



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRL-S**

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "Act") for a monetary order for rent and/or utilities and authorization to retain a security deposit pursuant to sections 38 and 67.

The landlord attended the hearing and the tenant was represented at the hearing by his agent/spouse, AB. For ease of reference, the agent will be referred to as the tenant. As both parties were present, service of documents was confirmed. The tenant acknowledged receipt of the landlord's Notice of Dispute Resolution Proceedings package and did not dispute timely service of documents. Both parties were prepared to have the merits of the landlord's application heard.

Issue(s) to be Decided

Should the landlord be compensated for the tenant's ending of the fixed term tenancy early?

Can the landlord retain the tenant's security deposit?

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. In accordance with rule 7.14, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence. 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 term tenancy began on June 27, 2019 and was set to end on July 15, 2020. Rent was set at \$4,580.00 per month, payable on the 15th day of each month. A security deposit of \$1,975.00 was collected by the landlord which the landlord continues to hold. A condition inspection report was done at the commencement of the tenancy and the parties agree that there was no damage done to the rental unit at the end of the tenancy.

The landlord gave the following testimony. The rental unit is new, located in a high-end beachfront apartment building. On September 10, 2019, the landlord emailed the tenant to see if the tenant was finding the tenancy satisfactory. On September 30, 2019, the tenant responded to the landlord's email advising that he couldn't continue living in the rental unit due to dust from the building construction in the adjacent property. On September 30th, the tenant has removed all his possessions and put everything back in order so that the landlord could look for a new tenant immediately. A copy of the email exchange was provided as evidence. The landlord acknowledges the tenant paid rent up until October 15, 2019 and seeks to recover compensation for unpaid rent until the date he filed his Application for Dispute Resolution Proceedings Package, March 15, 2020, a period of five (5) months.

The landlord testified he had no forewarning from the tenant that he was going to leave. Right after being advised of the construction issue, the landlord sought an air quality report from an environmental engineer. The report, dated October 25, 2019, concludes: *The air quality in this apartment was exceptional. If there was any distress, it was highly improbable that it was the result of environmental conditions within the apartment.*

The landlord testified he tried to find new tenants after the tenant moved out. The timing of the vacancy made it difficult to find a new tenant, as the rental unit is located on a beachfront community that sees significantly less traffic in the fall and winter. He advertised the rental unit on Kijiji and Craigslist, with Craigslist being the preferred method of finding a new tenant. Between the time the tenant vacated and the time he filed his Application for Dispute Resolution, the landlord advertised the unit for rent four(4) different times on Craigslist. A screenshot of the landlord's Craigslist account was provided, indicating four expired listings, all undated. The landlord surmises he reposted the advertisement every 5 or 6 weeks, however he was unable to confirm specifically when the advertisements ran.

The landlord testified the advertisements indicated the cost to rent the unit was \$4,580.00, the same rent the previous tenants paid. Later in his testimony, the landlord

corrected his testimony to say that the unit was advertised at \$3,995.00, unfurnished, with the potential to rent it out fully furnished for \$4,580.00. No copies of the Craigslist advertisements were provided as evidence for this hearing. The landlord testified he needed the high rent to justify the additional costs incurred in purchasing furniture for these tenants who wanted to rent a furnished apartment.

The landlord was motivated to rent it out after the tenant left because the vacancy is an insurance liability for him. Also, the loss of rental income is financially stressful. After the tenant left, the landlord had a single showing of the unit. This potential tenant sent the landlord an email advising that the construction outside prevented her from taking the rental unit. The landlord has since been unable to re-rent the unit, so he put it up for sale instead, limiting the amount of compensation sought against the tenant to five months instead of nine.

The tenant gave the following testimony. The dust from the pouring of concrete during construction was so bad that the tenant got symptoms related to COPD and they had to leave the country immediately. They were so concerned with the tenant's health that they didn't try to assign or sublet the tenancy agreement. The tenant's car was also damaged by the construction, however that was covered by insurance. The tenant also pointed out other deficiencies with the rental unit including a loss of privacy from all the windows in the beachfront rental unit.

The tenant submits that the landlord failed to mitigate his losses by finding a new tenant at reasonable economic rent. The tenant further submits that the landlord failed to provide sufficient evidence of diligently searching for a new tenant to occupy the rental unit after they vacated it. The tenant argues that the Craigslist evidence listing the multiple expired listings of the rental unit are not indicative of the landlord's attempts to find a new tenant. The tenant argued that it is the landlord's responsibility to locate new tenants in order to mitigate the losses suffered by the landlord when the tenant ended the tenancy early.

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.

I find that the tenant gave the landlord his notice to end tenancy on September 30, 2019 ending the tenancy on that date. I find that the notice was given contrary to 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, July 15, 2020. The tenant breached the Act and the tenancy agreement by ending the tenancy early.

Residential Tenancy Branch Policy Guideline PG-3 [Claims for Rent and Damages for Loss of Rent] provides guidance in situations where a tenant has breached a tenancy agreement or abandoned a rental unit. (excerpts below)

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. *Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;*
2. *Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.*

...

*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.** (emphasis added)*

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.

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

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.

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.

In this case, I find the tenant ended the fixed term tenancy before the end date stipulated on the tenancy agreement of July 15, 2020, contravening section 45 of the Act. The tenant did not make any attempt to assign the tenancy, leaving the burden of finding a new tenant to the landlord. The landlord has provided credible and consistent evidence to satisfy me he took the steps to re-rent the unit as soon as possible for a

reasonable rent. For these reasons, I find the landlord is entitled to compensation from the tenant for the breach, pursuant to section 67 of the Act.

First, the landlord hired an air quality assessment to determine whether the tenant correctly advised him of air quality concerns in the unit. Second, he placed advertisements on Craigslist on four occasions seeking a new tenant. Third, he offered the rental unit both with and without furnishings to broaden his pool of prospective tenants. Lastly, there is no evidence before me that the landlord ever tried to raise the rent after the tenants left.

While the listing of expired posts to Craigslist does not specifically disclose the dates the ads were published, I find the evidence produced is sufficient to corroborate the landlord's testimony that the ads were placed throughout the time the rental unit remained vacant. Although the tenant argued that the landlord has not provided evidence to show the landlord sought a tenant willing to pay '*reasonable economic rent*'; the tenant did not provide any evidence to show the rent sought was unreasonable, given the location of the rental unit and its age. The landlord testified the reason the rental unit remained vacant was because that there was construction happening adjacent to the unit and because the pool of potential renters capable of affording a high-end waterfront apartment is scarce. There is no evidence before me that he tried to raise the rent above the amount being paid by the tenants in this dispute. The landlord's single showing of the unit and subsequent refusal indicates to me the reasons the potential tenant didn't take the unit was the construction issue and the lack of privacy in the window-filled unit, not the cost of the rent.

As a sign of minimizing the damage or loss to the tenants, the landlord put the rental unit on the market for sale, choosing to limit the claim against the tenants for breaking the fixed term tenancy agreement to five months instead of nine months. I find this action by the landlord to be consistent with his willingness to mitigate the losses.

For the tenant's breach of the tenancy agreement by ending the fixed term tenancy before the end of the fixed term, the landlord is entitled to the five months' compensation from the tenant pursuant to section 67 of the Act. ($\$4,580.00 \times 5 = \$22,900.00$).

The landlord continues to hold the tenant's security deposit. In accordance with the offsetting provisions of section 72 of the Act, the entire security deposit of \$1,975.00 is to be retained by the landlord in partial satisfaction of the monetary order.

Conclusion

I issue a monetary order in the landlord's favour in the amount of **\$20,925.00**. 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 5, 2020

Residential Tenancy Branch