



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SKYLINE LIVING
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 the tenant's security deposit 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*.

The landlord's agent attended on behalf of the corporate landlord at the date and time set for the hearing of this matter, and is herein referred to as "the landlord". The tenant did not attend this hearing, although I left the teleconference hearing connection open until 2:02 p.m. in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 p.m. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

As only the landlord attended the hearing, I asked the landlord to confirm that he had served the tenants with the Notice of Dispute Resolution Proceeding for this hearing.

The landlord testified that the tenant was served with the notice of this hearing and evidence by Canada Post registered mail on December 14, 2018 to the forwarding address provided by the tenant, and provided a Canada Post registered mail tracking number as proof of service, which I have noted on the cover sheet of this decision.

The landlord was unable to confirm if the tenant was served with the tenant's rent ledger, which was submitted to the Residential Tenancy Branch dispute website as evidence in support of the landlord's claim. As such, I find that I am unable to consider this documentary evidence submitted by the landlord as it was not confirmed to have been shared with the tenant. The landlord was at liberty to provide verbal testimony regarding the tenant's rent ledger.

As such, I find that the tenant was served with the documents for this hearing in accordance with section 89 of the *Act*, with the exception of the tenant's rental ledger.

Preliminary Issue – Amendment of Landlord's Application

The landlord noted that the dispute address city was missing the qualifier of "West" and requested this to be amended for clarity. Pursuant to my authority under section 64(3)(c) of the *Act*, I amended the landlord's Application to amend the dispute address city to add "West" in front of it.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent? If so, is the landlord entitled to retain all or part of the tenant's security deposit in satisfaction of the monetary award?

Is the landlord entitled to recover the filing fee 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 May 3, 2018, scheduled to end on April 30, 2019
- Monthly rent of \$1,425.00 payable on the first of the month
- Security deposit totalling \$712.50 was paid by the tenant prior to the start of the tenancy and continues to be held by the landlord

The landlord provided the following testimony pertaining to their claim:

- On July 16, 2018, the tenant provided notice to the landlord in an email that he was ending the tenancy that same day.
- The tenant's forwarding address was received by the landlord on July 24, 2018.
- The tenant did not authorize the landlord to withhold all or part of the security deposit.
- On October 16, 2018, the landlord signed a tenancy agreement with a new tenant for the rental unit, for a tenancy beginning on November 19, 2018.

The landlord filed an Application for Dispute Resolution on December 12, 2018 to retain all of the tenant's security deposit in satisfaction of the landlord's monetary claim for unpaid rent for the month of August 2018.

The landlord's agent testified that no specific advertisement to re-rent the tenant's rental unit was posted, as the corporate landlord regularly advertises regarding general rental opportunities in the building on a popular online classifieds' website and on the corporate landlord's website.

I note that the landlord submitted no documentary evidence of any re-rental efforts, such as copies of the general rental listings posted on websites.

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 he did not know how many rental units were empty in the building at the time the landlord sought to re-rent the tenant's unit.

The landlord's agent testified that the rental unit was advertised at \$1,520.00 monthly rent, which I note is higher than the monthly rent paid in the tenant's tenancy agreement.

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 revenue loss for the month of August 2018 due to the tenant ending a fixed term tenancy prior to the scheduled end date in the tenancy agreement.

Based on the testimony and the tenancy agreement submitted into documentary evidence, I find that the landlord and tenant had a fixed term tenancy with an end date of April 30, 2019. 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.

In this case, the landlord's agent testified that the tenant provided notice on July 16, 2018 that he was ending his tenancy and returned vacant possession of the rental unit to the landlord that same day. Therefore, I find that the tenant 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.

The landlord's agent testified that a new tenant took occupancy in November 2018. In this matter, the landlord has stated in its Application for Dispute Resolution that it is only seeking to recover rent for August 2018 from the tenant.

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 advertised for a new tenant within a reasonable time after the tenant vacated the rental unit, which was prior to the expiry of the fixed term lease. 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. 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 August 1, 2018.

Further to this, the landlord acknowledged that the rental unit was advertised for rent at a higher monthly rent of \$1,520.00.

Therefore, based on the evidence and testimony provided, I find that the landlord has failed to provide sufficient evidence to meet the burden of proof, on a balance of probabilities, that it took reasonable efforts to mitigate its claimed loss of one month's rent for August 2018 in the amount of \$1,425.00 due to the tenant failing to provide notice to end the tenancy in accordance with the *Act*. The landlord submitted no evidence to document efforts to re-rent the unit, and further to this, the landlord sought a higher monthly rent. Given that it took the landlord three months to find a new tenant willing to take the rental unit at the higher monthly rental amount, I find that the higher rent may not have been "reasonably economic" and therefore, the landlord's decision to change the terms of the rental by increasing the monthly rent may have contributed to the landlord's inability to re-rent the unit sooner, resulting in the landlord's failure to mitigate its loss.

Therefore, given the above reasons, I find that the landlord has failed to establish all of the criteria required for a monetary claim. As such, the landlord's monetary claim is dismissed in its entirety.

The landlord continues to hold the tenant's security deposit.

The *Act* contains comprehensive provisions on dealing with security deposits. Under section 38 of the *Act*, the landlord is required to handle the security deposit as follows:

- 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.

...

- (4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
 - (a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
 - (b) after the end of the tenancy, the director orders that the landlord may retain the amount.

...

- (6) If a landlord does not comply with subsection (1), the landlord
 - (a) may not make a claim against the security deposit or any pet damage deposit, and
 - (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

At no time does the landlord have the ability to simply keep all or a portion of the security deposit because they feel they are entitled to it due to damages caused by the tenant or monies believed to be owed by the tenant. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

In this matter, the tenancy ended on July 16, 2018, and the landlord confirmed receipt of the tenant's forwarding address by July 24, 2018.

Therefore, the landlord had 15 days from July 24, 2018, which is the later date, to address the security deposit in accordance with the *Act*.

The landlord did not apply for arbitration within 15 days of the receipt of the forwarding address of the tenant, to retain all or a portion of the security deposit, as required under section 38 of the *Act*.

Based on the above legislative provisions and the testimony and evidence before me, on a balance of probabilities, I find that the landlord failed to address the security deposit in compliance with the *Act*. As such, in accordance with section 38(6) of the *Act*, I find that the tenant is entitled to a monetary award equivalent to the value of double the amount of the security deposit withheld by the landlord, with any interest calculated on the original amount only. No interest is payable for this period.

As the landlord's monetary claim is dismissed, I order that the landlord must return the security deposit, totalling \$712.50 and pay compensation to the tenant of the equivalent amount, \$712.50.

Therefore, I issue a Monetary Order in the tenant's favour in the amount of \$1,425.00 pursuant to sections 38, 67 and 72 of the *Act*.

As the landlord was not successful in its Application, the landlord must bear the costs of the filing fee.

Conclusion

Accordingly, I dismiss the landlord's monetary claim in its entirety. The landlord must bear the costs of their Application filing fee.

I issue a Monetary Order in the tenant's favour in the amount of \$1,425.00 pursuant to sections 38, 67 and 72 of the *Act*.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order 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 *Residential Tenancy Act*.

Dated: April 16, 2019

Residential Tenancy Branch