



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNDCL-S, 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 October 30, 2018 (the “Application”). The Landlord sought compensation for monetary loss or other money owed, to recover unpaid rent, to keep the security deposit and for reimbursement for the filing fee.

The Landlord and 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.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence.

The Tenants testified that they received the hearing package. The Tenants had also received a package with the tenancy agreement and one other page of evidence. The Tenants had received the remaining evidence February 10th. The Tenants sought exclusion of this evidence as they had not had sufficient time to review the evidence. The evidence is just over 100 pages.

The Landlord acknowledged that she sent the remaining evidence nine or ten days prior to the hearing. The Landlord could not point to any new evidence in the package. The Landlord submitted that the evidence was supporting evidence.

The Rules of Procedure state the following:

2.5 Documents that must be submitted with an Application for Dispute Resolution

To the extent possible, the applicant should submit the following documents at the same time as the application is submitted:

...

- copies of all other documentary and digital evidence to be relied on in the proceeding, subject to Rule 3.17 [Consideration of new and relevant evidence].

3.1 Documents that must be served with the Notice of Dispute Resolution Proceeding Package

The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

...

d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

3.17 Consideration of new and relevant evidence

Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5 [Documents that must be submitted with an Application for Dispute Resolution], 3.1, 3.2, 3.10.5, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence

and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

[emphasis added]

I was not satisfied the Landlord complied with the Rules of Procedure. I heard the parties on whether the evidence should be admitted or excluded. The Landlord submitted that the evidence is supplementary evidence in response to the Tenants' evidence.

I note that the Tenants served their evidence on the Landlord within the time limit set out in rule 3.15 of the Rules.

I excluded the evidence served late. This is the Landlord's application and she has raised the issues in the Application. The Landlord should have submitted the evidence in her possession relevant to the issues she raised in the Application when she filed the Application and served it on the Tenants. The Landlord could not point to any new evidence that was not in existence at the time she made the Application. The Landlord failed to comply with the Rules in relation to the timing of service. The late evidence exceeds 100 pages. The Tenants submitted that they did not have time to review the evidence and I accept this. I was satisfied that acceptance of the late evidence would prejudice the Tenants and result in a breach of the principles of natural justice.

The following evidence submitted by the Landlord is admissible:

- Monetary Order Worksheet
- Tenancy Agreement
- Invoice for \$2,500.00

The remaining evidence submitted by the Landlord is excluded.

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 admissible 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 compensation for monetary loss or other money owed?
2. Is the Landlord entitled to recover unpaid rent?
3. Is the Landlord entitled to keep the security deposit?
4. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord sought compensation as follows:

1. \$2,500.00 property listing fee;
2. \$1,500.00 security deposit; and
3. \$3,000.00 loss of rent.

The Landlord advised that she is seeking to keep the security deposit for loss of rent.

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. It is between the Landlord and Tenants in relation to the rental unit. The tenancy started May 20, 2017 and was for a fixed term ending May 31, 2018. The rent was \$3,000.00 due on the first day of each month. The Tenants paid a \$1,500.00 security deposit.

The Tenants advised that they vacated the rental unit around November 10, 2017.

Tenant C.C. testified that the Tenants provided their forwarding address via text message and email. She could not provide the date of the text message. Tenant C.C. testified that the email was sent December 06, 2017. The Landlord agreed she received the Tenants' forwarding address by email December 06, 2017.

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

The Landlord testified that the Tenants agreed she could keep the security deposit by text and email. Tenant C.C. testified that the parties discussed resolving the issue but that no agreement was reached.

In relation to the compensation sought, the Landlord testified as follows. The Tenants violated the tenancy agreement by ending the tenancy early. The rental unit was not re-rented until January 16th or 17th of 2018. She did what she could to mitigate loss by re-listing and marketing the rental unit. She lowered the rent both in the listings and new tenancy agreement. She lost rent and incurred marketing costs.

The Landlord testified that the Tenants had keys to the rental unit until December 7th or 8th. She said the Tenants sent an informal notice to end the tenancy via email on December 5th. The Landlord testified that the form and content of the notice did not comply with the *Residential Tenancy Act* (the "Act"). The Landlord testified that the Tenants paid November rent but not December rent. She confirmed she is claiming for December and part of January rent.

The Landlord testified that the property listing fee is for marketing the rental unit and finding new tenants. I also understood the Landlord to say the fee included property management.

The Tenants acknowledged that they breached the tenancy agreement by ending the tenancy early.

Tenant C.C. testified as follows. The Tenants dealt with the Landlord during the tenancy not a property manager. Generally, the cost of tenant placement is half of the monthly rent for the rental unit. The Tenants are fine with paying \$1,500.00 of the fee but nothing further because the remaining amount seems to be in relation to additional services.

Tenant C.C. further testified as follows. The Landlord sent a text October 22, 2017 in relation to the rental unit being available which shows the Landlord was aware the Tenants were ending the tenancy. She googled the rental unit address once the Tenants had vacated and the first time a listing came up was December 06, 2017. The Landlord had increased the rent amount to \$3,100.00 which is shown in the evidence. The Landlord did not mitigate her loss.

The Tenants disputed that the Landlord did not re-rent the rental unit until January. Tenant C.C. testified that a neighbour told them he was pretty sure someone had moved in in December.

The Tenants submitted written submissions stating the following. Tenant D.M. told the Landlord October 21, 2017 that they would be moving out at the end of October or early November. The invoice for the property leasing fee does not detail the nature of the services provided.

The Tenants submitted the following evidence.

A text from the Landlord dated October 22, 2017 about the unit being available.

Google searches of the rental unit showing it was not listed for rent prior to December 06, 2017.

A notice posted by the Landlord about the rental unit being available. It shows rent was listed as \$3,100.00. It also states the rental unit was available "mid November or earlier".

A text from the neighbour dated December 25th about a dog barking in the rental unit and stating that the neighbour is pretty sure someone has moved into the unit.

Rental listing showing the rent was increased to \$3,195.00.

A text from the Landlord dated November 06, 2017 about doing a showing the previous day and about coming in to take pictures to market the rental unit.

Evidence from companies showing they charge 50% of one month's rent for tenant placement.

In reply, the Landlord testified as follows. The Tenants did not move out at the beginning of November. The rental unit was re-listed October 27th. She had given the Tenants a deal on the rent so did not raise rent, the \$3,100.00 was market value. The leasing agent did not provide extra services. In December, her family was visiting for Christmas. The rental unit was re-rented mid January.

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.

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

Pursuant to rule 6.6 of the Rules, the Landlord as applicant has the onus to prove the claim.

The Landlord did not submit that the Tenants had extinguished their rights in relation to the security deposit under sections 24 or 36 of the *Act*.

It is not necessary to determine whether the Landlord extinguished her right to the security deposit under sections 24 or 36 of the *Act* as extinguishment only relates to claims for damage to the rental unit.

The parties disagreed about when this tenancy ended. I accept that the Tenants vacated the rental unit at the beginning of November. The Landlord disputed this; however, I have no admissible evidence before me from the Landlord showing the Tenants remained in the rental unit longer. The Tenants paid rent up until the end of November. The Tenants gave their keys back to the Landlord December 7th or 8th. For

the purposes of section 38 of the *Act*, I find the tenancy ended December 08, 2017 at the latest.

There is no issue the Landlord received the Tenants' forwarding address December 06, 2017. I acknowledge that this was by email and not strictly "in writing"; however, I find the form sufficient given the Landlord acknowledged receiving it.

Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from December 08, 2017 to repay the security deposit or file an application for dispute resolution claiming against the deposit. The Application was filed October 30, 2018, well outside the time limit.

I do not find that the Tenants had extinguished their right to the security deposit. The Landlord did not have an outstanding monetary order against the Tenants.

The parties disagreed about whether the Tenants agreed the Landlord could keep the security deposit. There is no admissible evidence from the Landlord showing the Tenants agreed she could keep the security deposit. I do not accept that the Tenants did.

Given the above, I find the Landlord failed to comply with section 38(1) of the *Act* and that none of the exceptions outlined in section 38(2) to 38(4) of the *Act* apply.

Pursuant to section 38(6) of the *Act*, the Landlord cannot claim against the security deposit and must return double the deposit to the Tenants. I find the Landlord must return \$3,000.00 to the Tenants. I note that there is no interest owed on this as the rate has been 0% since 2009.

The Landlord is still entitled to claim for loss of rent and I consider that now.

There is no issue that the Tenants breached section 45(2) of the *Act*.

The Landlord submitted that she incurred a property listing fee because of the breach in the amount of \$2,500.00. The Tenants did not dispute that the property listing fee was loss or damage that resulted from the breach but did dispute the amount.

The invoice submitted by the Landlord for the \$2,500.00 simply states "service" in the description column. The invoice does not include any explanation of the services provided or the basis for the amount. The Tenants submitted evidence showing other companies would place tenants for half the monthly rent.

I am not satisfied the \$2,500.00 relates solely to the cost of placing tenants. Nor am I satisfied the Landlord mitigated her loss by hiring a company that charged \$2,500.00 for placing tenants. I am satisfied that the Landlord is entitled to recover \$1,500.00 being half of the monthly rent for the rental unit for the cost of placing tenants.

The Landlord sought loss of rent for December and January in the amount of \$4,500.00. The Landlord testified that the rental unit was not re-rented until January 16th or 17th. The Tenants disputed this on the basis that a neighbour told them it appeared someone had moved in in December. The Landlord submitted that this was her family. I have no admissible evidence before me from the Landlord supporting her position in relation to when she re-rented the rental unit or that her family stayed there in December. I am not satisfied that the Landlord did not re-rent the rental unit until January 16th or 17th in the circumstances. I decline to award the Landlord loss of rent for January as I am not satisfied she did lose rent for this month.

In relation to December rent, the Tenants stated that they told the Landlord October 21st that they were moving at the end of October or early November. The text message evidence submitted shows the Landlord was aware the Tenants were vacating as of October 22nd. I find the Landlord was required to start mitigating her loss as of October 22nd as it is clear she was aware the Tenants were vacating. The Landlord testified about re-listing the rental unit October 27th. At first, she testified that she lowered the rent. She later testified that she listed the rent for market value. The Tenants disputed that the Landlord mitigated her loss and provided evidence that the Landlord increased the rent amount in the listings.

I do not accept that the Landlord listed the rental unit online immediately as there is no admissible evidence from the Landlord showing this. The Tenants have submitted evidence showing the rental unit was not shown when searched on google until December.

Further, I accept that the Landlord raised the rent amount. The Landlord submitted that the Tenants had received a reduced rate of \$3,000.00 and so she did not raise the amount she just listed the unit for market value. I do not accept this submission. The Landlord was willing to rent the rental unit for \$3,000.00 for the duration of the tenancy agreement with the Tenants. The Landlord was required to mitigate her loss when the Tenants ended the tenancy early. Raising the rent is not mitigating loss.

However, I agree the Tenants did not give proper notice to end the tenancy in accordance with the *Act*. Further, I accept that the Tenants did not return their keys

until December 7th or 8th as they did not dispute this. As well, I note that the Tenants told the Landlord they were vacating very late in October. In these circumstances, I find the Landlord is entitled to some compensation for loss of December rent. I award the Landlord half of the rent for December being \$1,500.00.

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

In summary, the Landlord must return \$3,000.00 to the Tenants. However, the Tenants must compensate the Landlord \$3,100.00. Therefore, the Landlord can keep the security deposit and is issued a monetary order for \$100.00 for the filing fee.

Conclusion

The Landlord must return \$3,000.00 to the Tenants. However, the Tenants must compensate the Landlord \$3,100.00. Therefore, the Landlord can keep the security deposit and is issued a monetary order for \$100.00 for the filing fee. This Order must be served on the Tenants. If the Tenants fail 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: March 18, 2019

Residential Tenancy Branch