



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL, MNRL

Introduction

On May 5, 2020, the Landlord applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the “Act”).

Both the Landlord and the Tenant attended the hearing. All in attendance provided a solemn affirmation.

The Landlord advised that the Notice of Hearing and evidence package was served to the Tenant by email on May 6, 2020 and the Tenant acknowledged that he received this package. Based on this undisputed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Tenant was served with the Notice of Hearing and evidence package. The Landlord also advised that she served additional late evidence to the Tenant on June 9, 2020 by email. The Tenant confirmed that he received this evidence, that he had reviewed it, and that he was prepared to respond to it. As such, I have accepted this and will consider all of the Landlord’s evidence when rendering this Decision.

The Tenant advised that he served his evidence to the Landlord on June 6, 2020 by email and that he served additional late evidence on June 11, 2020 by email. The Landlord confirmed that she received this evidence, that she had reviewed it, and that she was prepared to respond to it. As such, I have accepted this and will consider all of the Tenant’s evidence when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me;

however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order for compensation?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy was supposed to start on November 10, 2019; however, there was a flood on November 6, 2019 that prevented the Tenant from moving in. The Tenancy ended on January 24, 2020 when the Tenant gave notice to end his tenancy. Rent was established at \$1,350.00 per month and was due on the tenth day of each month. A security deposit of \$675.00 and a pet damage deposit of \$500 were also paid. A signed copy of the tenancy agreement was submitted as documentary evidence.

The Landlord advised that there was an unforeseen flood that occurred on November 6, 2019 and she informed the Tenant that the rental unit would be in need of restoration. She stated that she understood if he did not want to continue the tenancy and offered to cancel the agreement and return his deposits; however, the Tenant was still interested in fulfilling the tenancy after the repairs were completed. At no time did the Tenant advise her that he was not interested in moving into the rental unit once these repairs were completed. She had constant communication with the Tenant, and she would update him on when the rental unit would be available for occupation. The Tenant even asked the Landlord about measurements of the rental unit and requested the replacement of the stove in December 2019. The Tenant maintained interest in moving in and did not bring up any concerns with doing so until she received an email from him on January 24, 2020, advising her that he would not be moving in as he had found a new unit to rent.

Once she was notified that he would not be moving in, she posted the rental unit in an online ad on January 27, 2020 and subsequently updated the pictures in that ad the

next week. As she lives in a small community, she also spread news of the rental unit being available through word of mouth. She received some interest, but most prospective tenants were seeking a rental unit that allowed pets. She estimated that she had less than five inquiries in February 2019 and then the interest waned due to the pandemic. She then lowered the rent to \$1,275.00 in March 2020 and found a replacement tenant for May 15, 2020. She advised that she is seeking compensation in the amount of **\$4,050.00** for the rental loss that she suffered for February, March, and April 2020.

The Tenant acknowledged that they signed a fixed term tenancy until May 10, 2020, that there was a flood prior to the tenancy starting, and that the Landlord offered to cancel the tenancy; however, he still wanted to move in once the required repairs were completed. He confirmed that there was constant communication between him and the Landlord and that he had hoped to move in mid-December, but after talking with the Landlord, it appeared as if the rental unit would not be ready until possibly mid-January 2020. He stated that he did not hear from the Landlord in mid-January, so he visited the rental unit on January 21, 2020 and spoke with a restoration employee who had informed him that restoration of the rental unit was complete. However, he observed that the rental unit was “full of stuff” and he “took the view” that it would not be ready for occupation by January 31, 2020. As a result, and without confirming with the Landlord when the rental unit would be ready, he then found a new place to rent and emailed the Landlord on January 24, 2020 advising her that he would not be moving in. He claims that he had advised the Landlord that it was his belief that the tenancy was frustrated, that he was entitled to end the tenancy, and that he is not responsible for any of the Landlord’s rental loss. However, he could not point to where in his evidence that he advised the Landlord that he was ending the tenancy due to frustration, and he suggested that this may have been in his January 27, 2020 letter to the Landlord.

With respect to the Landlord’s efforts to minimize her rental loss, he advised that she only advertised the rental unit in an online ad with no photos, that she updated it with photos later, and that she then updated it another time with more current photos on February 7, 2020. He stated that she did not advertise anywhere else or hire a property management company to assist her in finding a new tenant.

The Landlord referenced text messages, that were submitted as documentary evidence, that demonstrate that she had informed the Tenant on January 7, 2020 that the rental unit would be fully restored by January 31, 2020 and that he could move in then. In these text messages, the Tenant acknowledged this date.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 44(d) of the *Act* states that the tenancy is determined to have ended when the Tenant vacates or abandons the rental unit. In addition, subsection (e) states that the tenancy can also end if the tenancy agreement is frustrated.

Section 45 of the *Act* outlines the requirements around the Tenant's notice to end a tenancy.

Section 52 of the *Act* states what is required to be included in a notice to end a tenancy.

Policy Guideline # 34 outlines the doctrine of frustration as "without the fault of either party, a contract [that] becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible."

When reviewing the totality of the evidence before me, I find it important to note that it appears as if the source of the Tenant's claim that the tenancy was frustrated was due to the flood, and consequently not being able to move into the rental unit. However, this flood happened prior to the tenancy starting and there is no evidence that the Tenant claimed that the tenancy was frustrated at that point. Rather, the consistent and undisputed evidence is that the Tenant did not want the tenancy to end and was comfortable moving in once the restoration was complete.

Furthermore, while he elected to notify the Landlord that he would be ending the tenancy in a January 24, 2020 email, there is no evidence that he advised her that he was ending it due to frustration. While he claims that he did so on January 27, 2020, I find it important to note that this was three days after he had already given his notice to end the tenancy. Even if there was evidence that the Tenant claimed that it was his belief that the tenancy had ended due to frustration, this would have been three days after he had already given notice to end the tenancy. Moreover, I also find it curious why the Tenant did not make any attempts to contact the Landlord on January 21, 2020 after viewing the rental unit if it was his belief that the rental unit was uninhabitable and that the tenancy was frustrated.

Given that the flood happened in November 2019, that he was fully committed to moving into the rental unit when the restoration was complete, and that he was advised by text on January 7, 2020, that he replied to, that the rental unit would be ready for occupation on January 31, 2020, I am not satisfied that this tenancy was frustrated.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

Furthermore, Policy Guideline # 5 outlines a Landlord's duty to minimize their loss in this situation and that the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. In claims for loss of rental income in circumstances where the Tenant ends the tenancy contrary to the provisions of the Legislation, the Landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit.

When reviewing the totality of the evidence before me, there is no dispute that the parties entered into a fixed term tenancy agreement ending May 10, 2020, yet the tenancy effectively ended when Tenant advised the Landlord that he would not be taking possession of the rental unit on January 24, 2020. Sections 44 and 45 of the *Act* set out how tenancies end and also specifies that the Tenant must give written notice to end a tenancy. As well, this notice cannot be effective earlier than the date specified in the tenancy agreement as the end of the tenancy.

Given that I am not satisfied that the tenancy was frustrated, as the Tenant's notice to end the tenancy was effective for a date earlier than the end of the fixed term tenancy, I do not find that the Tenant ended the Tenancy in accordance with the *Act*. Therefore, I find that the Tenant vacated the rental unit contrary to Section 45 of the *Act*. Moreover, I find that the evidence indicates that as a result of the Tenant's actions, the Landlord could have suffered a rental loss.

Based on the above, I am not satisfied that the tenancy was frustrated or that the Tenant's notice complied with Sections 45 or 52 of the *Act*. In addition, I am also not satisfied that he gave the Landlord sufficient, written notification that he was ending the tenancy and vacating the rental unit. While the evidence does indicate that both parties

acknowledged that the tenancy was over, I am satisfied that she was given little notice to start advertising to re-rent the unit.

As she had been given minimal written notification that the Tenant would not be moving in, and as this was done at the end of the month, I am satisfied that the Landlord was put in a position that it would have been difficult for her to re-rent the unit. I am satisfied by the evidence presented that she made sufficient attempts to re-rent the unit as quickly as possible after January 24, 2020. Furthermore, there is evidence that the Landlord had reduced the rent in an effort to minimize her losses. While the Tenant's position is that he should not be responsible for the rent for the months of March and April because the pandemic lessened the amount of prospective tenants, I find it important to note that the Tenant was the party who initiated the breaking of the fixed term tenancy and is responsible for the rental loss that the Landlord suffered. Had he moved into the rental unit as was his intention, there would have been no rental loss suffered for these months.

As the Landlord re-rented the rental unit on May 15, 2020, I am satisfied that the Tenant is responsible for the rental loss that the Landlord suffered until she was able to secure a new tenant. However, as the Landlord only sought compensation on her Application for the loss of February, March, and April 2020 rent in the amount of \$4,050.00, I grant the Landlord a Monetary Order in the amount of **\$4,050.00** to satisfy the Landlord's loss for rent owing for these months.

Pursuant to Sections 67 and 72 of the *Act*, I grant the Landlord a Monetary Order as follows:

Calculation of Monetary Award Payable by the Tenant to the Landlord

February 2020 rental loss	\$1,350.00
March 2020 rental loss	\$1,350.00
April 2020 rental loss	\$1,350.00
TOTAL MONETARY AWARD	\$4,050.00

Conclusion

The Landlord is provided with a Monetary Order in the amount of **\$4,050.00** 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: June 16, 2020

Residential Tenancy Branch