



Dispute Resolution Services

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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 damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67; and
- Authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both the landlord and the tenant attended the hearing. As both parties were in attendance, service of documents was confirmed. The tenant confirmed receipt of the landlord's application for dispute resolution and the parties acknowledged the exchange of evidence and stated there were no concerns with timely service of documents. Both parties were prepared to deal with the matters of the application.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for the tenant's breaking of a fixed term tenancy?

Can the landlord retain the tenant's security deposit if successful?

Is the landlord entitled to recover the filing fee?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

A copy of the tenancy agreement was provided as evidence. The fixed one-year tenancy began on March 20, 2019 and was set to end on March 20, 2020. There is an addendum to the tenancy agreement, clause 19 which states:

EARLY TERMINATION OF FIXED TERM TENANCY• The tenant understands and agrees that should the tenant want to move before the end of the fixed term tenancy, the tenant will have to continue to pay rent until the end of the term unless the landlord agrees in writing that the tenant can end the tenancy early or can assign or sublet the unit or if the landlord is able to mitigate the potential loss by renting out the premises. The tenant will be responsible for all costs incurred by the landlord to mitigate the potential loss. This Is not a penalty.

Rent was set at \$2,450.00 per month payable on the first day of each month. A security deposit of \$1,225.00 was collected at the commencement of the tenancy which the landlord continues to hold. A condition inspection report was done at the beginning and end of the tenancy and the landlord acknowledges there is no damage done to the rental unit by the tenant.

The landlord provided the following testimony. The rental unit is a three-bedroom, three bath townhome built approximately in 2011. Rent for these townhome units usually run in the mid-\$2,500.00's and suggests that the unit is amongst the lower priced townhome rentals in the vicinity.

The parties agree that on October 14th, the tenant gave the landlord verbal notice that she would be ending the fixed term tenancy. The following day, the tenant gave the landlord a written notice to end tenancy, indicating she would be vacating the rental unit on December 1, 2020. No copy of the notice was provided as evidence, however the landlord testified the notice indicated the tenant would be '*moving out on December 1st after the end of my tenancy on November 30th.*'

The landlord responded later that day advising the tenant that '*based on your lease agreement, we need to find a new tenant to take over the lease.*' The landlord sought the tenant's assistance in finding a new tenant by taking photos of the unit with her furniture in it and helping to show the unit.

After posting ads to Craigslist, advertising the unit for \$2,550.00, the landlord got some interest from potential tenants wanting the unit for January. Copies of the landlord's postings and comparable listing titles were provided as evidence by the landlord. The landlord wanted a tenant as soon as possible, so they decreased the asking price to

\$2,450.00 and found a new tenant willing to commence a tenancy on December 15th. The landlord is seeking pro-rated rent from December 1st to December 14th, the period the rental unit was left vacant.

The landlord testified that the exact same unit in the building is currently advertised at \$2,650.00 per month and that their price was competitive and fair, despite being \$45.00 per month greater than the tenant in these proceedings was paying. Finding a tenant in December is difficult because it falls during the holidays, the landlord testified.

The tenant provided the following testimony. She believes she gave the landlord sufficient notice. She never promised the landlord she would find a new tenant to fulfil the remainder of her lease. She showed the rental unit to eight potential tenant couples for the landlord and took good care of it while she was a tenant. She was a good tenant throughout the tenancy other than not fulfilling the complete term of the tenancy. The reason she had to end the tenancy was because it was difficult to afford the rent being a single mother and she had the opportunity to rent a smaller condo owned by her son-in-law for \$2,000.00 in the same complex.

The parties agree the tenant provided her forwarding address to the landlord on November 30th and the landlord filed for dispute resolution on December 3, 2020.

Analysis

Section 1 of the *Residential Tenancy Act* defines a fixed term tenancy as a tenancy under a tenancy agreement that specifies the date on which the tenancy ends. In other words, a fixed term tenancy has a definite commencement date and expiry date. Neither party may end a fixed term tenancy early, except under specific circumstances: for cause, by agreement of both parties, or an Early Termination for Family Violence or Long-Term Care.

Pursuant to section 44(1)(a)(i), a tenancy can end if a tenant gives notice to end the tenancy **in accordance** with section 45.

Section 45(2) states:

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.

The tenant gave her notice to the landlord on October 15th, ending the tenancy on December 1, 2019. Although the tenant's notice gave the landlord in excess of one month's notice, the notice was given contrary so section 45(2)(b) since it had an effective date earlier than the date specified in the tenancy agreement as the end of the tenancy (March 20, 2020).

Residential Tenancy Policy Guideline PG-5 [Duty to Minimize Loss] provides guidance to landlords and tenants regarding ending fixed term tenancies.

Claims for loss of rental income

In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent. Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect.

Although the landlord was under no obligation to do so, the evidence before me shows the landlord took immediate steps to re-rent the unit after being given the tenant's notice to end tenancy. I find the advertised rent for the unit was reasonable, given the comparable units in the vicinity. In seeking a new tenant to commence renting the unit immediately after the tenancy with this tenant ended, I find the landlord took the steps to mitigate the damage or loss being suffered by having the unit left vacant.

The landlord points to clause 19 of the tenancy agreement addendum to recover fourteen days rent from the tenant because she broke the fixed term tenancy. However, I find this clause is contrary to section 22 of the Act which states:

Acceleration term prohibited

22 A tenancy agreement must not include a term that all or part of the rent payable for the remainder of the period of the tenancy agreement becomes due and payable if a term of the tenancy agreement is breached.

I caution the landlord that terms included in tenancy agreements that are contrary to the Act are not enforceable. Despite the unenforceable clause in the tenancy agreement addendum, the landlords have provided sufficient evidence to show they are entitled to recover rent for the fourteen days the rental unit was left vacant.

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim. The standard of proof is on a balance of probabilities. If the applicant is successful in proving it is more likely than not the facts occurred as claimed, the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the Act, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

I am satisfied the landlord has suffered a loss due to the tenant's failure to comply with the tenancy agreement by ending the fixed term tenancy before the end of the fixed term contrary to section 45(2)(b). Since the rental unit remained vacant from the time the tenancy ended and the time a new tenancy began, I am satisfied the value of the loss, calculated as 14 days at a prorated daily rate of 79.03 per day. I am also satisfied the landlord took the steps to mitigate the damages by finding a tenant as soon as they could at a reasonably economic rent. I award the landlord **\$1,106.42** ($\$79.03 \times 14 = \$1,106.42$).

As the landlord's application was successful, the filing fee of **\$100.00** can be recovered.

Section 1 of the Act defines a security deposit as:

"security deposit" means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

- (a) post-dated cheques for rent;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

As the security deposit is not meant specifically for damage to the rental unit, it can be used to offset any liability or obligation of a tenant to a landlord. In accordance with

section 72 of the Act, the landlord may retain part of the tenant's security deposit in full satisfaction of the monetary order.

Item	amount
Compensation for breaching fixed term tenancy, 14 days at \$79.03/day	\$1,106.42
Filing fee	\$100.00
Less security deposit	(\$1,225.00)
Amount due to the tenant	(\$18.58)

Conclusion

The landlord is to retain \$1,206.42 of the tenant's security deposit in full satisfaction of their claim in accordance with sections 67 and 72 of the Act.

The landlord is to return the remaining \$18.58 of the tenant's security deposit to the tenant.

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 05, 2020

Residential Tenancy Branch