Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

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

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

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 1:46 p.m. in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 p.m. The landlord's property manager attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. 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.

The property manager testified that the tenant was served with the landlord's application for dispute resolution via registered mail on June 21, 2019. The property manager provided the Canada Post Tracking number orally during the hearing, to prove this registered mailing. The Canada Post Tracking number is on the cover page of this decision. The property manager testified that the tenant provided her with an updated forwarding address via text on June 14, 2019 and this is the address she sent the landlord's application for dispute resolution to. The June 14, 2019 text was entered into evidence.

I find that while text message is not a recognized method of service under section 88 of the *Act*, the landlord was sufficiently served with the tenant's updated address on June

14, 2019, for the purposes of this *Act*, pursuant to section 71 of the *Act* because the property manager acknowledged receipt of the forwarding address on this date.

I find that the tenant was deemed served with the landlord's application for dispute resolution on June 26, 2019, five days after its registered mailing, in accordance with section 89 of the *Act.*

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to retain the tenant's security deposit, pursuant to section 38 of the *Act*?
3. Is the landlord entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*?

Background and Evidence

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

The property manager provided the following undisputed testimony. This tenancy began on April 1, 2018 and ended on September 30, 2018. This was originally a fixed term tenancy set to end on March 31, 2019. Monthly rent in the amount of $1,675.00 was payable on the first day of each month. A security deposit of $837.50 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

This application was made by the landlord on June 18, 2019.

The property manager testified to the following facts. The tenant informed her via text on September 4, 2018 that she was ending the tenancy effective September 30, 2018. The property manager put up new online advertisements in three locations for the subject rental property on September 5, 2018. The property manager arranged a number of showings for the subject rental property in September of 2018, but the tenant

refused to allow the property manager to show the unit. The property manager was only able to show the unit once the tenant moved out and was not able to find a tenant for October 2018. The landlord is claiming $1,675.00 for the loss of October 2018's rent. The property manager testified to the following facts. The property manager was unable to re-rent the subject rental property at the tenant's rental rate of $1,675.00 but was able to secure a new tenant for November 1, 2018 at a rental rate of $1,475.00. A tenancy agreement stating same was entered into evidence. The landlord is claiming loss of income for six months at a rate of $200.00 per month for a total of $1,200.00.

Section 5 of the Addendum to the Tenancy Agreement states:

> Should the tenancy agreement be terminated for any reasons prior to the agreed length of stay… an administration fee of $200.00 will automatically apply. The tenant may be liable to pay [the property management company] for a pro-rated amount of rent and any additional costs to re-rent the property. Early termination of a lease will require the tenant to pay a "placement fee" to find a new tenant, which is equivalent to ½ month's rent.

The property manager testified that the landlord is seeking to recover $837.50 from the tenant, pursuant to section 5 of the Addendum to the Tenancy Agreement, for costs associated with finding a new tenant.

The property manager testified that the landlord filed a previous application seeking to retain the tenant's security deposit; however, the previous arbitrator was not satisfied that the tenant was served with the landlord's application for dispute resolution. The previous decision dated February 19, 2019 states:

> *The landlord testified that the tenant was served with the landlord's application for dispute resolution hearing package on November 7, 2018, by way of registered mail. The landlord provided a Canada Post tracking number verbally during the hearing.*
>
> *When I questioned the landlord as to what address the application was sent to, she said it was the tenant's forwarding address provided to her in a text message on October 23, 2018. The landlord did not provide a copy of this text message with this application. She said that the mail was unclaimed and returned to the landlord as the sender.*
>
> *Section 89(1) of the Act outlines the methods of service for an application for dispute resolution, which reads in part as follows (my emphasis added):*

89 (1) An application for dispute resolution …, when required to be given to one party by another, must be given in one of the following ways:

(a) by leaving a copy with the person;

(b) if the person is a landlord, by leaving a copy with an agent of the landlord;

*(c) **by sending a copy by registered mail to the address at which the person resides** or, if the person is a landlord, to the address at which the person carries on business as a landlord;*

(d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;

(e) as ordered by the director under section 71 (1) [director's orders: delivery and service of documents].

I find that the landlord was unable to show that the address where she sent this application was a residential address or a forwarding address provided by the tenant. The landlord failed to show a forwarding address provided by the tenant, as a copy of the text message was not provided by the landlord. The mail was returned to sender. The tenant did not appear at this hearing to confirm receipt of the application.

Accordingly, I find that the landlord failed to prove service in accordance with section 89(1) of the Act and the tenant was not served with the landlord's application.

At the hearing, I informed the landlord that I was dismissing the landlord's application with leave to reapply, except for the filing fee. I notified her that the landlord would be required to file a new application and pay a new filing fee, if the landlord wishes to pursue this matter further. I cautioned the landlord that service would have to be proven at the next hearing, including recent documentary evidence of the tenant's forwarding or residential address.

In this application, the landlord testified that she originally received the tenant's forwarding address on October 23, 2018 via text. The October 23, 2018 text was entered into evidence.

Analysis

Loss of Rental Income

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.

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.

In this case, I accept the property manager’s uncontested testimony that the tenant ended a fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement from October 2018 to March 31, 2019. Pursuant to section 7, the tenant is 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.

I accept the property manager's testimony that she advertised the subject rental property immediately after the tenant provided notice to end tenancy. I also accept the property manager's uncontested testimony that the tenant refused access to the subject rental property for showings. I find that the landlord accepted a lower rental rate to secure a new tenant which decreased the tenant's potential liability for further untenanted months. Based on the above I find that the landlord mitigated his damages.

Section 45(2) of the *Act* states that 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.

Pursuant to the tenancy agreement, I find that the earliest time the tenant was permitted to end the tenancy was March 31, 2019 and the tenant is therefore responsible for the damages suffered by the landlord from October 1, 2018 to March 31, 2019. I find that the tenant is responsible for October 1, 2018's rent as she breached the fixed term tenancy and despite the landlord's mitigation of his damages, a new tenant was not found for October 2018.

Pursuant to Policy Guideline 3, I find that the tenant is liable to pay the difference between what the landlord would have received under the tenancy agreement and what the landlord will receive under the new tenancy agreement until March 31, 2019, which is the earliest date the tenant was permitted to end the tenancy. In this case, for the months of November 2018- March 2019 the landlord received $200.00 less per month for five months. The landlord is therefore entitled to recover $1,000.00 in lost revenue, from the tenant.

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 tenant signed and fully understood the tenancy agreement and that she is liable to pay liquidated damages for causing the tenancy to end prematurely. I find that the liquidated damages clause was clearly and carefully laid out in the tenancy agreement and detailed the consequences of breaking the fixed term tenancy agreement to the parties.

I find that the amount of ½ a month's rent stipulated to cover the costs of finding a new tenant is reasonable and not extravagant or exorbitant in relation to the rent payable in this tenancy. I find that the tenant is liable to pay liquidated damages in the amount of $837.50.

Security Deposit

While text message is not a recognized method of service under section 88 of the *Act*, I find that the landlord was sufficiently served, for the purposes of this *Act*, with the tenants' forwarding address on October 23, 2018.

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, this application to retain the tenants' security deposit was made more than 15 days after the landlord received the tenant's forwarding address on October 23, 2018. Therefore, the tenant is entitled to receive double her security deposit in the amount of $1,675.00.

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 $1,675.00 in part satisfaction of his monetary claim against the tenant.

Filing Fee

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

Conclusion

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

Item	**Amount**
October 2018 rent	$1,675.00
Loss of rental income from November 2018 to March 2019	$1,000.00
Liquidated damages	$837.50
Filing fee	$100.00
Less doubled security deposit	-$1,675.00

TOTAL	**$1,973.50**

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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: October 02, 2019

Residential Tenancy Branch