permission and notify he owner of the same in writing as soon as possible.*

The landlord has provided a copy of the request to re-rent in an email from the strata manager dated January 29, 2018 which states in part,

> *…I also attached the Bylaws of the Strata Corporation (Bylaw 43.1) states the limit of rental for your strata and* ***the limit has been reached****. To the best of our knowledge,* ***there are currently 5 owners on the waiting list for the rental in your building.*** *Once your tenant moved out, you will go back to the bottom of the waiting list and wait for your turn again…*

Analysis

Section 67 of the *Act* establishes that if damage or loss results 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 damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/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 or damage.

Residential Tenancy Branch, Policy Guideline 3. Claims for Rent and Damages for Loss of Rent states in part,

> *This guideline deals with situations where a landlord seeks to hold a tenant liable for loss of rent after the end of a tenancy agreement.*
>
> *Section 44 of the Residential Tenancy Act and section 37 of the Manufactured Home Park Tenancy Act set out when a tenancy agreement will end. A tenant is not liable to pay rent after a tenancy agreement has ended pursuant to these provision, however if a tenant remains in possession of the premises (overholds), the tenant will be liable to pay occupation rent on a per diem basis until the landlord recovers possession of the premises.* ***In certain circumstances, a tenant may be liable to compensate a landlord for loss of rent****.*
>
> ***Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises****, the landlord has two options. These are:*
>
> 1. *Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;*
> 2. ***Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy****.*
>
> *These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the Act or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.*
>
> *If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant while the tenant remains in*

possession of the premises is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement*. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy.*

In this case, I accept the undisputed affirmed evidence of the landlord that the tenant provided verbal notice on January 10, 2018 to pre-maturely end the fixed term tenancy on February 15, 2018. I accept the landlord's undisputed evidence that without notice the landlord discovered that the tenant had abandoned the rental property as of January 31, 2018. I find that the landlord did not receive formal notice in writing to end the tenancy until February 1, 2018 as per the landlord's claims that the tenant provided a forwarding address in writing for return of the security deposit on February 1, 2018. I also find that the landlord was unable to mitigate any possible losses as the strata bylaw 43 which was confirmed by the email from the Strata Manager prevented the landlord from re-renting the rental property. The landlord provided notice to the tenant in the letter dated January 18, 2018 that a claim for loss of rent would be made.

On this basis, I find that the landlord has provided sufficient evidence that a loss of rental income totaling, $21,000.00 (6 months @ $3,500.00 per month) was caused by the tenant pre-maturely ending the fixed term tenancy.

The landlord having been successful is also entitled to recovery of the $100.00 filing fee.

In offsetting this claim, I authorize the landlord to retain the $3,500.00 security deposit currently held by the landlord in partial satisfaction of this claim.

I note during the hearing that the landlord's requirement in demanding a $3,500.00 security deposit equal to the monthly rent was noted to the landlord as contrary to the

Act and that the landlord may not contract out of the Act. The landlord had commented that she was unaware of this and had just changed the terms to suit her needs. It was noted to the landlord that she and the tenant had expressly crossed-out and initialed this change to the tenancy agreement (RTB-1).

Conclusion

The landlord is granted a monetary order for $17,600.00.

This order must be served upon the tenant. Should the tenant fail to comply with the order, the order may be filed in the Small Claims Division of the Provincial 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: September 07, 2018

Residential Tenancy Branch