Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL MNRL-S

Introduction

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

- 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;
- a monetary order for unpaid rent in the amount of $678 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties 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 form and supporting evidence package. The tenant did not submit any evidence of her own. I find that the tenant has been served with the required documents in accordance with the Act.

Preliminary Issue – Amendment of Claim

During the hearing, the landlord stated that he is claiming for an entire month's rent, which is $1,278. He stated that the amount of $678 listed on the Notice of Dispute Resolution represents the balance of one month's rent, once the security deposit of $600 is applied to it.

This is, strictly speaking, not the correct way to quantify a claim. Rather, the landlord should have claimed for the full amount of one month's rent ($1278) and applied to be

able to retain the security deposit in partial satisfaction of this amount (which he has done). This is not an uncommon error and is easily fixed.

Pursuant to Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
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> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.

During the hearing it was clear that both parties understood the landlord's claim was for a full month's rent. I find that an amendment to correct the amount claimed by the landlord could have been reasonably anticipated. As such, I order that the landlord's monetary claim be amended to $1,278, in place of $678.

Issue(s) to be Decided

Is the landlord entitled to:

1) retain the security deposit in partial satisfaction of any monetary order made;
2) a monetary order of $1,278 for unpaid rent; and
3) recover his filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenant entered into a tenancy agreement with the prior owners of the rental property. The landlord took over the tenancy from the prior owners sometime in late 2017. At the time the tenancy ended, the tenancy was a periodic, month to month tenancy. Monthly rent was $1278, payable on the first of each month. The tenant paid the prior owners a security deposit of $600. The landlord retains this deposit.

On May 3, 2019, the tenant testified she put a letter in the landlord's mailbox (to which she has a key) notifying him that she is giving one month's notice to end the tenancy, effective June 1, 2019. The tenant testified that she knew this notice was provided late.

She testified that the reason for this was that she had worked several nightshifts prior, and lost track of the days.

She testified that she vacated the rental unit on June 1, 2019.

The landlord testified that he never received this letter. He testified that the first time he was made aware of it, or the tenant's intention end the tenancy, was in a June 3, 2019 email she sent him, in reply to his reminder her June rent was due.

The landlord testified that he was out of the country in early June. However, he testified that upon learning the tenant had vacated the rental unit, he posted advertisements on Craigslist, Kijiji, and Facebook to re-rent the rental unit. He testified that upon his return he was able to show the rental unit to prospective renters and rent it out for July 1, 2019.

The parties agree that the tenant returned the rental unit keys to the landlord on July 19 or 20, 2019.

The tenant testified that she provided her forwarding address to the landlord on June 3, 2019, by leaving a letter containing it in the landlord's mail box. The landlord confirms receipt of the letter (and uploaded a picture of it, showing the date as June 3, 2019), but testified that on the back of it is dated June 6, 2019. The landlord did not enter into evidence a photograph of the back of the letter.

The landlord filed this application for dispute resolution on June 16, 2019.

The tenant testified, and the landlord confirmed, that a move-out inspection report was not completed (nor was an inspection done). She testified that she asked on two separate occasions that one be done (once in an email on June 3, 2019, and once in person when she returned the keys). The landlord testified that he offered to conduct a move-out inspection when the tenant returned the keys. The tenant denies this. The landlord gave no evidence about any other times he offered to conduct a walkthrough.

Analysis

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act (in this case, non-payment of rent) is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

I will address each of these factors in turn.

Did the Tenant breach the Act?

Section 26 of the Act requires that a tenant pay rent when it is due under a tenancy agreement. The tenant argues that she gave notice to end the tenancy as of June 1, 2019. Therefore, she argues, the tenancy ended as of June 1, 2019, and no rent is due.

Section 45 of the Act allows a tenant to end a periodic tenancy. It states:

> **Tenant's notice**
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> 45(1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (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.

Per the tenancy agreement, rent is payable on the first of the month. So, in order to end a tenancy at the end of May 2019, the tenant would be required to give notice before May 1, 2019. She did not do this. She testified that she gave notice to end the tenancy on May 3, 2019. In her testimony, she (correctly) acknowledged that her notice to end tenancy was “late”.

Section 53 of the Act sets out how improper dates on notices to end tenancy are to be treated. It states:

> **Incorrect effective dates automatically changed**
>
> 53(1) If a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) or (3), as applicable.
>
> […]
>
> (3) In the case of a notice to end a tenancy, other than a notice under section 45 (3) [tenant's notice: landlord breach of material term], 46 [landlord's notice: non-payment of rent] or 50 [tenant may end tenancy early], if the effective date stated in the notice is any day other than 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, the effective date is deemed to be 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
>
> (a) that complies with the required notice period, or
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> (b) if the landlord gives a longer notice period, that complies with that longer notice period.

As such, the tenant's notice to end tenancy is deemed changed to be effective on June 30, 2019, as this amount of time complies with required notice period of at least one month and is on the day before the rent is due.

As such, it is not necessary for me to determine if the landlord was properly served with the tenant's notice to end tenancy. For the reasons outlined above, I would find that it would not have had the effect of ending the tenancy as of June 1, 2019. I find that if the tenant's notice was delivered as alleged by the tenant, it would have the effect of ending the tenancy as of June 30, 2019.

As such, by not paying rent for June 2019, the tenant breached the Act.

Damages

Based on the evidence before me, I find that the tenant was obligated to pay monthly rent in the amount of $1,278. The tenant did not pay this amount in June 2019. As such, I find that the landlord has suffered damage in the amount of $1,278.

Did the landlord minimize his damages?

I find that by securing a renter for July 1, 2019, the landlord minimized his damages. It would not be reasonable for him to have procured a new tenant any sooner, as the tenancy did not end until that date (as discussed above).

As such, I find that the landlord is entitled to recover from the tenant the full amount of June 2019 rent.

Lack of Move-Out Condition Inspection Report

No condition inspection walkthrough or report was done at the end of the tenancy. Sections 35 and 36 of the Act sets out the obligations of the parties regarding such reports and the consequences.

Condition inspection: end of tenancy

35(1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit

(a) on or after the day the tenant ceases to occupy the rental unit, or

(b) on another mutually agreed day.

(2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

(3) The landlord must complete a condition inspection report in accordance with the regulations.

(4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(5) The landlord may make the inspection and complete and sign the report without the tenant if

(a)the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or

(b)the tenant has abandoned the rental unit.

Consequences for tenant and landlord if report requirements not met

36(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord

> (a) does not comply with section 35 (2) *[2 opportunities for inspection]*

I find that the landlord did not offer the tenant two opportunities to conduct the move out inspection as required by section 35(2). As such, his right to claim against the security deposit is extinguished, per section 36(2)(a). The effect of extinguishing this right is set out at section 38(4) and (5) of the Act:

> (4)A landlord may retain an amount from a security deposit or a pet damage deposit if,
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> (a)at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or
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> (b)after the end of the tenancy, the director orders that the landlord may retain the amount.
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> (5)The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

As the tenant has not agreed in writing that the landlord may keep the security deposit, the extinguishment has little effect on the present claim. Policy Guideline 17 states:

> B.9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
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> - […]
> - to file a claim against the deposit for any monies owing for other than damage to the rental unit;

The landlord's claim is for lost rent, not damage to the rental unit. As such, I find that the landlord's failure to conduct a move out condition inspection report is not relevant to the present claim.

Pursuant to section 72(1), as the landlord has been successful, I order that the tenant reimburse him the filing fee of $100.

Pursuant to section 72(2), I order that the landlord may retain the security deposit of $600 in partial satisfaction of the damages suffered.

Conclusion

I order the tenant to pay the landlord $778, calculated as follows:

June 2019 Rent	$1,278
Filing Fee	$100
Security Deposit credit	-$600
Total	**$778**

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