Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, MNRL-S, FFL

Introduction

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

- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- a Monetary Order for damage or compensation, pursuant to section 67;
- a Monetary Order for damage, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

Landlord J.V. (the "landlord") and tenant Y.S. (the "tenant") 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, and the tenant confirmed, that the landlord served the tenant with the notice of dispute resolution and amendment via registered mail. I find that the tenant has been served with the above documents in accordance with section 89 of the Act.

Issues to be Decided

1. Are the landlords entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Are the landlords entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
3. Are the landlords entitled to a Monetary Order for damage, pursuant to section 67 of the *Act*?

4. Are the landlords entitled to retain the tenants' security deposit, pursuant to section 38 of the *Act*?
5. Are the landlords entitled to recover the filing fee from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on August 15, 2018 and ended on November 24, 2018. This was originally a fixed term tenancy agreement set to end on August 31, 2019. Monthly rent in the amount of $3,600.00 was payable on the first day of each month. A security deposit of $1,800.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The tenant testified that after she moved out of the subject rental property she filled out a Mutual Agreement to End Tenancy which had her new address on it and sent it to the landlord via e-mail on November 27, 2018. The landlord confirmed receipt of the Mutual Agreement to End Tenancy on or around November 27, 2018 but did not sign it.

The landlord testified that he used the tenant's address listed on the Mutual Agreement to End Tenancy to send the tenant his application for dispute resolution and amendment. The landlord filed his application for dispute resolution on February 13, 2019.

Landlord's Claim

The landlord testified that mid-November he was advised by his property manager that their might be a situation with the tenants and that they might not be able to pay rent. The landlord testified that the tenants did not provide him or his agent with a proper notice to end tenancy. The landlord testified that around November 24, 2018 his property manager started marketing the subject rental property at a rental rate of

$3,600.00 which included two parking spots, the same agreement he had with the tenants.

The landlord testified that his property manager found new tenants who moved into the subject rental property on December 21, 2018; however, the new agreement was at a rental rate of $3,000.00 per month including only one parking spot and was a fixed term ending on June 30, 2019. The landlord testified that the rental rate had to be reduced because his property manager could not find a tenant at the higher rate. The landlord testified that the new tenants paid a pro-rated amount of $725.00 for December 2018's rent.

The landlord testified that the tenancy agreement has a liquidated damage clause in the amount of $7,200.00. The liquidated damage clause states:

> If the Tenant ends the tenancy before the end of the original term (clause 2(c)), the sum of $7,200.00 shall be paid by the Tenant to the Landlord as liquidated damages. They payment by the Tenant of the said liquidated damages to the Landlord is agreed to be in addition to any rights or remedies available to the landlord. The Tenant will not have to pay this liquidated damages, if the landlord does not incur a damage, such as; if the tenant finds another tenant to take over the lease, and the tenant is approved by the landlord after their own due diligence, if no rent loss or property management expenses are incurred by the Landlord, the tenant will not have to pay the Liquidated Damages.

I asked the landlord how the figure of $7,200.00 was arrived at. The landlord testified that it was two month's rent and that his property manager advised to put this amount as liquidated damages.

The landlord testified that he is seeking $21,600.00 in damages from the tenants as follows:

- December 2018's rent: $3,600;
- Difference in rent that would have been received under the tenants' tenancy agreement and the new tenancy agreement from January 2019 – June 2019: $3,600.00
- July and August 2019 rent: $7,200.00; and
- Liquidated Damages: $7,200.00.

Tenant's Response

The tenant testified that she called the landlord's property management company on November 2, 2018 and informed him that her husband abandoned her and her nine-year-old son and she would therefore not be able to continue to reside at the subject rental property. The tenant testified that she asked the landlord's agent to immediately start marketing the subject rental property for rent and that she would accommodate any showings. The tenant entered into evidence a follow up e-mail to the property manager which states:

> As discussed, I will pay fee of 1 month +tax to find a new tenant.
> [Property manager team] will start marketing right away
> The rent will be paid until the new tenant takes over the property.
> Please do your best, I really appreciate it.

The tenant testified that she moved out of the subject rental property on November 24, 2018. The tenant testified that the landlord and or the property manager did not show the subject rental property for rent while she resided at the subject rental property.

After the tenant provided testimony about the November 2, 2018 telephone call to the landlord's agent and the follow up e-mail I again asked the landlord when he or his agent started marketing the subject rental property for rent. The landlord changed his earlier testimony and testified that his property manager started marketing the subject rental property for rent immediately after November 2, 2018.

The tenant testified that on November 27, 2018 she emailed the landlord and ccd the property manager. The November 27, 2018 email was entered into evidence and states in part:

> I am [tenant]. I feel very sorry to write this email but I have to face reality. I told [the property manager] on Nov 2nd that I need to move out the unit for I have a marriage crisis suddenly….

> I moved out everything last week and left visitor pass and one set of key in the mail box (I kept the mailbox key). Two parking lots are empty and clean. House is clean and available for showing at any time.
>
> I am very very very sorry to let you know that I have to end the lease. I would like to talk to you in person to discuss how to end it….

Attached to the November 27, 2018 email was the Mutual Agreement to End Tenancy.

The tenant testified that one of the adds for the subject rental property was for $3,495.00 per month with one parking stall and so she believes that she is only responsible to pay the difference between that amount and the actual rental rate received from the new tenants for the months of January to June 2019.

Analysis

Breach of Fixed Term Lease

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

Policy Guideline 5 states that where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided. The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved.

In this case, the tenants ended a one-year fixed term tenancy nine months early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement for the months of December 2018 to June 2019. Pursuant to section 7 of the *Act*, the tenants are required to compensate the landlord for that loss of rental income. However, the landlords also have a duty to minimize that loss of rental income by re-renting the unit at a reasonably economic rate as soon as possible.

In this case, I find that the tenant made the property manager aware of her intention to breach the fixed term tenancy on November 2, 2018 as evidenced by the tenant's testimony and the e-mail dated November 2, 2018. Based on the landlord's inconsistent testimony, I find that the landlord failed to prove that he or his property manager started to market the subject rental property on or around November 2, 2018 when the property manager became aware of the damages occurring. I find that, on a balance of probabilities the landlord or his property manager started marketing the subject rental property after the tenant moved out on November 24, 2018. I find that due to the landlord's failure to mitigate his damages, the landlord is only entitled to received 50% of damages suffered for December 2018.

I find that had the tenancy continued, the landlord would have received $3,600.00 for the month of December 2018 from the tenants. However, under the new tenancy agreement the landlord only received $725.00. Thus, the landlord suffered the following loss: $3,600.00 - $725.00= $2,875.00. As per my above finding, the landlord is entitled to recover 50% of $2,875.00 which equals $1,437.50 for December 2018.

Policy Guideline 3 states that the damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include

compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.

I find that the landlord is entitled to recover from the tenants $3,600.00 which is the difference between what the landlord would have received form the defaulting tenants ($3,600.00) and what he was able to re-rent the subject rental property ($3,000.00) for the balance of the un-expired term of the tenancy (January to June 2019). I find that the fact that the landlord reduced the rental rate to entice a new tenant does not impact the above calculation as the landlord was mitigating his damages by attempting to re-rent the property as soon as possible to decrease further damages for which the tenants could be liable.

I find that the landlord's claim for loss of rent for July and August 2019 is pre-mature as it is not yet known what loss if any the landlord will suffer. For example, if the current tenants continue to reside at the subject rental property the loss to the landlord would only be $1,200.00; however, if the landlord is able to re-rent the subject rental property for a higher amount the loss would be less. Therefore, I dismiss the landlord's claim for damages for July and August 2019 with leave to reapply once those damages are known.

Liquidated Damages

Policy Guideline #4 states that 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 in 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.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally, clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

In this case, I find that the sum of $7,200.00 is extravagant in comparison to the greatest loss that could follow a breach. In addition, I find that landlord did not prove, on a balance of probabilities, that the sum chosen, two months rent, was a genuine pre-estimate of damages. The landlord was unable to provide a breakdown of how that sum was arrived at other than that it was two months' rent. I therefore find that the liquidated damages clause constitutes a penalty and is therefore unenforceable.

As the landlord was successful in the majority of his application, I find that he is entitled to recover the $100.00 filing fee from the tenants, pursuant to section 72 of the *Act.*

Security Deposit

While e-mail is not an approved method of service under section 88 of the *Act*, I find that the tenant's forwarding address was sufficiently served for the purposes of this *Act,* pursuant to section 71 of the *Act,* with the tenant's forwarding address on or around November 27, 2018 as the landlord acknowledged receipt of it on or around that date.

Section 38 of the Act requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the Act, equivalent to double the value of the security deposit.

Section C(3) of Policy Guideline 17 states that unless the tenants have specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act.

In this case, while the landlord made an application to retain the tenants' security deposit, it was more than 15 days after receiving the tenant's forwarding address in writing. Therefore, the tenants are entitled to the return of double their deposit, in the amount of $3,600.00.

Section 72(2) states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenant's entire doubled security deposit in the amount of $3,600.00 in part satisfaction of his monetary claim.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	**Amount**
Loss of rental income: December 2018	$1,437.50
Loss of rental income January to June 2019	$3,600.00
Filing Fee	$100.00
Subtotal	**$5,137.50**
Less doubled security deposit	-$3,600.00
TOTAL	**$1,537.50**

The landlords are provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants 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: May 31, 2019

Residential Tenancy Branch