



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFT

Introduction

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

- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant 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. As the tenant confirmed that the landlord's representative handed them a copy of the landlord's dispute resolution hearing package on or about April 6, 2019, I find that the tenant was duly served with this package in accordance with section 89 of the *Act*. Since both parties confirmed that they had received one another's written evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This tenancy began by way of a series of text messages between the parties. The parties agreed that the tenant took occupancy of the rental unit on or about December 26, 2018. When this tenancy began, the tenant was offered the choice of a term of one month, six months or one year. The tenant agreed that in one of their text messages, they agreed to a six month lease, which was to have expired on June 30, 2019. The tenant said that there was also an oral agreement that this tenancy was to be for one month. The landlord disputed this latter statement, claiming that the tenancy was scheduled as a six month lease, as per the text message that the landlord entered into written evidence.

The parties agreed that monthly rent was set at \$1,300.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$600.00 security deposit paid before the tenant moved into the rental unit.

As the tenant was becoming nervous that the property was listed for sale and that the tenant might have to leave quickly if the house was sold, the tenant testified that they sent the landlord a text message on February 11, 2019, advising the landlord that they were vacating the rental unit by March 1, 2019. The landlord testified that they did not receive this text message until the day before the tenant moved out.

The landlord's application for a monetary award of \$4,600.00 was for the landlord's loss of four month's rent, from March through June 2019, due to the tenant's premature decision to vacate the rental unit before the end of June 2019.

The landlord testified that the property has now been sold and that a new owner took possession by June 1, 2019.

The landlord said that based on the tenant's actions, the landlord was reluctant to try to enter into another short term rental of this home. The landlord initially said that they had not advertised the home for re-rental, then said that they had "asked around" with friends to see if anyone they knew could find a tenant for the property, then finally asserted that their real estate agent had taken steps to try to re-rent the premises. The landlord said that they had not posted the availability of the premises for rent on any rental website, and did not know what their realtor had done to try to re-rent the premises to prospective tenants. The landlord did not deny the tenant's claim that the premises were listed for sale when this tenancy began. The landlord did not dispute the

tenant's assertion that the property remained listed throughout this tenancy, and eventually changed ownership by June 2019.

Analysis

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. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant was responsible for a contravention of the *Act* or their tenancy agreement and that the landlord is to be compensated for this contravention.

I should first note that the legislation requires landlords to create written tenancy agreements. While oral agreements are allowed under the *Act*, the lack of any written agreement can lead to misunderstandings which require arbitration. In addition, relying on text messages leaves both parties susceptible to claims that text messages did not go through to one another, and relies on an assessment of the credibility of the sworn parties who claim to have sent the message or to have not received it.

Without a written agreement in place, I can only consider the sworn testimony of the parties, relying to the extent necessary on supporting documentation or other evidence. Although text messages are hardly definitive proof of the terms of a tenancy, I do accept the landlord's assertion that there is sufficient evidence to demonstrate that the parties originally intended for this to be a six month fixed term tenancy. On this basis, the tenant had a contractual obligation to pay rent when it became due for a six-month period.

Section 45(2) of the *Act* reads as follows:

- 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...*

Although the tenant claimed to have been unaware that they could not end a tenancy by way of a text message, section 52 of the *Act* establishes that a tenant must end a tenancy by providing written notice to the landlord. Text messages are not considered written notice. In this case, the landlord also claimed to have not received the text message of February 11, until the tenant was asked to resend it shortly before the tenant vacated the rental unit.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. Section 26(1) of the *Act* establishes that “a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent.”

I find that the tenant was in breach of their fixed term tenancy agreement because they vacated the rental premises prior to the June 30, 2019 date specified in that agreement. There is undisputed evidence that the tenants did not pay any rent from March 2019 until June 2019, the last month of their fixed term tenancy. As such, the landlord would be entitled to compensation for losses they incurred as a result of the tenants’ failure to comply with the terms of their tenancy agreement and the *Act*. However, section 7(2) of the *Act* also places a responsibility on a landlord claiming compensation for loss resulting from a tenant’s non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

In this case, the landlord has sold the property, thus mitigating the tenant's exposure to losses of rent for the month of June 2019. Prior to that time, I find on a balance of probabilities that the landlord has provided less than convincing evidence to demonstrate any real attempt to mitigate the tenant's exposure to the landlord's loss of rent for the months of March, April and May 2019. It would appear that the property remained for sale for most of this time, and even before this tenancy began. The landlord testified that they did not publicly advertise the availability of the premises for rent, only letting family and friends know about its availability. The landlord provided

few details regarding any attempts made by their realtor to re-rent these premises, presumably while the property remained listed for sale. The landlord said that they could have their realtor provide additional information at some future date. Since the realtor was not present for this hearing and provided nothing in writing to support the landlord's changing testimony with respect to this matter, I considered the landlord's application based on the evidence presented by the parties at this hearing.

Under these circumstances, I find that the landlord has fallen for short of the standard required by section 7(2) of the *Act* to mitigate the tenant's exposure to the landlord's loss of rent for the period claimed. Consequently, I dismiss the landlord's application for a monetary award without leave to reapply.

Pursuant to section 63 of the *Act*, the Arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. During the hearing, the parties engaged in a conversation, turned their minds to compromise and near the end of this hearing appeared to have achieved a resolution of their dispute.

Based on this discussion, the tenant agreed to allow the landlord to keep their security deposit, even though the landlord was not yet under any legal obligation to return that deposit because the tenant had not provided their forwarding address in writing to the landlord. In so doing, the tenant recognized that they had provided little warning to the landlord that they were ending their tenancy, and that the landlord was likely in little position to have re-rented the premises for March 1, 2019. The landlord said that they were in agreement with this provision relating to the retention of the security deposit. However, the foul language and obscenities hurled at both the tenant and I by the landlord with respect to their agreement to these terms revealed that the landlord was not entering into this agreement of their own free will and instead required an arbitrated decision regarding this entire matter.

As such, and as the tenant has not disputed the landlord's application to retain the security deposit or that the landlord did suffer some loss as a result of the untimely end to this tenancy, I am ordering the landlord to retain the security deposit. This allows the landlord a monetary award for the first portion of March 2019, a period when it is unlikely that any amount of efforts to mitigate the tenant's exposure to the landlord's loss of rent could have led to a re-renting of the premises to other short term tenants.

Under these circumstances and as the landlord has been substantially unsuccessful in their application, I make no order for the recovery of the landlord's filing fee from the tenant.

Conclusion

The landlord's application for a monetary award for loss of rent and the recovery of their filing fee is dismissed without leave to reapply.

I order the landlord to retain the tenant's security deposit.

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: June 17, 2019

Residential Tenancy Branch