



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNRL-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 30, 2018 (the “Application”). The Landlord sought to recover money for unpaid rent, to keep the security deposit and for reimbursement for the filing fee.

The Landlord appeared at the hearing with two witnesses. The Tenant appeared at the hearing.

The Landlord confirmed he was seeking \$5,005.00 as outlined on the Monetary Order Worksheet. The Tenant acknowledged understanding that the Landlord was seeking this amount.

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues were raised in this regard.

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

Issues to be Decided

1. Is the Landlord entitled to recover money for unpaid rent?
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 the following compensation:

1. \$4,455.00 for loss of rent from August 1, 2018 to November 1, 2018;
2. \$250.00 for liquidated damages clause;
3. \$160.00 for utilities cost for hot water tank and fridge for three months and heat for September 20, 2018 to November 1, 2018;
4. \$40.00 for registered mail relating to the dispute; and
5. \$100.00 for the filing fee.

A written tenancy agreement was submitted as evidence. It is between the Landlord and Tenant in relation to the rental unit. The tenancy started August 1, 2018 and was for a fixed term ending August 1, 2019. The rent was \$1485.00 per month plus \$165.00 for utilities other than heat. Heat was paid according to use. Rent was due on the first day of each month. The Tenant paid a \$742.50 security deposit. The agreement includes a liquidated damages clause indicating the liquidated damages are \$250.00. The agreement was signed by the Tenant June 26, 2018. The Landlord did not sign the agreement; however, there was no issue that the Landlord is the landlord and that the Tenant agreed to rent the rental unit from him.

The parties agreed the Tenant was supposed to move into the rental unit August 1, 2018 but never did so. The Tenant advised that she never provided a forwarding address to the Landlord.

Item #1

The Landlord submitted that the Tenant breached the *Residential Tenancy Act* (the "Act") and tenancy agreement by not moving into the rental unit as agreed. The Landlord submitted that he is entitled to compensation for loss of rent for the three months that the rental unit could not be rented after the Tenant failed to move in.

The Landlord testified that he received the Tenant's letter stating she was not moving into the rental unit in the fourth week of August. He testified that re-renting the unit for August was not possible by the time he returned from a trip. The Landlord testified that the unit was posted for rent at the end of August and again in September and October. He testified that it was not re-rented until November 1, 2018.

The Landlord testified that his property manager posted the rental unit for rent but that the two of them could not communicate while he was away as he was on a wilderness trip and not reachable.

The Landlord testified that the failure of the Tenant to move into the rental unit as agreed to resulted in him trying to rent it out in September which is not an easy time to rent places in that location. He advised that the location has schools and students have rented places by September.

The Landlord submitted evidence of the rental listings. The Landlord attempted to re-rent the unit for \$100.00 less per month. The Landlord testified that the new tenants are paying less rent but pay a fixed amount for heat.

The Tenant testified that she spoke to the Landlord about the move-in date and he told her to call the landline. The Tenant testified that she called 10 times on August 1, 2018 and August 2, 2018 but did not hear from the property manager until August 2, 2018. The Tenant testified that she told the property manager August 2, 2018 she was not moving into the rental unit.

The Tenant took the position that the tenancy never began. The Tenant said she followed the instructions she was given which was to call the landline in relation to moving in. The Tenant submitted that the agreement fell through on the Landlord's end given nobody was present to exchange money for keys on the move-in date.

The Tenant testified that she sent the Landlord written notice that she was not moving into the rental unit on August 10, 2018. She said she knew the Landlord was away.

The Tenant did not dispute the Landlord's testimony about posting the rental unit for rent nor did the Tenant take issue with the ads posted. The Tenant did not dispute that the rental unit was empty until November 1, 2018.

In reply, the Landlord testified that the Tenant simply had to attend the rental unit as it was unlocked and accessible. He said he had arranged for the property manager to be available on the move-in date.

The Tenant testified that she was told to call the landline on the move-in date and that she wanted to contact the property manager before attending the rental unit because she did not want to just show up. She said she wanted to be sure the property manager was there and ready.

The Landlord testified that he told the Tenant where the property was, referred her to a website that has written directions and told her the property manager would be present to meet her and exchange money for keys. He said the parties agreed the Tenant would show up between 1:00 and 5:00 on the move-in date. The Landlord questioned why the Tenant needed to talk to someone before attending the rental unit.

The Landlord called witness M.G. who testified as follows. He was on the property of the Landlord the entire day on August 1, 2018. He waited for the Tenant to arrive on August 1, 2018. He spoke to the Tenant on the phone August 2, 2018 and she told him she was not coming. He told the Tenant "okay" and hopefully she could let the Landlord know.

In response to questions from the Tenant, M.G. testified as follows. While the Landlord was away he could only do what the Landlord would have instructed him to do and could not sign documents or complete rental proceedings for the Landlord.

Item #2

The Landlord sought the liquidated damages noted in the tenancy agreement. He said this is the cost of advertising the unit and having the property manager show the unit.

The only submission made by the Tenant was that she did not know the Landlord could charge for everything he did.

Item #3

The Landlord testified that he had to heat the rental unit from September 20, 2018 to November 1, 2018 because it did not show well being cold. The Landlord

acknowledged he could have turned the hot water tank and fridge off. He said it looks better when showing the unit if the fridge is on.

The Tenant did not make submissions about this item.

Item #4

I told the Landlord it is my view parties are not entitled to costs associated with corresponding and preparing for the hearing. I did not hear from the parties on this item.

The Landlord did not call witness D.A. given the testimony of the Tenant.

Analysis

Section 7(1) of the *Act* states that a party that does not comply with the *Act* must compensate the other party for damage or loss that results. Section 7(2) of the *Act* states that the other party must mitigate 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.

Section 38(1) of the *Act* requires a landlord to return a security deposit or claim against it within 15 days of the later of the end of the tenancy and receiving the Tenant's forwarding address in writing.

I find section 38(1) of the *Act* was not triggered in this matter as the Tenant acknowledged she never provided the Landlord with her forwarding address. Therefore, the Landlord has complied with section 38(1) of the *Act*.

Item #1

I find the Tenant entered into the tenancy agreement June 26, 2018 when she signed it. At this point, the Tenant was bound by the tenancy agreement pursuant to section 16 of the *Act*. The agreement stated that the tenancy started August 1, 2018 and the Tenant was required to pay rent as of that date. It was for a fixed term with an end date of August 1, 2019.

I accept that the Tenant failed to move into the rental unit and pay rent as agreed upon as this was not in dispute.

The Tenant submitted that the Landlord was the one who did not follow through with the agreement. I do not accept this. I find the Tenant was required to do more than call the landline on the move-in date. The Tenant should have attended the rental unit and tried to connect with the property manager in person or on the phone again. I am not satisfied that it was reasonable for the Tenant to call the landline and wait for someone to contact her before attending the rental unit. Upon hearing the testimony of the Tenant, I find it likely that it was her choice or preference to speak to the property manager prior to attending the rental unit rather than an agreement between the parties that this was a requirement prior to her moving in. In the circumstances, I am satisfied the Tenant did not make reasonable attempts to move into the rental unit on the date agreed upon and that she did not follow through with the tenancy agreement.

Pursuant to section 45 of the *Act*, the Tenant was not permitted to end a fixed term tenancy prior to the end of the term. I find the Tenant did so. I do not accept that telling the property manager she was not moving in constitutes proper notice under the *Act* as section 52 of the *Act* requires such notice to be in writing. I find the Tenant provided written notice to end the tenancy August 10, 2018.

I find the Tenant breached the tenancy agreement and *Act* by failing to follow through with the tenancy agreement and ending the fixed term tenancy prior to the end of the term.

I accept that the Landlord lost rent for August, September and October as a result. The Tenant did not dispute that the rental unit was not re-rented until November 1, 2018.

The request for August rent is more than reasonable given the Tenant did not provide written notice ending the tenancy until August 10, 2018. The Landlord is entitled to compensation for August rent.

In relation to September and October rent, I accept that the Landlord minimized his loss. I accept that the property manager and Landlord listed the rental unit for rent within a reasonable time after the Tenant provide proper notice under the *Act*. The Tenant did not dispute the testimony of the Landlord in relation to re-listing the unit. I note that the Landlord listed the unit for a lower rent amount which also shows he minimized his loss.

In the circumstances, I am satisfied the Landlord is entitled to compensation for the months the rental unit was empty as a result of the Tenant failing to follow through with the tenancy agreement and breaching the *Act*. I award the Landlord \$4,455.00.

Item #2

The liquidated damage clause states:

If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with 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 \$250.00 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 further rental revenue losses that will remain unliquidated.

As stated, the Tenant signed the tenancy agreement and was bound by its terms including the liquidated damage clause. I have found the Tenant breached the tenancy agreement by not following through with the agreement and ending the fixed term tenancy prior to the end of the term. Therefore, I find this clause applies.

Policy Guideline 4 deals with liquidated damages and states in part:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

I do not find the clause to be a penalty. I do not find the amount excessive compared to the greatest loss that could follow the breach outlined. I find the amount to be reasonable when one considers the time and work required to re-rent a unit. I do not find the amount to be oppressive to the Tenant.

In the circumstances, I find the liquidated damages clause enforceable and find the Landlord is entitled to the \$250.00 outlined in that clause.

Item #3

I do not accept that the Landlord had to heat the rental unit or keep the appliances on while it remained empty. I do not accept that the chances of re-renting the unit would have been affected by these issues. I am not satisfied the Landlord minimized his loss in this regard as I find the Landlord could have left the heat and appliances off. I am not satisfied the Landlord is entitled to the compensation sought.

Item #4

The Landlord is not entitled to compensation for these types of costs.

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

In summary, the Landlord is entitled to the following compensation:

1. \$4,455.00 for loss of rent from August 1, 2018 to November 1, 2018;
2. \$250.00 for liquidated damages clause; and
3. \$100.00 for the filing fee.

In total, I find the Landlord is entitled to compensation in the amount of \$4,805.00. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to retain the entire security deposit amount of \$742.50. Further, I grant the Landlord a Monetary Order in the amount of \$4,062.50.

Conclusion

The Landlord is entitled to compensation in the amount of \$4,805.00. The Landlord is authorized to retain the \$742.50 security deposit. The Landlord is granted a Monetary Order in the amount of \$4,062.50. This Order must be served on the Tenant as soon as possible. If the Tenant fails to comply with this Order, it 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 *Act*.

Dated: February 04, 2019

Residential Tenancy Branch