Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL

Introduction

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

- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover his 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 landlord testified that the tenants were served the notice of dispute resolution package via registered mail on October 11, 2018, and provided a Canada Post tracking number. The tenants confirmed receipt of the notice of dispute resolution, but did not specify the date. I find that the tenants were deemed served with this package on October 16, 2018, five days after the landlord mailed it, in accordance with sections 89 and 90 of the Act.

The tenants testified that the landlord was served the notice of dispute resolution package via registered mail on January 25, 2019, but were unable to provide a Canada Post tracking number. The landlord confirmed receipt of the tenants' evidence package early in the week of January 28, 2019 (he did not specify an exact date).

The landlord noted that the delivery of these documents was outside the time frame set out by Rule of Procedure 3.15 of "not less than seven days before the hearing". The landlord stated that he had time to review the documents, and was able to proceed with the hearing on this date. Accordingly, I admit the tenants' documents into evidence.

I find that the landlord was served with the tenants' evidence package on January 30, 2019, five days after the tenant mailed it, in accordance with sections 89 and 90 of the Act.

Issue(s) to be Decided

Is the landlord entitled to:

- retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested;
- a monetary order for unpaid rent; and
- recover his filing fee for this application from the tenants?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of their submissions and my findings are set out below.

The parties entered into a written fixed term tenancy agreement starting January 1, 2018 and ending December 31, 2018. Monthly rent was $2,400.00 due on the 1st of each month. The tenancy agreement provided that the tenants pay a security deposit to the landlords of $1,200.00. The landlord still retains this deposit.

Prior to entering into this tenancy agreement, the parties had a one-year fixed-term tenancy, ending on December 31, 2017.

The tenants testified that they entered into a second fixed-term rent in order to provide an element of security against the volatile rental market by dissuading the landlord from issuing a notice to end tenancy in 2018.

On January 26, 2018, the landlord served a notice of rent increase on the tenants. It purported to increase the monthly rent by $72.00, effective May 1, 2018.

On August 30, 2018, the tenants emailed the landlord to advise him that they would be moving out of the rental property effective September 30, 2018, and relocating to another province to pursue an employment opportunity.

The landlord testified he was surprised to learn that the tenants would be breaking the fixed-term lease. He did not anticipate them so doing. Upon learning of this, he immediately set about reviewing the rental housing market in the area. He considered his options as to what to do with the rental property. He considered selling it, renovating it, re-renting it, and retaining it for his family's use.

Ultimately, the landlord decided to re-rent the property. He testified that, on September 4, 2018 (the first day back to work after the Labour Day long weekend), his wife posted at her work that the property was available for rent. He told friends and colleagues of its availability. He also made a post on Craigslist advertising the property for rent. The landlord scheduled a series of

four viewings on September 8, 9, 12, and 13, 2018. He testified that the tenants suggested the dates of September 8 and 9 for the first two viewings. The tenants did not dispute this.

The landlord testified that he received 17 inquiries regarding renting the property, and nine prospective tenants attended the four viewings. He testified that he received three offers to rent the property (one was later rescinded).

The landlord re-rented the property to a tenant with a move-in date on October 15, 2018.

The tenants paid rent for September 2018. They did not pay any rent for the period of October 1 to 15, 2018, despite demands from the landlord to do so. At the hearing they argued that they should not have to pay for this period of time, as they did not occupy the property, and they gave what they consider to be sufficient notice.

Additionally, the tenants argue that the landlord could have done more to try to rent the property out by October 1, 2018, as opposed to October 15, 2018. For this reason, they do not believe they should be obligated to compensate the landlord.

On September 20, 2018, the tenants emailed the landlord to seek the return of their security deposit, and provide their forwarding address.

On October 4, 2018, the landlord filed an application for dispute resolution seeking to damages caused by the tenants breaking the tenancy agreement.

Analysis

The Tenancy Agreement and Rent Increase

The parties agree that the fixed tenancy agreement starting January 1, 2018 is binding upon them. The creation of this agreement supplants the previous tenancy agreement ending December 31, 2018. The parties created an entirely new tenancy agreement, rather than entering into a continuation of the previous one.

Section 42 of the Act states:

> **Timing and notice of rent increases**
>
> **42**(1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:
>
> (a)if the tenant's rent has not previously been increased, the date on which the tenant's rent was first payable for the rental unit;

The rent increase issued by the landlord for $72.00 went into effect May 1, 2018, five months after the tenants' rent (under the new tenancy agreement) was first payable. As such, I find that

it is in violation of section 42(1)(a) of the Act and is invalid. A rent increase would not have been permissible until January 1, 2019.

Section 43(5) states:

> **Amount of rent increase**
>
> (5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.

The tenants resided at the property for five months following the issuance of the rent increase. Accordingly, I find the tenants had overpaid rent for the duration of five months of the most recent fixed term tenancy agreement in the amount of $360.00. Furthermore, I find that the rent for the period the landlord is seeking compensation for was $1,200.00 and not $1,272.00 as claimed.

End of Tenancy

With respect to the landlord's claim for lost revenue, section 45(2) of the Act states:

> **Tenant's notice**
>
> (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.

A tenant is required to comply with all of these conditions before he or she may validly end a fixed-term tenancy. In this case, I find that the tenants fail to meet the conditions set out in section 45(2)(b): they gave notice on August 30, 2018 to end the tenancy on September 30, 2018 which is earlier than December 31, 2018, the date the tenancy was to end.

Accordingly, the tenants are not entitled to simply rely on the fact that they provided one month's notice prior to their leaving the rental property. The parties entered into a binding contract, and the landlord is entitled to the whole benefit of that contract (that is, the rental income). The terms of the tenancy agreement (and the provisions of the Act) do not allow the tenants to unilaterally cancel the tenancy agreement.

I also note Section 45(3) allows that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the

tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

As there is no evidence before me that the tenant had provided the landlord with a notice of any breach of a material term of the tenancy I find the earliest the tenant could have ended the tenancy was at the end of the fixed term, December 31, 2018. As such, I find the tenant is responsible for the payment of rent for the duration of the fixed term subject only to the landlord's obligation to mitigate their losses, as set out in section 7(2) of the Act, which states:

> **Liability for not complying with this Act or a tenancy agreement**
> (2)A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

In this matter, the landlord must demonstrate that he took reasonable actions to minimize the damage caused to him by the tenants breaching the tenancy agreement.

I find that the actions the landlord took immediately following receiving the tenants' notice to be reasonable. He held two viewings within eight days of receiving the notice, and I accept his evidence that he and his wife made inquiries among their professional and social circles regarding renting the property, and posted an advert on Craigslist even sooner.

These efforts of the landlord led to his entering into a tenancy agreement with a new tenant starting October 15, 2018. I do not find a six week gap between receiving notice that a tenant is leaving, and the finding and moving-in of a new tenant (and everything that entails) to be an unreasonable length of time.

Accordingly, I find that, by moving in a new tenant by October 15, 2018, the landlord has mitigated his damages.

Amount of damage

I have already found that the rent increase is invalid. Accordingly, I find it appropriate to deduction from the monetary order I make in favour of the landlord the amount of the overcharged rent ($360.00).

As the landlord has been substantially successful in his application, I find that he is entitled to recover his filing fee from the tenants in the amount of $100.00.

As such, I find that the landlord is entitled to damages as follows:

Rent for 1/2 October, 2018	$1,200.00

Filing Fees	$100.00
Deduction of overcharged rent	-$360.00
Total	**$940**.00

Security Deposit

Section 38(1) of the Act states:

Return of security deposit and pet damage deposit

38 (1)Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a)the date the tenancy ends, and

(b)the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c)repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The landlord received the tenants' forwarding address (via email) on September 20, 2018. 15 days after this date is October 5, 2018. The tenancy ended on September 30, 2018 (when the tenants moved out of the property). 15 days after this date is October 15, 2018.

The landlord made his application for dispute resolution on October 5, 2018. This is within 15 days of the *earlier* of the two events contemplated in section 38. Accordingly, I find that he was not required to return the security deposit, until his claim was adjudicated through this hearing process

As I have found that the landlord is entitled to damages as the result of the tenants not complying with the Act, I order that the landlord may deduct from the security deposit $940.00, pursuant to section 72(2). I order that he return the balance to the tenants.

Conclusion

I find that the landlord is entitled to a monetary award in the amount of $940.00 representing damages suffered by the landlord resulting from the tenants' failure to comply with the Act and repayment of his filing fees. The landlord may deduct this amount from the security deposit.

I grant the tenants a monetary order in the amount of **$360.00** comprised of the balance of the security deposit owed. This order must be served on the landlord. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be 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: February 6, 2019

Residential Tenancy Branch