Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNRL-S, FFL

Introduction

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

- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- a Monetary Order for damage, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

The landlord, the tenant, and the tenant's agent and interpreter attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties agree that the tenant was served with the landlord's application for dispute resolution via registered mail. I find that the tenant was served in accordance with section 89 of the *Act*,

Preliminary Issue- Security and Pet Damage Deposit

Both parties agree that in a previous Residential Tenancy Branch Decision dated December 5, 2019, the tenant was awarded double her security and pet damage deposits. The file number of the previous decision is located on the cover page of this decision.

Res judicata prevents a plaintiff from pursuing a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement

of an earlier judgment. It also precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. Former adjudication is analogous to the criminal law concept of double jeopardy.

The December 5, 2019 decision made a final and binding decision regarding the security and pet damage deposits. The landlord's claim for authorization to retain the tenant's security and pet damage deposit are res judicata. I therefore dismiss the landlord's claim for authorization to retain the security and pet damage deposit, without leave to reapply.

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage, pursuant to section 67 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 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 agreed to the following facts. This tenancy began on February 26, 2018 and ended on June 22, 2019. This was a fixed term tenancy set to end on February 26, 2020. Monthly rent in the amount of $1,875.00 was payable on the first day of each month. A written tenancy agreement was signed by both parties and a copy was submitted for this application. Move in and move out condition inspection reports were not completed. The tenant sent the landlord an email dated March 7, 2018 noting some pre-existing damage to the subject rental property. The email included photographs of the damage.

Both parties agree that the tenant texted the landlord on May 26, 2019 and provided the landlord with her notice to end tenancy effective at the end of June 2019. The landlord testified that he received the May 26, 2019 email on May 26, 2019.

The landlord testified that the following damages resulted from this tenancy:

Item	**Amount**
Loss of rental income for July 2019	$1,875.00
Loss of rental income from August 2019 to February 2020	$525.00
Cleaning	$60.00
Moulding and drywall repairs	$230.00
Filing fee	$100.00
Total	**$2,790.00**

The landlord testified that his application for dispute resolution originally contained an additional claim for the cost of replacing a fob in the amount of $150.00, but that this claim was resolved in the December 5, 2019 decision.

Loss of Rental Income

The landlord testified that he began marketing the subject rental property for rent on May 27, 2019 at a rental rate of $1,975.00 for a term of one year. The landlord entered into evidence a list of the listings and renewals he made on one website. The landlord testified that he lowered the rental rate he was seeking every few days to try to secure a new tenant. The landlord testified that he started advertising the subject rental property for $1,875.00 on June 12, 2019.

The landlord testified that he was not able to find a new tenant for July 1, 2019 but was able to find a new tenant for August 1, 2019; however, at a lower rental rate of $1,800.00 per month. The landlord testified that he is seeking July 2019's rent in the amount of $1,875.00 and the difference between what he would have received under the tenant's tenancy agreement and what he has received under the new tenancy agreement. The difference is $75.00 per month for seven months, for a total of $525.00. The new tenancy agreement was entered into evidence and states a rental rate of $1,800.00 for a term of two years.

The tenant's agent testified that the landlord failed to mitigate his losses by advertising the subject rental property for a higher rent than that paid by the tenant. The tenant's agent testified that the landlord told the tenant that the landlord was seeking a rental term of four to five years at a rental rate of $1,930.00 and so the advertisements the tenant posted reflected the above rate and term. The increased rent and term decreased the potential renters for the subject rental property. To evidence the above the tenant entered into evidence the following series of text messages dated May 30, 2019:

- Landlord: Morning. I posted as well with friends and online and have 4 very interested serious applicants, interested in 1975$ price point for rent
- Tenant: Ok, are they going to view the apartment?
- Landlord: I've sent pics and waiting to hear back who will be the longest term renter. I want someone looking for long term like 4-5 years.
- Tenant: Cool. I will let my viewers know this.
- Landlord: Im More concerned about long term instead of price but if I can more and long term it's best for everyone
- Tenant: Yes, so I will tell them about the different price from 1874$ to 1975$ and long term is preferred by the landlord.
- Landlord: Thank you so morni
- Landlord: Much* sounds good
- Tenant: Thank you for your understanding.
- Landlord: We can work together
- Landlord: Ill accept all applicants and they can put offer of monthly rent between 1875 and 1975 and how long they think they will stay in unit
- Landlord: How about that

The landlord testified that the tenant misunderstood his position of the term of the lease. The landlord testified that the term of the lease was always one year; however, if there were multiple applicants, he would prefer to choose the applicant who intended on residing at the subject rental property the longest.

Cleaning

Both parties agreed that at the end of the tenancy they had a verbal agreement that the tenant would pay ½ of the cleaning cost to finish cleaning the subject rental property. The landlord testified that he paid a cleaner $126.00 to clean the subject rental property, a receipt dated July 20, 2019 for cleaning was entered into evidence. The landlord testified that the he is seeking the tenant to pay $60.00 of this bill.

The tenant's agent testified that the tenant does not have to pay for the cleaning because the cleaning was done more than 15 days after this tenancy ended. The tenant's agent testified that the cleaning was also done after the landlord conducted repairs to the subject rental property and the tenant should not be responsible for cleaning up after those repairs.

The landlord testified that the repair person wore shoe covers and cleaned up the mess he made and that the cleaning of the property had nothing to do with the repairs made.

Moulding and drywall repairs

The landlord testified that the tenant damaged shoe moldings and drywall at the subject rental property. No evidence of the move in or move out condition of the subject rental, aside from the landlord's testimony, was entered into evidence. The landlord entered into evidence a receipt from a handyman for the above repairs in the amount of $459.96. The landlord testified that he is seeking the tenant to pay $230.00 of the repair bill as the repair man also repaired some damage that pre-existed the tenancy.

The tenant's agent testified that the shoe molding and drywall were already damaged when the tenant moved in and that the tenant did not damage shoe molding or the drywall. The tenant entered into evidence an email from the tenant to the landlord dated March 7, 2018 in which the tenant provides photographs of damages to the subject rental property in existence when she moved in. One of the photographs shows damage to shoe molding and drywall.

The landlord testified that the photo of the damage to the shoe molding shown in the photograph entered by the tenant was a photograph taken at the end of the tenancy, not the beginning of the tenancy. The tenant's agent disputed this testimony.

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 attempting to re-rent the premises at a greatly increased rent will not constitute mitigation. Pursuant to Policy Guideline 5, if I find that the party claiming damages has not minimized the loss, I 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 tenant ended a fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement. Pursuant to section 7, the tenant is required to compensate the landlord for that loss of rental income. However, the landlord also has 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 landlord's undisputed testimony that he started advertising the subject rental property at the rental rate of $1,875.00 on June 12, 2019. I find that the landlord chose to attempt to rent the unit at a rate higher than specified in the tenancy agreement for approximately 16 days before lowering the price to $1,875.00.

I find that for 16 days the landlord advertised the rental property over the rental rate of $1,875.00, the landlord failed to mitigate its loss. I find that due to the landlord's failure to mitigate its damages for 16 days, the landlord is only entitled to receive compensation for 15 days of rent for the month of July 2019. The pro-rated amount of rent for 15 days is $907.26.

I find that in the May 30, 2019 text message exchange the landlord did not instruct the tenant to list the term of the tenancy in her advertisements for four to five years. Based on the text messages and the testimony of the landlord, I find that the tenant mis-understood the landlord's instruction and that while the landlord preferred a tenancy of four to five years, the advertisement for the subject rental property was not meant to state a term of this duration.

Pursuant to Policy Guideline #5, 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 the landlord mitigated his loss by advertising the subject rental property for rent at a rental rate of $1,875.00 as of June 12, 2019, further efforts were not required. I find that the tenant's advertisements are separate and apart from the landlord's advertisement's and his duty to mitigate his loss.

I find that as a result of the tenant breaching the fixed term of the tenancy agreement, the landlord suffered a loss of rental income from August 2019 to February 2020 in the amount of $75.00 per month as the new tenant is paying $75.00 less per month than the tenant would have under the tenancy agreement. I therefore find that the tenant is required to compensate the landlord for that loss in the amount of $525.00.

Cleaning

Section 37(2)(a) of the *Act* states that when tenants vacate a rental unit, the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Based on the testimony of both parties, I find that the subject rental property was not left reasonably clean at the end of the tenancy, as the tenant agreed to pay the landlord ½ of the cleaning costs.

The tenant's agent testified that the tenant is not required to pay for the cleaning fees because the cleaning occurred more than 15 days after the tenancy ended. I disagree. Residential Tenancy Policy Guideline 16 states that 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. The loss is not required to be incurred within 15 days of the end of the tenancy.

I accept the landlord's testimony that the cleaning that occurred on July 20, 2019 did not include cleaning up after the handyman repairs.

I find that the tenant breached section 37 of the *Act,* the landlord has proved the loss he suffered as a result. I therefore find that the landlord is entitled to recover $60.00 for cleaning from the tenant.

Moulding and drywall repairs

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. When one party provides testimony of the events in one way, and the other party provides an equally probable but different

explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

The testimony of the parties regarding the move in condition and move out condition of the shoe moldings and drywall are different. The tenant's agent testified that the shoe moldings and drywall were damaged when the tenant moved in, the landlord testified that they were not. I find that the landlord has not provided, on a balance of probabilities, that the tenant damaged the subject rental property. I therefore dismiss the landlord's claim for damage to drywall and shoe moldings in the amount of $230.00.

As the landlord was successful in his application for dispute resolution, 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**
Loss of rental income for July 2019	$907.26
Loss of rental income from August 2019 to February 2020	$525.00
Cleaning fee	$60.00
Filing fee	$100.00
Total	**$1,592.26**

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: May 06, 2020

Residential Tenancy Branch