



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ADVENT REAL ESTATE SERVICES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S FFL

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 of the *Act*;
- authorization to retain all or a portion of the tenant's security and pet damage deposits in partial satisfaction of the monetary order requested pursuant to section 67 of the *Act*; and
- recovery of the filing fee from the tenant pursuant to section 72 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Landlord's agents J.W. and M.F. attended on behalf of the corporate landlord and are herein referred to as "the landlord".

Preliminary Issue – Service of Documents

The landlord confirmed that it submitted this Application for Dispute Resolution on March 2, 2018. The landlord could not confirm when the tenants were served with the Notice of the landlord's Application for Dispute Resolution by Canada Post registered mail, but the tenants confirmed that they only received one Notice of hearing from the landlord in mid-March 2018. The landlord confirmed that the tenants were not each served individually with the landlord's Notice of this hearing.

I note that both tenants are named on the tenancy agreement and that both tenants are name on the landlord's Application for Dispute Resolution.

The landlord confirmed that the tenants were also not served individually with the landlord's evidence in this matter. The tenants were served in one package via Canada Post registered mail on August 27, 2018.

The landlord explained that there had been a change in property management staff and that this delayed the preparation of documents.

The tenants served their evidence on the landlord by Canada Post registered mail on September 9, 2018.

Rule 3.11 of the Residential Tenancy Branch Rules of Procedure sets out the requirements for service of evidence, as follows:

3.11 Unreasonable delay

Evidence must be served and submitted as soon as reasonably possible.

If the arbitrator determines that a party unreasonably delayed the service of evidence, the arbitrator may refuse to consider the evidence.

I find that the over five-month delay between the time the landlord served the tenants with the Application of Dispute Resolution and the time it served the evidence package to the tenants was unreasonable.

I find that all of the evidence submitted by the landlord was available to the landlord as of March 1, 2018, and therefore would have been available to be included in the Notice of Dispute Resolution package sent to the tenants at the beginning of March 2018.

In accordance with Rule 3.11, I have not considered the documentary evidence submitted by the landlord, and I have only considered the landlord's testimony provided at the hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent?

Is the landlord entitled to keep all or part of the security deposit in full or partial satisfaction of their claim?

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

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

The parties signed a written tenancy agreement with the following terms:

- Fixed-term tenancy beginning June 1, 2017, scheduled to end on May 31, 2018
- Monthly rent of \$2,300.00 payable on the first of the month
- Security and pet damage deposits totalling \$2,300.00 were paid by the tenants prior to the start of the tenancy and continue to be held by the landlord.

Both parties confirmed the following facts in this matter:

- On January 4, 2018, the tenants provided notice to the landlord in writing to end the tenancy on February 28, 2018, prior to the end date of the fixed-term of the tenancy.
- The tenants paid full rent for the month of February 2018, but moved-out, turned over the keys and provided vacant possession of the rental unit to the landlord on February 21, 2018.
- The tenants provided the landlord with their forwarding address in writing on February 21, 2018.
- Both parties participated in a move-in and move-out condition inspection of the rental unit. The landlord provided the tenants with a written report of the condition inspection at move-in and at move-out.
- The tenants did not authorize in writing for the landlord to withhold part or all of the deposits.
- On March 1, 2018, the landlord signed a tenancy agreement with a new tenant for the rental unit, for a tenancy beginning on April 1, 2018.
- The landlord filed an Application for Dispute Resolution on March 2, 2018 to retain all of the tenants' deposits in satisfaction of the landlord's monetary claim for unpaid rent for the month of March 2018.

The landlord's agent testified that an advertisement to re-rent the rental unit was posted to a popular online classifieds website on January 4, 2018, and posted on the corporate landlord's website by January 7, 2018. However, the landlord submitted no documentary evidence of this, such as copies of the rental listings, even in the landlord's evidence package which was unreasonably delayed in its service to the tenants.

The tenants dispute this claim as they inquired to the landlord's agent about the posting of the rental listing on January 12, 2018 as they had not been able to find it on the corporate landlord's website.

The landlord's agent was unable to provide any testimony regarding the dates and number of showings of the rental unit, as he stated he did not have that information. The landlord's agent testified that a previous property manager had been responsible for the re-renting of the rental unit.

Analysis

Section 67 of the *Act* provides that, where an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement, an arbitrator may determine the amount of that damage or loss and order compensation to the claimant.

In this case, the landlord has claimed for compensation for rental loss for the month of March 2018 due to the tenants ending a fixed term tenancy prior to the scheduled end date in the tenancy agreement.

Based on the testimony of both parties and the tenancy agreement submitted into documentary evidence, I find that the landlord and tenants had a fixed term tenancy with an end date of May 31, 2018. I find that rent was payable on the first day of each month per the terms of the tenancy agreement.

Section 45(2) of the *Act* sets out the requirements that must be met for a tenant to end a fixed term tenancy, including that a tenant cannot end a fixed term tenancy earlier than the end date of the tenancy as specified in the tenancy agreement, as follows:

- 45 (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
 - (a) is not earlier than one month after the date the landlord receives the notice,
 - (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and**
 - (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

[Emphasis added]

In this case, the tenants provided written notice on January 4, 2018 that they intended to end the tenancy on February 28, 2018. The tenants returned vacant possession of the rental unit to the landlord on February 21, 2018. The tenants paid rent for January and February 2018. Therefore, I find that the tenants failed to comply with the *Act* and the terms of the fixed term tenancy agreement by ending the tenancy early, and as a result the landlord experienced a monetary loss.

Residential Tenancy Policy Guideline 5. Duty to Minimize Loss provides guidance regarding the expectation for a landlord to mitigate a rental income loss due to a tenant ending a fixed-term tenancy early, as follows:

The landlord who does not advertise for a new tenant within a reasonable time after the tenant vacates a rental unit or site prior to the expiry of a fixed term lease may not be entitled to claim loss of rent for the first month of vacancy; however, claims for loss of rent for subsequent months may be successful once efforts to find a new tenant are made.

...

*In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent. Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. **The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect.** Oral notice is not effective to end the tenancy agreement, and the landlord may require written notice before making efforts to re-rent.*

[My emphasis added]

The landlord's agent testified that a new tenancy agreement was signed on March 1, 2018 with the tenancy start date of April 1, 2018. Therefore, the landlord found a new tenant to move in on a date **one month following** the date that the notice took legal effect. It is possible that the landlord was unable to find an interested tenant to move in earlier than April 1, 2018. However, as the landlord is seeking a monetary claim in this matter, the landlord bears the burden of proof, on a balance of probabilities to provide sufficient evidence to establish **all** of the following four points:

1. The existence of the damage or loss;

2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

The landlord has failed to submit any documentary evidence to prove the landlord made “reasonable efforts” to find a new tenant to move in on the date following the date the notice takes legal effect. Documentary evidence, such as copies of advertising listings, would confirm details, such as: when the rental unit was listed; where it was listed; how much it was listed for; were the tenancy terms the same; were the same facilities/services included, etc. As a previous property manager was responsible for the re-renting of the rental unit, the landlord’s agent was unable to provide verbal testimony regarding the dates or number of showings of the rental unit to substantiate whether or not reasonable efforts were made to re-rent the unit for March 1, 2018.

Therefore, based on the evidence and testimony provided, I find that the landlord has failed to prove, on a balance of probabilities, that it took reasonable efforts to mitigate its claimed loss of one month’s rent in the amount of \$2,300.00 due to the tenants failing to provide notice to end the tenancy in accordance with the *Act*. As such, the landlord’s monetary claim is dismissed in its entirety.

The landlord continues to hold the tenants’ security and pet damage deposits. As the landlord’s monetary claim is dismissed, I order that the landlord must return the deposits, totalling \$2,300.00, to the tenants within 15 days of deemed receipt of this Decision. The deemed receipt date of this Decision is five days from the date of this Decision. The date of this Decision is noted in the Conclusion section of this Decision.

The landlord can mail payment to the tenants at the address for service of the tenants used in this dispute. If the tenants have moved, the tenants are obligated to contact the landlord to confirm a current address for service.

Should the landlord fail to return the deposit within that timeline, the tenants will be at liberty to reapply for dispute resolution to claim double the amount of the security deposit pursuant to section 38(6) of the *Act*.

Conclusion

Accordingly, I dismiss the landlord’s monetary claim in its entirety.

I order the landlord to return the tenants security and pet damage deposits totaling \$2,300.00 within 15 days of the deemed receipt date of this decision.

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 10, 2018

Residential Tenancy Branch