Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the *Act)*, I was designated to hear an application regarding the above-noted tenancy. The landlord applied for:

- a monetary order for compensation for loss of rental income, pursuant to section 67 of the Act;
- an authorization to retain the tenant's security deposit under section 38 of the Act; and
- an authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the *Act*.

Issues to be Decided

Is the landlord entitled to:

1. retain the tenant's security deposit?
2. receive a monetary award for compensation for loss of rental income?
3. an authorization to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is their obligation to present the evidence to substantiate their application.

Both parties agreed the fixed-term tenancy started on October 01, 2017, ended on September 30, 2019 and was supposed to end on September 30, 2020. Monthly rent was $3,100.00 when the tenancy ended and was supposed to increase to $3,200.00 in October 2019, due on the first day of the month. At the outset of the tenancy the landlord collected a security deposit of $3,000.00 and holds in trust $1,500.00.

Both parties also agreed the landlord confirmed receipt of the Notice to End Tenancy (the Notice) on July 10, 2019 and the landlord moved to the rental unit on November 01, 2019.

The landlord advertised the rental unit to find a new tenant, but she does not remember when she started to advertise it. The landlord moved to the rental unit because she could not find a new tenant.

The price the tenant was paying was a lowered price as the tenant had a three-year fixed term tenancy agreement and the landlord needed to rent the unit immediately.

The landlord asked for a monthly rent of $3,600.00 for the new tenancy, as this was the market rate for the 3-bedroom 1,040 square feet apartment. The tenant emailed the landlord on July 12, 2019:

> As to moving, it will be October. I wanted to give you as much notice as possible so you could decide what to do for yourself. If you wish to have a new tenant, I am happy to assist with finding a new, suitable tenant. I have see [SIC] previous listings not too long ago for the same type unit in the same building for $3,500 – I think I saw one for $3,800 (might have been on upper floors).

The landlord emailed the tenant about the new rent amount and profile of the new tenant on September 21, 2019:

> I checked with a few friends who are aware of the rental market and confirmed that the advertised rent is reasonable and I would like to keep it as advertised. As you remember, there was a big discount for your respectable family with 3 members to live

> there and I wish that you could continue your agreement even with the increased rent for the third years. So far all the viewers were ok with the rent but either they did not provide credit check or they were looking for a third roommate that was not clear who that person might be an in any case I have not heard from them.
> I still prefer a family like yours to live there as I do not have any good experience with trios friends as one might leave and other 2 might not be ready to pay the absent person's share and it might not even be good for the safety and security of the building to let unknown people to live and Leave every few months.

On the same day the tenant replied:

> Given my rent for October 01, 2019 was to be $3,200, that is what you should be accepting for offers or advertising for.

On September 22, 2019 the landlord wrote to the tenant:

> I do not need to find a new tenant as I already have a great / responsible tenant that I had a contract with ending on Sep. 2020. I never received your official notice (forms to be filled) but you just informed me that you are planning to move to your new home end of Sep. . We missed the opportunity to find a new tenant before Sep. When families who are in general more responsible tenants try to settle down before School starts.
> […]
> Subleasing is not allowed in our contract and now we are close to end of Sep. and you are supposed to pay your next month rent.

The landlord interviewed three prospective tenants, but only one of the prospective tenants applied for a tenancy agreement. However, the new prospective tenant would be three unrelated individuals. A copy of a new tenancy agreement starting on October 01, 2019 with a monthly rent of $3,200.00 was submitted into evidence, listing co-tenants CK and SN. One of the new prospective co-tenants provided a credit score document only with her first name and the landlord could not confirm if that credit score related to the new prospective tenant. The second prospective co-tenant had a credit score of 620 points. The landlord affirmed she rented the unit to a single-family tenant and would prefer to rent to a new single-family tenant instead of three unrelated co-tenants.

The landlord emailed the prospective new tenant on September 25, 2019 and listed her expectations to sign the new tenancy agreement:

> Are you just the 2 parties named in the contract? As I need to give this information to the insurance company and the building and no other person can be added later. We

> still need to meet but existing tenant had her own add for the amount of rent to come out of her 3 years contract but I was asking for more as she had a special discount as a favor and also, I asked asked for a month deposit that is not shown on this contract.

Prospective new co-tenant CK provided personal references to the landlord on September 23, 2019 and employment confirmation. Co-tenants SN and BK also provided employment confirmation. Furthermore, two extra credit scores were provided, one for 666 and the other for 708 points, both not indicating who they belong to.

The landlord affirmed she did not know it is against the Act to ask for a full month of security deposit.

The tenant affirmed the landlord was not accepting to lower the amount of rent asked for the new tenancy agreement. An email sent from a prospective new tenant to the tenant on September 24, 2020 states:

> She won't budge on her price of 3600. We offered 3200, she rejected. Then we asked if she would accept anything in between and she said it was non negotiable.

The landlord received some offers for 'after December', but the landlord could not continue to pay rent and not receive rent from her rental unit. The landlord negotiated a short-term notice to end her tenancy and moved to her property.

The tenant affirmed the landlord refused to mitigate her damage in several ways. The landlord asked for a higher rent, discriminated against individual co-tenants, demanded a full month security deposit and prohibited the tenant from assigning the rental unit.

The tenant affirmed she showed the rental unit to at least 35-40 prospective new tenants. However, the negotiation of the new tenancy agreement was with the landlord.

The tenant submitted into evidence the strata rules proving the strata does not prohibit tenancy subleases and assignments.

The tenant also affirmed the landlord did not provide evidence she was trying to re-rent the rental unit. The tenant submitted emails with prospective new tenants. The tenant believes the landlord had the intention of moving to the rental unit and did not try to re-rent it.

Both parties had a previous arbitration hearing at the Residential Tenancy Branch (the file number is mentioned on the cover page of this decision). The decision, dated March 10, 2020, states:

> The landlord continues to hold a security deposit of $1,500.00 and the landlord must either refund that amount to the tenant or make an Application for Dispute Resolution to retain it by March 23, 2020.

The landlord submitted this application on March 16, 2020 asking for compensation for loss of rental income in the amount of $3,200.00 for the month of October 2019.

Analysis

Sections 7 and 67 of the Act state:

> Liability for not complying with this Act or a tenancy agreement
> 7 (1)If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
> (2)A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.
>
> Director's orders: compensation for damage or loss
> 67 Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> 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. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
>
> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;

- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

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.

Loss of rental income

Based on the parties undisputed testimony, I find the landlord incurred a loss of rent income for the month of October 2019 in the amount of $3,200.00.

Residential Tenancy Branch Policy Guideline 3 sets conditions for loss of rental income claims. It states:

> 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.

Further to that, Policy Guideline 5 states:

> 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.
>
> **(emphasis added)**

Based on the landlord's testimony, the email dated September 22, 2019 ("I do not need to find a new tenant as I already have a great"), the fact the landlord was asking for a full month security deposit, and the email from a prospective new tenant dated September 24, 2019 stating the landlord did not negotiate the amount of rent, I find the landlord did not prove, on a balance of probabilities, that she advertised the rental unit for a rent that the market would bear, or that she advertised at all. Thus, I find the landlord did not minimize her losses.

As such, I dismiss the landlord's application for a monetary award for compensation for loss of rental income for the month of October 2019.

Security deposit and filing fee

Section 38 of the Act states:

> (1)Except as provided in subsection (3) or (4) (a), within 15 days after the later of
> (a)the date the tenancy ends, and
> (b)the date the landlord receives the tenant's forwarding address in writing,
> the landlord must do one of the following:
> (c)repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
> (d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.

As the landlord claimed against the security deposit within the timeframe set in the previous arbitration decision between the parties, the landlord complied with section 38(1)(d) of the Act. As the landlord application to receive a monetary award for damages caused by the tenant was dismissed, the landlord must return the security deposit.

Thus, I order the landlord to return the security deposit in the amount of $1,500.00. During the tenancy there was no interest on the amount of the security deposit.

As the landlord was not successful in her application, the landlord must bear to cost of the filing fee.

Conclusion

Pursuant to section 38(1)(c) of the Act, I order the landlord to return the tenant's security deposit. Thus, pursuant to sections 38 and 67 of the Act, I grant the tenant a monetary order in the amount of $1,500.00.

The tenant is 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: July 27, 2020

Residential Tenancy Branch