Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding REAL PROPERTY MANAGEMENT LIMITED and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, MNSD

Introduction

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

- a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord's property manager (the "landlord") and tenant J.P. (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 tenant testified that she served the landlord with her application for dispute resolution via registered mail but could not recall on what date. The landlord testified that he received the tenants' application for dispute resolution on November 2nd or 3rd, 2019. I find that the tenants' application for dispute resolution was served on the landlord in accordance with section 89 of the *Act*.

Issues to be Decided

1. Are the tenants entitled to a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67 of the *Act*?
2. Are the tenants entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
3. Are the tenants entitled to recover the filing fee for this application from the landlord, 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 submitted a significant amount of evidence. I explained to both parties during the hearing that it was their responsibility to present their evidence to me and set out their claims. In this decision I only refer to evidence presented during the hearing.

Both parties agreed to the following facts. This tenancy began on June 23, 2019 and ended on September 30, 2019. This was originally a fixed term tenancy set to end on May 31, 2020. Monthly rent in the amount of $3,700.00 was payable on the first day of each month. A security deposit of $1,850.00 and a pet damage deposit of $1,850.00 were paid by the tenants to the landlord. At the end of the tenancy the landlord retained both deposits. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that the tenants provided the landlord notice to end the tenancy effective September 30, 2019, on August 24, 2019 via e-mail. The landlord testified that the August 24, 2019 email was received on either August 24 or 25, 2019.

Both parties agree that the tenants wished to assign their tenancy agreement to avoid pecuniary repercussions from breaking the fixed term tenancy agreement. Both parties agree that the landlord approved the tenants' application to assign their tenancy agreement on August 22, 2019.

The tenant testified that the landlord did not advertise the subject rental property for rent until October 28, 2019 after she sent the landlord an email stating that the landlord failed to mitigate their damages by not advertising their unit. The tenant testified that she paid the landlord for October 2019's rent but would like this returned because the landlord failed to mitigate its loss by properly advertising the subject rental property for rent. The tenant testified that she is also seeking the return of her pet damage deposit and security deposit in the amount of $3,700.00. The tenants total monetary claim is $7,400.00. The landlord confirmed that the tenants paid October 2019's rent.
The tenant testified that her forwarding address was provided to the landlord on the move out condition inspection report which was completed with the landlord on October 1, 2019. The landlord testified that the tenant's forwarding address was not provided on the move out condition inspection report. Neither party entered the move out condition inspection report into evidence. I provided the landlord 24 hours to upload the move out condition inspection report. The landlord uploaded the move out condition inspection report within 30 minutes of the end of this hearing. The tenants' forwarding address was not on the move out condition inspection report.

The tenant testified that she also sent the landlord her forwarding address via email on October 28, 2019. The landlord entered into evidence the October 28, 2019 email. In that email, the body of the text does not mention a forwarding address, but at the end of the email, below the tenant's name, is an address. The tenant testified that the address is her forwarding address. The landlord testified that he received the October 28, 2019 email but that he did not know the address included in the email was the tenants' forwarding address as it was not stated in the email and that it could have been a work address. The landlord testified that he only received the tenants' forwarding address on the tenants' application for dispute resolution.

The landlord testified that he posted an advertisement for the subject rental property on his website on August 24, 2019. This advertisement was not entered into evidence.

The landlord testified that in early September 2019 he received a new contract for an identical unit in the same rental building as the subject rental property. The landlord testified that the owners of that unit wanted to rent their unit fully furnished for $4,500.00 per month.

The landlord testified that between September 10-11, 2019 advertisements on nine different websites were posted using the photographs of the furnished unit. The advertisement stated that the advertised property was $3,700.00 per month unfinished and $4,500.00 per month fully furnished. The landlord testified that the actual address or specific unit number was not on the advertisement. The landlord testified that since the units were identical, he used the photographs from the furnished unit because the unit photographed better with furniture in it. The landlord testified that the two units were concurrently marketed in the same advertisement.

The tenant testified that while the advertisements posted by the landlord in September listed a furnished and unfurnished rental rate, all the photographs were of the other unit and not of the subject rental property. The tenant testified that the other unit had some upgraded finishes as compared to the subject rental property.

The landlord entered into evidence a list of nine advertising sites the advertisement was posted to. A copy of the advertisement was also entered into evidence. The advertisement lists a furnished rental rate of $4,500.00 and an unfurnished rental rate of $3,700.00.

The landlord testified that all the advertisements remained live and that they were re-posted on October 28, 2019. The tenant did not dispute that the subject rental property was marketed for rent on several sites on October 28, 2019.

The landlord testified that a new tenant was found for the subject rental property who moved in on December 15, 2019 at a rental rate of $3,700.00 per month. A tenancy agreement for this new tenancy was entered into evidence.

Analysis

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.

I find that the landlord became aware of the tenant’s intention to end the fixed term tenancy agreement on

August 24, 2019. I find that the landlord's duty to mitigate the damages suffered began on that date. I find that while the tenants received authorization to assign their lease, this did not decrease the landlord's obligation to mitigate its damages starting August 24, 2019, when they received notice that the tenants were moving out early.

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, the tenants ended a one-year fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement. Pursuant to section 7, 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.

I find that advertising the subject rental property concurrently with the identical furnished unit in the subject rental building constitutes reasonable mitigation by the landlord. As stated above, the party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation. I find that advertising both units, one furnished and one unfurnished, using photographs of the furnished unit with nicer furnishings, was a reasonable act of mitigation.

I find that while the landlord testified that an advertisement for the subject rental property was posted on August 24, 2019 on the landlord's website, I find that the subject rental property was not adequately marketed until September 10, 2019. I find that the landlord failed to mitigate its damages from August 25 to September 9, 2019, a total of 16 days. I find that due to the landlord's failure to mitigate their damages early enough, the tenants are entitled to a monetary award for the first 16 days of October 2019 as per the following calculation:

$3,700.00 (rent) /31 (days in October 2019) = $119.35 (daily rate)
$119.35 (daily rate) * 16= **$1,909.60.**

Security Deposit

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 88 of the *Act* sets out the approved methods of service for all documents other than those referred to in section 89 of the *Act,* including the provision of the forwarding address. The following methods are approved:

(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 ordinary mail or 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 ordinary mail or registered mail to a forwarding address provided by the tenant;

(e)by leaving a copy at the person's residence with an adult who apparently resides with the person;

(f)by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

(g)by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;

(h)by transmitting a copy to a fax number provided as an address for service by the person to be served;

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

(j)by any other means of service prescribed in the regulations.

E-mail is not an approved method of service under section 88 of the *Act.* In addition, I find that while the landlord received the October 28, 2019 email from the tenant that contained an address the tenant testified was the tenants' forwarding address, it was not clear in the email that the address listed below the tenant's name was the forwarding address. Based on both reasons set out above, I find that the landlord was not served with the tenants' forwarding address in accordance with section 88 of the *Act.*

Based on my review of the move out condition inspection report, I find that tenants' forwarding address was not provided to the landlord on that report. I find that the tenants' application for dispute resolution does not constitute service on the landlords of their forwarding address, for the purposes of this *Act.* I therefore dismiss the tenants' application for the return of their security and pet damage deposits, with leave to reapply, because their application is premature. The tenants are required to serve the landlord with their forwarding address in writing, pursuant to section 88 of the *Act*, before they file a new application with the Residential Tenancy Branch for the return of their deposits.

As the tenants were successful in their application for dispute resolution, they are entitled to recover the $100.00 filing fee from the landlord, pursuant to section 72 of the *Act.*

Conclusion

The tenants' application for the return of their security and pet damage deposits is dismissed, with leave to reapply.

I issue a Monetary Order to the tenants in the amount of $2,009.60.

The tenants are provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: December 20, 2019

Residential Tenancy Branch