



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

FFL MNDCL MNRL FFT MNDCT

Introduction

This hearing dealt with applications from both the landlord and tenants pursuant to the Residential Tenancy Act. The landlord applied for:

- A monetary award for damages and loss pursuant to section 67; and
- Authorization to recover the filing fee from the tenant pursuant to section 72.

The tenant applied for:

- A monetary award for damages and loss pursuant to section 67; and
- Authorization to recover the filing fee from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant spoke on her own behalf and was assisted by their family member.

As both parties were present service of documents was confirmed. The parties each confirmed receipt of the other's application and evidence. While the tenant disputed receiving a separate package of the landlord's evidence, the landlord confirmed that all evidentiary materials they are relying upon were included with the hearing package. Based on the testimonies I find that each party was served with their respective application and evidence in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is either party entitled to a monetary award from the other as claimed?

Is either party entitled to recover the filing fee for their application from the other?

Background and Evidence

There was a previous hearing and decision made under the file number on the first page of this decision. That application dealt with the landlord's claim for a monetary award for loss of rental income. The original arbitrator issued a monetary award in the landlord's favour of \$24,000.00 in satisfaction of the lost rental income for the period of September 2018 through to November 2018.

This fixed term tenancy was scheduled to begin on September 1, 2018 with monthly rent of \$8,000.00. The tenancy was scheduled to end on August 31, 2019. The tenant did not take possession of the rental unit and gave notice in August 2018 to terminate the tenancy agreement.

The landlord testified that they attempted to find a new occupant for the rental unit over the subsequent months but were unable to find someone. The landlord moved into the rental unit themselves on December 1, 2018 and rented out the apartment they were residing in for \$6,000.00 monthly.

The landlord seeks a monetary award of \$18,000.00, the difference in the rental income for the remaining 9 months of the fixed term tenancy. ($[\$8,000.00 - \$6,000.00] \times 9 \text{ months} = \$18,000.00$).

The landlord also seeks \$3,600.00 for utilities that the landlord submits they would not have had to pay had the tenant not broken the fixed term tenancy agreement. The landlord testified that the tenancy agreement they have with the occupant of their apartment includes utilities and therefore the landlord is incurring double the monthly utility costs. The landlord estimates that monthly utilities for the rental unit would be about \$300.00 and they are seeking the amount of utilities for the full duration of the fixed term tenancy agreement. ($\$300.00 \times 12 \text{ months} = \$3,600.00$)

The tenant disputes that there was an enforceable tenancy agreement between the parties. The tenant points to the fact that no condition inspection report was prepared for this tenancy. The tenant submits that the earlier decision should be overturned and an award of \$24,000.00 in the tenant's favour be issued. The tenant submits that the landlord did not take reasonable efforts to mitigate their losses to rent the suite as they only lowered the asking price by \$100.00. The tenant disputes the landlord's claim for

loss of rental income and utilities. The tenant submits that the landlord's estimate that utilities would be about \$300.00 monthly to be grossly exaggerated and unreasonable. The tenant submits that the landlord was not obligated to enter into an all-inclusive rent of \$6,000.00 for the apartment and they chose to pay double the utilities.

Analysis

The principle of *res judicata* prevents an applicant from pursuing a claim that has already been conclusively decided. There was an earlier decision under the file number on the first page of this decision. The decision dealt with an application from the landlord for a monetary award for damages and loss. In the earlier written decision the arbitrator writes:

I am satisfied that the landlord had made an effort to mitigate the tenant's exposure to the landlord's monetary loss of rent for September 2018 through to November 2018, as is required by section 7(2) of the *Act*. As stated in the tenant's own evidence, the landlord had placed advertisements for the home to be rented out. Despite these efforts, the landlord was unable to find a new tenant. I am satisfied that the potential loss the tenant could have been exposed to would have been greater for this fixed-term tenancy had the landlord not moved into the home himself, reducing the length of the vacancy due to the tenant's deliberate actions. Accordingly, I find that the landlord is entitled to a monetary order in the amount of \$24,000.00 in satisfaction of the lost rental income due to the tenant's failure to comply with sections 44 and 45 of the *Act*.

The tenant now applies for a monetary award in the amount of \$24,000.00 writing, "The landlord received compensation because he claimed he was unable to rent the property. I have evidence to support that he had two opportunities to rent he property and he declined."

It is clear from the submission of the tenant that their current claim pertains to disputing the findings of the original arbitrator and seeking a new monetary award in their favor. I find that the tenant's present application pertains to a matter which has already been the subject of a conclusive decision. The original arbitrator accepted the evidence of the parties pertaining to lost rental income and the landlord's efforts to mitigate their damages. Therefore, as the tenant's application pertains to a matter that has already been the subject of a conclusive finding of fact, I find that I do not have the jurisdiction to make a new finding. The tenant's application seeking a monetary award is a matter that has been the subject of an earlier decision and has been conclusively ruled upon. As such, I dismiss the tenant's application in its entirety.

In their earlier application the landlord stated that they were seeking the following:

and also If I rent for less then [the tenant] pay the difference for the entire term of our lease.

It is evident that their earlier application included a claim by the landlord for the difference in their rental income for the full duration of the fixed term tenancy. I find that this is the same grounds upon which the landlord claims a monetary award in their current application. In the earlier decision the arbitrator makes a final determination awarding \$24,000.00 for the loss of rental income. No award is issued for the difference in rental income for the duration of the lease. The arbitrator does not separate the issues or dismiss the portion of the landlord's application with leave to reapply. Based on the written decision it is evident that the arbitrator considered the landlord's submissions and evidence and issued a final binding decision.

I find that the landlord's earlier application included a claim for the difference in the rent for the entire term of the fixed term tenancy. I find that the other arbitrator issued a final and binding decision on the entirety of the landlord's earlier application without any portion being dismissed with leave to reapply. Therefore, I find that it is not open for the landlord to resubmit an application on a matter that has already been conclusively determined. I find that I do not have the jurisdiction to make a new finding on a matter that was before another arbitrator and I consequently dismiss this portion of the landlord's application.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. The applicant must also take reasonable steps to mitigate their losses.

I find the tenant's submission that there is no enforceable tenancy agreement as no condition inspection report was prepared to have no merit. Failure to prepare a condition inspection report does not invalidate or negate the existence of a tenancy agreement.

I find that there is insufficient evidence in support of the full amount of the landlord's claim. While I accept that the landlord is currently paying the utilities for the rental unit and for the apartment that is occupied by a separate resident, I find that this cannot be attributed wholly to the tenant's breach of the fixed term tenancy agreement. I find that there is little evidence that the landlord has taken any steps to mitigate their losses due to utility payments. The landlord was not obligated to enter into a tenancy agreement where the landlord was responsible for payment of utilities. I find that there is insufficient evidence that it was reasonable for the landlord to incur the utility costs of their rental apartment. I find that any costs incurred for payment of utilities is not attributable to the tenant's breach of the tenancy agreement but the landlord's failure to take reasonable steps. Consequently, I dismiss this portion of the landlord's application.

As I have dismissed the landlord's application I find they are not entitled to recover the filing fee.

Conclusion

The tenant's application is dismissed in its entirety without leave to reapply.

The landlord's application is dismissed in its entirety without leave to reapply.

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: May 3, 2019

Residential Tenancy Branch