



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFL MNDL-S MNRL-S**

Introduction

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

- Authorization to recover the filing fees from the tenants pursuant to section 72;
- A monetary order for damages to the rental unit and authorization to retain a security deposit pursuant to sections 67 and 38; and
- A monetary order for rent and/or utilities and authorization to retain a security deposit pursuant to sections 38 and 67.

The landlords attended the hearing and were represented by co-landlord, IR ("landlord"). The tenants attended the hearing and were represented by co-tenant, KB ("tenant"). The tenants acknowledge being served with the landlord's Application for Dispute Resolution and stated there were no issues with timely service of the Application for Dispute Resolution.

Preliminary Issue – Evidence

The landlord testified she did not provide the tenants with all the evidence she presented to the Residential Tenancy Branch and the tenants testified their evidence was served late. The landlord denies receiving the tenants' evidence. As both parties did not comply with Rule 3 of the Residential Tenancy Branch Rules of Procedure, I ruled that no documentary evidence other than the documents both parties acknowledge having in their possession would be accepted as evidence. These documents are the tenant's One Month Notice to End Tenancy dated May 31, 2019 and the landlord's response letter dated June 20, 2019.

Settlement Reached

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 discussed the issues between them, turned their minds to compromise and achieved a resolution of their dispute. Both parties agree that the landlord's claim for a monetary order for damages to the rental unit and authorization to retain a security deposit pursuant to sections 67 and 38 would be resolved by settlement.

1. The parties agree that the landlord may retain the \$500.000 security deposit in full and final settlement of that portion of the landlord's claim for compensation.
2. The parties agree that the arbitrator is to write a final and binding decision regarding the landlord's application for the equivalent of one month's rent for being served with the tenant's Notice to End Tenancy with less than one month's notice.

Both parties testified that they understood and agreed to the above terms, free of any duress or coercion. Both parties testified that they understood and agreed that the above terms are legal, final, binding and enforceable, which settles that aspect of the landlord's application.

Issue(s) to be Decided

Is the landlord entitled to the equivalent of one month's compensation for being served with the tenant's Notice to End Tenancy with less than one month's notice?

Background and Evidence

The landlord testified the fixed one-year tenancy began on October 8, 2015 becoming a 2 month by 2 month tenancy at the conclusion of the fixed term. The landlord explained that the tenants would be required to provide 2 months notice to end the tenancy in accordance with this provision.

The rental unit is a coach house above a garage on the landlord's property. Rent was set at \$995.00 per month payable on the first day of the month. A security deposit of \$500.00 was collected which the landlord continues to hold. No pets damage deposit was taken and a condition inspection report was conducted with the tenant PB at the commencement of the tenancy. Rent was increased to \$1,035.00 per month in November of 2017, effective January 1, 2018.

The landlord testified she was personally served with the tenant's One Month Notice to End Tenancy ("Notice") on June 1, 2019. Both parties have a copy of the Notice, dated May 31, 2019 which provides an effective date of June 30, 2019 and provides the tenant KB's forwarding address. It also provides KB's contact information to make it

easier for the landlord to show the unit to prospective tenants. Of note, the landlord's copy of the Notice has a notation that it was received on June 1, 2019 which the tenant's copy lacks. The landlord testified she wasn't home until approximately 10:00 p.m. on June 1st, and got earlier texts from the tenant advising they needed to meet. None of the texts were provided as evidence.

The landlord testified she verbally advised the tenants she didn't get a full months notice and the tenancy would continue until July 31, 2019. A letter to the same effect dated June 20th was served on the tenant KB on June 23rd which KB acknowledges. The landlord testified that the tenants did not want to pay for July rent and she told KB that if they found a new tenant for July they wouldn't need to pay. The landlord testified she made attempts to find a new tenant herself but provided no documentary evidence to corroborate this.

The tenant PB testified she moved out of the rental unit in October 2016 and was replaced as a tenant by KB's sister. The landlord was aware of the change in tenants and took copies of KB's sister's identification documents. PB was under the impression that her responsibility for the tenancy ended with the change in tenants. No new tenancy agreement was entered into with KB and KB's sister when PB left the tenancy.

The tenant KB testified she served the landlord with the Notice on May 31st, not June 1st. She recalls she called the landlord at least 3 times the night of May 31st and it was late on the night of May 31st, after 10:00 p.m. that she personally served the Notice. The landlord advised her the tenancy agreement stipulated she was to give the landlord 60 days notice, not 30. On June 24th, she acknowledges receiving the landlord's letter dated June 20th but denies the statement in it saying she served the Notice on June 1st.

Analysis

Section 45(1) of the Act states a tenant may end a periodic 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, and
- b) 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.

Section 5(1) and 5(2) of the Act state Landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect.

The tenancy agreement term that the tenancy become 2 month by 2 month is an attempt to contract out of the tenant's right to end a tenancy with one month's notice as is her right under section 45. As such this term has no effect in accordance with section 5 of the Act.

In the case before me, the parties disagree on when the tenant served the Notice, on May 31st or June 1st. When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Has the landlord provided any evidence beyond her testimony? I do not find the notation on the landlord's copy of the Notice indicating it was received on June 1st to be compelling as nothing corroborates it. It is altogether plausible that notation was made some time after June 1st. The landlord didn't supply any statements, text messages or witnesses to corroborate her version of events. The tenant KB has provided equally plausible evidence that she served the Notice on May 31st. As there are equally plausible versions of when the Notice was served, I find the landlord has not met the burden of proof to show her version is the one to be believed.

Section 7 of the *Act* explains, "If a tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results... **A landlord who claims compensation** for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement **must do whatever is reasonable to minimize the damage or loss.**" (emphasis added)

In this case, the landlord has not presented any evidence of trying to re-rent the premises as soon as she received the tenant's Notice. She testified that she told the tenants **if they found a new tenant** before July 1st, they would not be responsible for paying July rent. Leaving the responsibility of finding new tenants with the vacating tenants does not demonstrate the landlord taking steps to mitigate damages. While the landlord made vague references to her attempts at re-renting the unit, she has not presented any substantial evidence of doing so. She could not recollect the dates she placed online advertisements. She did present any testimony of showing the rental unit during June even though the tenant's Notice to End Tenancy gave contact information to make those arrangements. I find the landlord has not taken any steps to mitigate damages. Even if she were to be successful in being awarded compensation for receiving Notice with less than one month's notice, the award would be reduced to zero for her failure to mitigate the damages.

Given that the landlord has not successfully proven the Notice was served with less than one month's notice and the finding that the landlord did not make any attempt to mitigate damages, I find the landlord's claim for compensation cannot succeed. I dismiss the landlord's claim for compensation.

As the landlord was not successful in her claim, she will not recover the filing fee.

Conclusion

The landlord is entitled to retain the \$500.00 security deposit in accordance with sections 38 and 63 of the Act.

The remainder of the landlord's claim is dismissed.

This decision is **final and binding** and 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: October 13, 2019

Residential Tenancy Branch