



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Skyline Living
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL, FFL

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid and/or loss of rent. Both parties appeared or were represented at the hearing and had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

Issue(s) to be Decided

Has the landlord demonstrated an entitlement to recovery of unpaid and/or loss of rent from the tenants in the amount claimed?

Background and Evidence

On July 22, 2019 the parties executed a written tenancy agreement for a one year fixed term tenancy set to commence on September 1, 2019 and expire on August 31, 2020. The tenants were required to pay rent of \$1383.00 plus \$80.00 for parking for a total payment of \$1463.75 due on the first day of every month. The tenants vacated the rental unit on May 31, 2020. The tenants paid a security deposit; however, the parties were in agreement that it has been refunded to the tenants.

The landlord seeks compensation of \$4391.25 from the tenants, calculated as loss of rent and parking for the three months of June 2020, July 2020 and August 2020.

Below, I have summarized the parties' respective positions.

The landlord's agent recognized that the tenants provided more than one full month of advance notice of their intention to end the tenancy early by way of emails sent in late April 2020. The tenants provided the landlord with videos of the rental unit to aid in

virtual showings. The tenants also enquired as to having a “lease takeover” (also known as an “assignment”) but the landlord was not willing to consider that so as to adjust the rental rate to the current “market” rate. The landlord issued a letter to the tenants on May 7, 2020 to put the tenants on notice that the landlord would hold the tenants responsible for rent for the remainder of the fixed term or until such time the unit was re-rented. The tenants proceeded to vacate the rental unit by the end of May 2020.

The landlord’s agent stated the rental unit is one of four one-bedroom apartments that are being advertised for rent at the rental rate of \$1605.00. Replacement tenants have not yet been secured as of the date of this hearing. The landlord is of the position that \$1605.00 is the current “market” rent for the rental unit after conducting its own research and marketing strategy. The landlord recognized that the area is subject to intensive building of new rental units and the market is very competitive. Nevertheless, the landlord submitted that some of its other one-bedroom units have rented for \$1605.00 per month.

The tenant’s advocate submitted that the City where the rental unit is located has a vacancy rate of 1% yet 14% of the units in the residential property are vacant. The tenant’s advocate submitted that the landlord is advertising the rental unit at a rate that is so high it has effectively removed the rental unit from consideration by prospective tenants. The increased rental rate for the unit is well above a rent increase that would have been permitted had the tenancy continued. Also, the new rental rate advertised fails to take into account the residential building does not have as many amenities as other rental units in other buildings in the area. The tenant’s advocate also submits that the landlord uses its own website or an obscure website to advertise and does not use websites ordinarily used to find rental accommodation by residents of the area. Also, the sign that used to be out front of the residential property, advertising units for rent, was removed. The tenants submitted that during the last month of their tenancy there were no showings of the unit to perspective tenants. Further, the landlord would not consider a “lease takeover”. All of these things considered, the tenant’s advocate argued the landlord did not meet its burden to prove it did whatever was reasonable to mitigate losses, as required under section 7 of the Act.

The landlord’s agent responded that the landlord is not obligated to consider an assignment where there are less than six months left in the fixed term and if the landlord assigned the tenancy agreement, the landlord would be precluded from raising to its new “market rent” of \$1605.00. The landlord’s agent also pointed out that due to

COVID-19 the landlord is providing virtual showings of rental units. The landlord's agent maintains that \$1605.00 is the "market rate" for the rental unit.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

The landlord has made a claim for loss of rent and parking revenue for the months of June 2020 through August 2020 which is the unexpired fixed term. As I informed the parties during the hearing, I have not considered the landlord's claim for losses for August 2020 as this is an anticipatory loss only. It was undisputed that the tenants vacated the rental unit at the end of May 31, 2020 and this is in breach of their fixed term tenancy agreement; the tenants did not pay rent to the landlord for the period after May 2020; and, the rental unit has remained vacant for the months of June 2020. Therefore, I proceed to consider whether the landlord is entitled to recover loss of revenue from the tenants for the months of June and July 2020.

Residential Tenancy Branch Policy Guideline 3: *Claims for Rent or Damages or Loss of Rent* provides information and policy statements with respect to claiming for loss of rent for the unexpired fixed term. Below, I provide excerpts from the policy guideline, with my emphasis underlined:

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. This may include compensating the landlord for the difference between what he would have received from the

defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy. For example, a tenant has agreed to rent premises for a fixed term of 12 months at rent of \$1000.00 per month abandons the premises in the middle of the second month, not paying rent for that month. The landlord is able to re-rent the premises from the first of the next month but only at \$50.00 per month less. The landlord would be able to recover the unpaid rent for the month the premises were abandoned and the \$50.00 difference over the remaining 10 months of the original term.

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale. Even if a landlord is successful in re-renting the premises, a claim for loss of rent may still be successful where the landlord has other vacancies and is able to establish that those other premises would have been rented had the tenancy in question continued. In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent or damages, but any remainder is not recoverable by the tenant. In a month to month tenancy the fact that the landlord may have been able to re-let the premises at a higher rent for a subsequent tenancy does not serve to reduce the liability of the previous tenant.

Residential Tenancy Branch Policy Guideline 5: Duty to Minimize Loss also provides information and policy statements with respect to the duty to mitigate losses, including loss of rent. Below, I have provided excerpts from policy guideline 5, with my emphasis underlined:

Loss of Rental Income

When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:

1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
2. re-rent the unit as soon as possible.

For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November. Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear.

If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.

D. PROOF OF EFFORT TO MINIMIZE DAMAGE OR LOSS

The person claiming compensation has the burden of proving they minimized the damage or loss. If a landlord is claiming compensation for lost rental income, evidence showing the steps taken to rent the rental unit should be submitted or the claim may be reduced or denied. If a landlord is claiming a loss because they rented the rental unit for less money than under the previous tenancy, or they were unable to rent the unit, evidence like advertisements showing the price of rent for similar rental units, or evidence of the vacancy rate in the location of the rental unit may be relevant.

In the case before me, the parties had agreed upon a monthly rent of \$1383.75 on July 22, 2019. There is no evidence to suggest the rental rate agreed upon on July 22, 2019 was anything but the “market rent” at that time.

I am uncertain as to when exactly the landlord started to advertise the rental unit as available for rent; however, I accept the landlord’s position that the subject rental unit is one of four rental units that are included in its list of available one-bedroom units being currently advertised for \$1605.00 per month. I calculate that in its attempt to re-rent the unit for \$1605.00 per month, the landlord is seeking to increase the monthly rent it would have received from the tenants by \$221.25 or 8.6%. In contrast, the permissible rent increase, based on inflation, is 2.6% for 2020 which would equate to an increase of \$35.97 for inflation. As such, I find the landlord’s decision to advertise the unit for \$1605.00 per month represents a greatly increased rent.

The landlord argued that \$1605.00 per month for the unit is the current “market rent” based on its research; however, the landlord did not provide documentary evidence in

support of that position other than evidence for its own property. Whereas, the tenants provided evidence showing other units in the area renting for less per month and those units offering greater amenities.

The landlord's agent stated there are many new units that have been constructed in the area recently and the market is competitive. If the landlord is competing with several other new units, I would expect the landlord may have to limit any increase to a modest one or even consider reducing the rental rate so as to attract tenants within a reasonable amount of time. If the landlord re-rented the unit for less than that payable by the tenants the landlord would be entitled to the differential for the balance of the fixed term.

Upon review of the "vacancy report" submitted into evidence by the landlord, it appears to me that "the market" has not reacted favourably to the rate of \$1605.00 per month for its one-bedroom apartments. The "vacancy report" shows four one-bedroom units being advertised for rent at \$1605.00 and as of June 25, 2020, when the report was prepared, the days these units have remained vacant range from a low of 25 days, which is the subject rental unit, to a high of 146 days. I am of the view that with a low vacancy rate such as in this City, a rental unit priced at its market rent would attract prospective tenants and result in securing a replacement tenants within a reasonable amount of time. In this case, the landlord has experienced lengthy vacancy periods in advertising at \$1605.00 per month, as demonstrated by the "vacancy report".

All of the above considered, I find I am unsatisfied the landlord is advertising the rental unit at a reasonable economic rent and the landlord has not sufficiently mitigated its losses. Therefore, I dismiss the landlord's claims against the tenants in its entirety.

Conclusion

The landlord's claim against the tenants is dismissed in their entirety, without leave to reapply.

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: July 16, 2020

Residential Tenancy Branch