Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, MNRL-S, FFL, MNSD, FFT

Introduction

This was a cross application hearing that dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for the return of the security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

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

- a Monetary Order for damages, pursuant to section 67;
- a Monetary Order for damage or compensation under the Act, pursuant to section 67;
- a Monetary Order for rent, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The property manager (the "landlord") testified that the tenants were individually served the notice of dispute resolution packages by registered mail on February 20, 2018. The tenants confirmed receipt of the dispute resolution packages but did not know on what date. I find that the tenants were deemed served with these packages on February 25, 2018, five days after their mailing, in accordance with sections 89 and 90 of the *Act.*
The tenants testified that the landlord was served the notice of dispute resolution package together with their evidence by registered mail but could not recall on what date. The tenants provided the Canada Post Tracking number to confirm this registered mailing. The Canada Post Tracking website states that the package was sent on February 8, 2018. The landlord testified that his staff helped prepare for this meeting and that all he had in front of him was a folder with a sticky note on it marked "tenants' evidence" but that he did not see the tenants' dispute

resolution application. The landlord did not know on what date the evidence was received in his office. The Canada Post Tracking website states that it was signed for on February 9, 2018.

I accept the tenants' testimony that the tenants' application for dispute resolution and evidence were served as one package. I find that the landlord received both packages in accordance with sections 88 and 89 of the *Act* on February 9, 2018.

Issue(s) to be Decided

1. Are the tenants entitled to a Monetary Order for the return of the security deposit, pursuant to section 38 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
3. Is the landlord entitled to a Monetary Order for damages, pursuant to section 67 of the *Act*?
4. Is the landlord entitled to a Monetary Order for damage or compensation under the Act, pursuant to section 67 of the *Act*?
5. Is the landlord entitled to a Monetary Order for rent, pursuant to section 67 of the *Act*?
6. Is the landlord entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
7. Is the landlord entitled to recover the filing fee for this application from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This one-year fixed term tenancy began on April 15, 2017 and was originally set to end on March 31, 2018; however, the tenants moved out before the end of the fixed term on January 31, 2018. Monthly rent in the amount of $1,750.00 was payable on the first day of each month. A security deposit of $850.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree to the following facts. The tenants sent e-mails to the landlord on December 24 and 27, 2017, which were received by the landlord on those dates, providing the landlord with their notice to end tenancy effective January 31, 2018. A move in condition inspection and inspection report was completed by both parties on April 21, 2017. The move in condition inspection report was entered into evidence.

Both parties agree to the following facts. A move out condition inspection and inspection report was completed by both parties on January 31, 2018. The move out condition inspection report lists the following deductions from the tenants' security deposit of $850.00:

- Painting- $180.00
- Liquidated damages- $500.00
- Unpaid rent/late fees- $1,700.00

The tenants testified that they agreed to allow the landlord to deduct the painting fee and the liquidated damages from their security deposit. The tenants testified that they did not sign the condition inspection report because they did not agree with the $1,700.00 charge for February 2018's rent. The tenants provided the landlord with their forwarding address in writing on the move out condition inspection report. The landlord filed for dispute resolution with the Residential Tenancy Branch on February 14, 2018.

Both parties agree that when the tenants originally entered into the tenancy agreement with the landlord, their rent was $1,700.00 per month which was increased to $1,750.00 per month in November 2017 due to an additional occupant.

The landlord testified that a new renter for the subject rental property was found for March 1, 2018. The landlord did not know on what date the new renter was secured. The landlord is claiming compensation for February 2018's rent in the amount of $1,750.00.
Section 5 of the tenancy agreement states:

> "if the tenant provides notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of $500.00 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future renal revenue losses that will remain unliquidated."

The tenants testified that the landlord did not make enough effort to find a new tenant for February 2018. Both parties agree that the landlord started posting an advertisement for the subject rental property on the landlord's website on January 15, 2018. Both parties agree that the landlord started posting an advertisement for the subject rental property on Craigslist on January 15, 2018. The landlord entered into evidence a printout showing the following dates the advertisements for the subject rental property were updated/renewed on Craigslist: January 10, 16, 24, and 30, 2018. The landlord testified that he did not put advertisements up before January 10, 2018 because he was very busy after the holidays.

The tenants testified that the physical sign on the exterior of the apartment building which states whether there is or is not a vacancy was never updated to state that there was a vacancy in the building. In support of this the tenants entered into evidence 11 photographs of the sign in front of the subject apartment building stating "no vacancy". The tenants submit that the photographs were taken on the following dates: January 2, 8, 9, 11, 15, 17, 22, 23, 24, and 31, 2018 and

February 6, 2018. The photographs were not time and date stamped; however, the photograph allegedly from January 24, 2018 also contained a receipt from a grocery store in the foreground, dated January 24, 2018. The photograph allegedly from February 6, 2018 had a newspaper bearing the same date in the foreground of the photo. The photographs are from a variety of times in the day/ night as was evidenced by sun light levels pictured in the photographs.

The landlord testified that he did not know if or when the sign in front of the apartment building was updated but that it was regularly updated by the caretaker. The caretaker testified that he did not have his records with him and so could not say exactly when he updated the sign but that he would have updated it promptly.

The tenants testified that they only received one Notice of Entry to show the subject rental property while they lived in the unit and that was for January 9, 2018. The tenants testified that to their knowledge, the subject rental property was only shown on one occasion, that being January 9, 2018, while they lived in the subject rental property. The tenants testified that tenant A.T. was not working in January 2018 and was always home and would have known if their apartment was shown on other dates.

The landlord testified that the tenants were provided with three Notices of Entry for the following dates:

- January 9, 2018;
- January 15-19, 2018; and
- January 29-31, 2018

The Notices of Entry were entered into evidence.

The caretaker testified that he personally either hand delivered the Notices of Entry to the tenants or posted them on the tenants' door if they were not home. The caretaker testified that he could not recall the specific dates he showed the subject rental property to prospective tenants but that he showed it 4-5 times or more. The caretaker testified that he keeps a log of all of his showings but that he did not have access to that log during the hearing. The landlord testified that the caretaker provided him with an e-mail listing all the dates the subject rental property was shown. The e-mail was entered into evidence and listed the following dates: January 19, 22, 26, and 31, 2018 and February 1, 8, and 13.

The tenants testified that the landlord's website was not operating property for some period of time in February 2018 and that it was not possible to find the advertisement for the subject rental property. The tenants entered a video of the website not operating properly into evidence.

Analysis

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting

damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.
Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

Policy Guideline 3 states that 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.

Policy Guideline 5 states that where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided. The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss or incur excessive costs in the process of mitigation.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved.

In this case, the tenants ended a one-year fixed term tenancy two months early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement for the months of February and March 2018. Pursuant to section 7, the tenants are required to compensate the landlord for that loss of rental income. However, the landlords also have a duty to minimize that loss of rental income by re-renting the unit as soon as possible. The landlord did not start to advertise the subject rental property until January 10, 2018.

I find that for the 17 days the landlord did not advertise the subject rental property after first receiving the tenant’s notice to end tenancy, the landlord failed to mitigate its loss. The landlord is claiming 28 days of rent for February 2018, I find that due to the landlord’s failure to mitigate its damages for 17 days, the landlord is only entitled to receive compensation for 11 days of rent for the month of February 2018. The pro-rated amount of rent for 11 days is $687.50.

I find that the landlord did not update the sign in front of the building to show a vacancy in the building. I prefer the evidence of the tenants over that of the caretaker in regards to the building

sign as they submitted multiple photographs at different times of the day, showing the no vacancy sign on the building in question. In addition, the caretaker did not have his records in front of him and was not able to provide concrete answers as to when he updated the sign. I find that in failing to update the vacancy sign the landlord failed to mitigate his loss. I find that the tenants' are entitled to a 10% reduction in rent payable for the 11 days in February 2018 as per the following calculation:

$687.50 (pro-rated rent due for 11 days) * .10 = $68.75 (10 % reduction in rent payable)
$687.50 (pro-rated rent due for 11 days) - $68.75 (10 % reduction in rent payable) = **$618.75.**

Policy Guideline 5 states that the landlord need not do everything possible to minimize the loss or incur excessive costs in the process of mitigation. I find that the landlord's website failure does not constitute a failure to mitigate as the landlord took steps to list the property and technical issues are usually unintentional.

In regard to the provision of the Notices of Entry and the dates the subject rental property was shown, I prefer the testimony and evidence provided by the caretaker over that of the tenants. The e-mail from the caretaker to the landlord sets out the specific dates the rental property was shown. I accept this evidence. I accept the testimony of the caretaker that he provided the Notices of Entry to the tenants and that he showed the property on the dates set out in the e-mail.

Agreed Upon Charges

At the hearing, the tenants agreed to the following deductions from their security deposit:

Item	**Amount**
Liquidated damages	$500.00
Painting	$180.00
TOTAL	**$680.00**

Based on the testimony of both the landlord and the tenants, I find that the tenants are liable for the above listed charges in the amount of $680.00.

Filing Fee

As the landlord was successful in this application, I find that he is entitled to recover the $100.00 filing fee from the tenants.

Conclusion

Section 72(2) states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenants. I find that the landlord is entitled to retain the tenants' entire security deposit in the amount of $850.00 in part satisfaction of their monetary claim against the tenant.

I issue a Monetary Order to the landlord under the following terms:

Item	**Amount**
Liquidated damages	$500.00
Pro-rated rent for 11 days in February 2018 less 10%	$618.75
Painting	$180.00
Filing Fee	$100.00
Less security deposit	- $850.00
TOTAL	**$548.75**

The landlord is provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this Order, this 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: October 01, 2018

Residential Tenancy Branch