Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing ordinally convened on July 9, 2020 and was adjourned to August 18, 2020. The Interim Decision resulting from the July 9, 2020 hearing should be read in conjunction with this decision. This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for damage or compensation, pursuant to section 67;
- authorization to retain the tenant's security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

Landlord Y.Q.W. (the "landlord"), the landlord's agent/interpreter and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord testified that the tenant was served with the landlords' application for dispute resolution via registered mail on March 12, 2020. The tenant testified that she received the landlords' application on March 16, 2020. I find that the tenant was served in accordance with section 89 of the *Act.*

Preliminary Issue- Amendment

In the July 9, 2020 Interim Decision, I granted the landlords leave to file an amendment with the Residential Tenancy Branch pertaining to unpaid utilities. The landlord's agent testified that he left his amendment application with the Residential Tenancy Branch and sent a copy of the amendment and evidence supporting the amendment to the tenant via registered mail on July 22, 2020. The tenant testified that she received the above documents via registered mail but could not recall on what date. The landlord's

agent testified that the proof of marketing from March to July 2020 were also served on the tenant in the above package. The tenant confirmed the above testimony.

Section 4.2 of the Rules states that in circumstances that can reasonably be anticipated, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

The Residential Tenancy dispute management system does not show that the landlords filed an amendment, but the amendment evidence was uploaded. I find that the landlords did not file an amendment; however, I will amend the landlords' application because the tenant knew or ought to have known that the landlords were seeking to amend their claim as it was discussed in the first hearing and the Interim Decision. The tenant was served with amendment related evidence and had an opportunity to respond to that evidence prior to the second hearing. Therefore, pursuant to section 4.2 of the Rules and section 64 of the *Act*, I amend the landlords' application to include a monetary claim for unpaid utilities.

Issues to be Decided

1. Are the landlords entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
2. Are the landlords entitled to retain the tenant's security deposit, pursuant to section 38 of the *Act*?
3. Are the landlords 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 landlords' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on September 1, 2019 and ended on February 29, 2020. This was originally a fixed term tenancy set to end on August 31, 2020. Monthly rent in the amount of $1,300.00 was payable on the first day

of each month. A security deposit of $650.00 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application. The landlords applied for dispute resolution three days after the end of this tenancy.

Loss of Rental Income

Both parties agree that the tenant texted the landlord's agent on January 27, 2020 and asked to speak with him. Both parties agree that in a telephone conversation on January 27, 2020, the tenant gave the landlord notice to end the tenancy effective February 29, 2020. Both parties agree that on January 28, 2020 the landlord emailed the tenant as follows:

> Thank you for notifying us of your plans to end your tenancy with us after the end of this February. However, we now have to find a new tenant to take over the lease of the unit since you are prematurely ending your lease term with us. We will begin our search for a new tenant as soon as possible. You must cooperate with us in our search for a new tenant that includes but does not limit to unit showing for potential tenants and/or helping us find new possible candidates for tenancy. Since you are ending your 1 year fixed-term tenancy agreement with us before the end of its term (ending on August 31st, 2020), we must remind you that if we are unable to find a new tenant to continue the tenancy of the unit at the beginning of this upcoming March, you will be responsible for the remaining 6 months of lease payments left in our lease agreement…..

The landlord testified that the subject rental property was advertised for rent online beginning January 30, 2020 at a rental rate of $1,330.00. The landlord testified that the rental rate was dropped to $1,300.00 at the end of February 2020, when the tenant moved out. The landlord testified that the rental rate was dropped to $1,100.00 in July and that a new tenant moved into the subject rental property on August 15, 2020 at a rental rate of $1,100.00. Online advertisements from January 30- July 4, 2020 were entered into evidence. The landlord's agent testified that the landlords are seeking lost rental income from March 2020 to August 2020. The tenant testified that she does not believe that the landlords could not find a new tenant before August 15, 2020.

The tenant testified that the landlord showed the subject rental property 5-6 times in February 2020, but new tenants were not found. The tenant testified that she posted an advertisement for the subject rental property online, but the landlords asked her to take

it down because it conflicted with their advertisement.

The tenant testified that it not her fault that the landlords had to reduce the rental rate at the subject rental property or that the landlords could not find a new tenant.

Utilities

Both parties agree on the following facts. The property has an upper suite, and a lower suite. The tenant and her roommates resided in the lower suite. The upper suite paid 60% of the utility bill and the lower suite paid 40% of the utility bill. On January 30, 2020 the landlord texted the tenant as follows:

> Also the gas utilities from December 19, 2019 to January 21, 2020 just came in. Your portion of the gas utility is $40.62. Please send it over to us with the February lease. Thank you.

Both parties agree that the following text messages were send from the landlords to the tenant on or around February 25, 2020:

- Also I will send you the calculations for the power and gas utilities for January and February in just a bit.
- Since the bill hasn't arrived yet and that you will be leaving on Saturday, we will go with the same amount as last month for both power and gas.
- Hey [tenant]. So the utility fee for gas from January 22 to February 28 is $40.62 and the utility fee for power (BC hydro) from December 19, 2019 to February 28, 2020 is $147.83. The total amount of your closing utilities will be $188.45…

Both parties agree that the tenant paid the landlord $40.62 for the February gas bill and that this amount was 40% of the January gas bill.

The landlord's agent testified that the February 2020 gas bill came in after the tenant vacated the subject rental property and was more than double the January 2020 bill. The landlord's agent thought that this was odd and contacted the gas company who informed him that due to a large snow fall in January 2020, the gas meter could not be read and so the January bill was artificially low. The meter was read in February and accounted for gas used in both January and February. A gas bill from January 21, 2020 to February 20, 2020 in the amount of $423.44 was entered into evidence.

The landlord's agent testified that the landlords are seeking additional money for February 2020's gas bill according to the following calculations:

> $423.44 (gas bill) x .40 (tenant's portion of bill) = $168.38 (40% of gas bill)
>
> $168.36 (40% of gas bill) – $40.62 (amount tenant already paid) = $128.76

The tenant testified that she should not have to pay any extra for February 2020's gas bill because the landlord only asked her to pay $40.62 and this was a final amount. The landlord did not tell her that she would have to pay more if the bill was higher than January 2020's.

Analysis

Loss of Rental Income

Section 45(2) of the *Act* 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.

I find that the tenant breached section 45(2) of the *Act* by ending the tenancy prior to the end of the fixed term.

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.

The tenant confirmed that the landlords were trying to find a new tenant in February of 2020 as she allowed access to the subject rental property for the viewings. I find that the tenant’s submission that she did not believe that the landlords could not find a new tenant is not substantiated by any other evidence. Based on the testimony of the landlord and the landlord’s agent and the advertisements entered into evidence, I find that the landlords attempted to find new tenants for the subject rental property for the

months of March to August, 2020 and were successful in finding new tenants effective August 15, 2020 at a rental rate of $1,100.00 per month.

The tenant ended a one-year fixed term tenancy early; thereby decreasing the rental income that the landlords were 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 landlords also have a duty to minimize that loss of rental income by re-renting the unit at a reasonably economic rate as soon as possible. The landlords chose to attempt to rent the unit at a rate higher than specified in the Tenancy Agreement for approximately one month before lowering the price to $1,300.00.

I find that the landlords failed to mitigate their loss for one month and so one month's worth of rent will be deducted from the award the landlords otherwise would have received, pursuant to the below calculations:

> March 2020 to July 2020 lost rental income: $6,500.00 - $1,300 (failure to mitigate) = **$5,200.00**
>
> August 2020 lost rental income: $1,300.00 (rent under the tenancy agreement) - $550.00 (rent received by the landlords for August) = **$750.00**

Utilities

I do not find the tenant's argument that since the landlord told her to pay $40.62 for February 2020's gas bill, she is absolved from any further amount owing. I accept the landlord's agent's testimony that the gas meter was not properly read in January 2020 and that February 2020's bill was substantially higher because of it.

Both parties agreed that the tenant was responsible for 40% of the utilities. I find that the landlord has proved the amount of the gas bill and the tenant is responsible for 40% of that bill less the amount already paid towards it as stated below:

> $423.44 (gas bill) x .40 (tenant's portion of bill) = $168.38 (40% of gas bill)
>
> $168.36 (40% of gas bill) – $40.62 (amount tenant already paid) = **$128.76**

Security Deposit and Filing Fee

Section 38 of the *Act* states that 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.

I find that the landlords made an application for dispute resolution claiming against the security deposit pursuant to section 38(a) and 38(b) of the *Act* because the landlords' application was made three days after this tenancy ended.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenant's security deposit in the amount of $650.00.

As the landlords were successful in their application for dispute resolution, I find that they are 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 landlords as follows:

Item	**Amount**
Loss of rental income	$5,950.00
Utility	$128.76
Filing fee	$100.00
Less security deposit	-$650.00
TOTAL	**$5,528.76**

The landlords are 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: August 18, 2020

Residential Tenancy Branch