



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding GATEWAY PROPERTY MANAGEMENT CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL, MNDCL-S

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on August 28, 2018 (the "Application"). The Landlord applied for compensation for monetary loss or other money owed, to keep the security deposit and for reimbursement for the filing fee.

The Agent appeared at the hearing for the Landlord. The Tenants appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

The parties confirmed the correct address of the rental unit and this is reflected on the front page of this decision.

The Landlord had submitted evidence prior to the hearing. The Tenants had not. I addressed service of the hearing package and evidence and no issues arose in this regard.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all documentary evidence and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to compensation for monetary loss or other money owed?
2. Is the Landlord entitled to keep the security deposit?

3. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord sought \$1,317.86 as follows:

1. \$1,300.00 based on the Tenants failing to follow through with the tenancy agreement; and
2. \$17.86 for credit checks done during the application process.

The Tenants agreed that the Landlord could keep \$17.86 for the credit checks and therefore I will not address this issue.

The Agent testified as follows. The Landlord received an application from the Tenants for the rental unit. The rental application was processed and approved. There were others interested in the rental unit. The Tenants were told the rental application was approved and that a security deposit was required. The Tenants paid the security deposit. The other applicants were turned down. The move-in was scheduled for July 27, 2018. The Tenants subsequently sent an email stating they were not moving into the rental unit. She responded by letting the Tenants know they were liable for one month's rent and related expenses based on the following statement in the rental application:

If this offer is accepted and the Applicant fails to sign the Landlord's Residential Tenancy Agreement, or to take possession of the rental unit, the Applicant will be liable for the payment of the equivalent of one month's rent to the Landlord and any related expenses incurred by the Landlord.

The Landlord had submitted a written tenancy agreement. It is between the Landlord and Tenants in relation to the rental unit. The tenancy was to start August 1, 2018 and was for a fixed term ending July 31, 2019. Rent was to be \$1,300.00 per month due on the first day of each month. A security deposit of \$650.00 was paid July 5, 2018. There was to be a pet deposit of \$400.00. The agreement was not signed by the parties.

Both parties agreed the written tenancy agreement is an accurate outline of what the agreement between the parties was in relation to the tenancy. The parties agreed the Tenants did not pay a pet deposit. Both parties agreed the Landlord still holds the security deposit. The Agent submitted that the tenancy ended August 1, 2018.

Both parties agreed the Tenants provided the Landlord with their forwarding address in a letter dated August 14, 2018. The Agent testified that the Landlord received it within two days of August 14th. The Agent advised that the address provided was wrong and so she followed up with the Tenants and received the correct address August 30, 2018.

The Agent advised that the Landlord filed the Application August 22, 2018 which is what the documentation shows.

The parties agreed the Landlord did not have an outstanding monetary order against the Tenants at the end of the tenancy.

The Agent submitted that the Tenants agreed in writing that the Landlord could keep the security deposit at the end of the tenancy. She pointed to an email submitted as evidence. The Agent sent the Tenants an email stating that they are liable for one month's rent and related expenses incurred given they were not going to be taking possession of the rental unit. Tenant H.B. replied as follows:

I guess I was to excited and didn't even read that properly □ I will have to do pay it back in increments as now I'm out \$650. I should of read that in detail. I didn't think there would be a problem as we were moving in. Such is life I guess.

The Tenants took a somewhat unclear position on whether the above email constituted an agreement that the Landlord could keep the security deposit. I understood the final position of the Tenants to be that this did not constitute such an agreement.

Both parties agreed no move-in or move-out inspection was done as the Tenants never moved into the rental unit.

The Agent testified that the rental unit was not re-rented until August 15, 2018 and therefore the Landlord lost half of the monthly rent for the rental unit. The Agent confirmed the Landlord is seeking the \$1,300.00 based on the clause in the rental application. The Agent could not point to any section of the *Residential Tenancy Act* (the "Act") or *Residential Tenancy Regulation* (the "Regulations") that entitled the Landlord to the compensation sought pursuant to the clause in the rental application.

Tenant J.B. testified about the reason the Tenants did not move into the rental unit which involved health issues with a family member. He said the Tenants were unable to move into the rental unit given the circumstances. Tenant J.B. testified that the Tenants did not see the clause in the rental application in relation to owing one month's rent plus

related expenses if the Tenants did not follow through with the rental. The Tenants did not point to any section of the *Act*, *Regulations*, tenancy agreement or rental application that relieved them of their obligations based on personal circumstances.

Analysis

Under sections 24 and 36 of the *Act*, tenants can extinguish their rights in relation to the security deposit if they do not comply with the *Act* and *Regulations*. Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

I note that the Tenants did not extinguish their right to return of the security deposit under sections 24 or 36 of the *Act* as no move-in or move-out inspections were done in the circumstances.

I find that, for the purposes of section 38(1) of the *Act*, the tenancy ended July 10, 2018 when the Tenants advised that they would not be moving into the rental unit. I note that the Tenants' notice did not comply with section 52 of the *Act*. However, the Agent did not raise this as an issue and it appears from the evidence submitted that the parties were both under the understanding that the Tenants would not be moving into the rental unit as of July 10, 2018.

I accept the testimony of the Agent that the Landlord received the Tenants' forwarding address by August 16, 2018. I find this to be the relevant date for the purposes of section 38(1) of the *Act*. I do not find it relevant that the address was wrong. In my view, when a landlord receives a forwarding address from a tenant, that triggers section 38(1) of the *Act* whether the address is correct or not. I also note that landlords are entitled to rely on the forwarding address provided whether it is correct or not.

Pursuant to section 38(1) of the *Act*, the Landlord was required to repay the security deposit or claim against it within 15 days of August 16, 2018. I accept that the Landlord applied to keep the security deposit August 22, 2018 as this accords with the documentation. Therefore, I find the Landlord complied with section 38(1) of the *Act*.

I do not accept that the Tenants agreed in writing at the end of the tenancy that the Landlord could keep the security deposit. In my view, such an agreement must be clear. Upon a review of Tenant H.B.'s email, I do not find it clear that she was giving the Landlord permission to keep the security deposit.

In relation to the compensation sought, I do not accept that the clause in the rental application applies and entitles the Landlord to this compensation. The Agent did not point to anything in the *Act* or *Regulations* that entitles the Landlord to compensation pursuant to the clause in the rental application. I note that the rental application is not a tenancy agreement.

I do find that the sections in the *Act* in relation to compensation apply in the circumstances. Section 7 of the *Act* states:

(1) If a...tenant does not comply with this Act...or their tenancy agreement, the non-complying...tenant must compensate the [landlord] for damage or loss that results.

(2) A landlord...who claims compensation for damage or loss that results from the [tenant's] non-compliance...must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The definition of tenancy agreement in section 1 of the *Act* is as follows:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities...

[emphasis added]

I find that the Landlord and Tenants entered into a tenancy agreement as outlined in the written tenancy agreement as of July 5, 2018 when the rental application was approved and the Tenants paid the security deposit. It is not relevant that the parties did not sign the written tenancy agreement as the definition of tenancy agreement in the *Act* includes oral agreements and I find such an agreement was reached when the Tenants paid the security deposit for the rental unit.

The tenancy agreement was to start August 1, 2018 and was for a fixed term ending July 31, 2019. The Tenants gave notice that they would not be moving into the rental unit on July 10, 2018. The Tenants never moved into the rental unit.

Section 16 of the *Act* states:

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

Pursuant to section 16 of the *Act*, it is not relevant whether the Tenants moved into the rental unit or not. The Tenants were bound by the tenancy agreement when they entered into it which I have found occurred when they paid the security deposit.

Section 45 of the *Act* sets out the requirements for a tenant's notice to end tenancy and states:

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.

...

(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

[emphasis added]

Section 52 of the *Act* outlines the form and content of a notice to end tenancy and states:

52 In order to be effective, a notice to end a tenancy must be **in writing** and must

(a) be signed and dated by the landlord or tenant giving the notice,

(b) give the address of the rental unit,

(c) state the effective date of the notice...

[emphasis added]

I find that the Tenants' email in relation to not moving into the rental unit does not comply with the requirements in section 52 of the *Act*. Nor did the Tenants comply with section 45 of the *Act* in relation to ending the tenancy. I find the Tenants breached the *Act* by not complying with the notice requirements.

I acknowledge that the Tenants provided a reason for why they could not move into the rental unit. However, the Tenants were bound by the tenancy agreement they entered into and were bound by the *Act*. The personal circumstances of the Tenants or their family do not relieve the Tenants of their obligations under the tenancy agreement or *Act*.

I accept the testimony of the Agent that the Landlord did not re-rent the rental unit until August 15, 2018. There was nothing about the testimony of the Agent that called into question her reliability or credibility. I accept that the Landlord lost half of the monthly rent for the rental unit given the Tenants failure to move into the rental unit.

I note that the Landlord did not submit evidence about minimizing their loss, nor did the Agent speak to this issue. However, I am satisfied that the Landlord is entitled to compensation equivalent to half of the monthly rent lost between August 1, 2018 and August 15, 2018 when the rental unit remained empty. It is clear that the Tenants did not comply with the notice requirements for ending the tenancy under the *Act*. The

Tenants only provided notice 21 days before the start of the tenancy. As stated by the Agent, the Landlord had already turned down other applicants when the Tenants gave notice. In these circumstances, I find it reasonable to compensate the Landlord for the loss suffered from August 1, 2018 to August 15, 2018. I am satisfied the Landlord is entitled to \$650.00 in compensation.

Given the Landlord was partially successful in this application, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Landlord is entitled to the following:

1. \$650.00 for loss of rent from August 1, 2018 to August 15, 2018;
2. \$17.86 as agreed to by the Tenants; and
3. \$100.00 for the filing fee.

The Landlord is awarded \$767.86. The Landlord still holds the \$650.00 security deposit and is entitled to keep the deposit pursuant to section 72(2) of the *Act*. The Tenants owe the Landlord a further \$117.86 and I issue the Landlord a Monetary Order in this amount.

Conclusion

The Landlord is awarded \$767.86. The Landlord still holds the \$650.00 security deposit and is entitled to keep the deposit. The Tenants owe the Landlord a further \$117.86 and I issue the Landlord a Monetary Order in this amount. This Order must be served on the Tenants. If the Tenants do not comply with the Order, it may be filed in the Provincial Court (Small Claims) 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 *Act*.

Dated: January 16, 2019

Residential Tenancy Branch