Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL, FFL

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid and/or loss of rent and a late fee. 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.

At the outset of the hearing, I confirmed the parties had exchanged their respective hearing documents and evidence upon each other and I admitted their materials into evidence for consideration in making this decision.

The hearing process was described to the parties and the parties were given the opportunity to ask questions. The parties were affirmed.

Issue(s) to be Decided

Has the landlord established an entitlement to compensation from the tenants, as claimed?

Background and Evidence

The parties executed a one year fixed term co-tenancy agreement that commenced on September 1, 2019 and was set to expire on August 31, 2020. The tenants were required to pay the monthly rent of $1950.00. The tenants paid a security deposit of $975.00. The tenants returned possession of the rental unit to the landlord on February 29, 2020.

On January 20, 2020 co-tenant RK informed the landlord of her concerns with respect to continuing the tenancy given SS's health issues. On January 22, 2020 RK gave the

landlord sent a written notice to end tenancy effective February 29, 2020. After receiving RK's notice, the landlord met with both co-tenants together on January 22, 2020 and options were explored; although, RK did not find any of the options put forth to be satisfactory to her.

On January 23, 2020 the landlord communicated to the tenants in an email that if they ended the tenancy early they would continue to be liable for the rent for the remainder of the fixed term or until such time the unit was re-rented; or, since SS had indicated she may wish to continue occupying the rental unit if she found a new roommate, SS and her new roommate may enter into a new tenancy agreement starting March 1, 2020.

Shortly after receiving the email of January 23, 2020, SS commenced efforts to find a new roommate but she had little response. SS attributed the lack of response to the term of the school semester having already started (the rental unit is located near a university). On or about February 8, 2020, SS asked the landlord if she would have to pay all of the March 2020 rent to continue residing in the rental unit past February 29, 2020 to which he confirmed she would. In response, on February 12, 2020 SS informed the landlord that she would be vacating the rental unit by February 29, 2020.

On February 12, 2020 the landlord began advertising the rental unit with an available date of March 1, 2020 for the monthly rent of $1950.00. On March 2, 2020 the landlord advertised the unit as being available for April 1, 2020 for the monthly rent of $1950.00. The landlord stated he received little to no interest from prospective tenants so he began performing a market analysis and reduced the asking rent to $1750.00 starting sometime after March 5, 2020. On March 29, 2020 the landlord secured replacement tenants for a tenancy that commenced on May 1, 2020 for the monthly rent of $1750.00.

A move-out inspection was performed on February 29, 2020 and SS authorized the landlord to deduct $400.00 from the security deposit as liquidated damages. SS also paid the landlord rent for March 2020. The landlord refunded the net balance of the security deposit to the tenants via etransfer.

By way of this Application for Dispute Resolution, the landlord seeks to recover from the tenants loss of rent for April 2020 in the amount of $1950.00 plus a late fee of $25.00 for April 2020; and, recovery of the rental shortfall of $200.00 per month for the months of May 2020 through August 2020 in the amount of $800.00.

Co-tenant SS stated she was in agreement that she and her co-tenant owe the landlord the amounts he claimed and that she and RK were having a dispute as to how to allocate the liability amongst themselves. I informed the parties that I do not have jurisdiction to resolve disputes between roommates or co-tenants and they would have to seek dispute resolution of such matters in the appropriate forum. I explained to the parties that co-tenants are jointly and severally liable and that my jurisdiction is limited to resolving the landlord's claims against the co-tenants.

RK, on the other hand, opposed the landlord's entitlement to recovery of the amounts claimed. RK submitted that she had to move out because the unit was uninhabitable and the tenancy became frustrated. RK attributed the unit as being uninhabitable due to a parasitic infection that SS contracted and passed to RK but that the infection continued because SS was not adequately managing her infection. RK acknowledged that she did not give a landlord a written notice of any breach on his part and that she would end the tenancy if he did not correct his breach.

RK was also of the position that the landlord had 38 days (from January 23, 2020 to March 1, 2020) to find replacement tenants and that he did not sufficiently mitigate his losses by advertising sooner and for a monthly rent that reflected the market conditions at the time. RK pointed to an advertisement for another rental unit nearby that was advertised for $1650.00 per month. RK also pointed out that the landlord advertised the unit as not being available until April 1, 2020 in his March 2, 2020 advertisement when in fact it was available when he placed the advertisement and everyday matters in trying to find new tenants.

The landlord explained that after there was no interest by prospective tenants at the monthly rent of $1950.00, he performed a market analysis and adjusted the advertised rate. Also, the landlord advertised online and some websites require a specific availability date and one cannot say "available immediately" or "as soon as possible". Also leases traditionally commence on the first of the month which is why the advertisements indicated the first of the month but that if there were enquiries for prospective tenants looking for earlier occupancy, he would have told them it was available sooner.

Analysis

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.

In this case, it is undisputed that the parties entered into a fixed term co-tenancy agreement that was set to continue until August 31, 2020. Under a co-tenancy agreement, all of the co-tenants are jointly and severally liable to fulfill the terms of the tenancy agreement and any debts that accrue to the landlord during the tenancy. It is upon the co-tenants to apportion any debts or liabilities to the landlord amongst themselves and the Act does not apply to disputes between co-tenants. As I informed the parties during the hearing, my jurisdiction is limited to disputes between the landlord and the co-tenants and any Monetary Order I issue would be against both co-tenants and the landlord may pursue one or both of the co-tenants to collect. Should one co-tenant satisfy a liability to the landlord, it shall be upon the co-tenant to pursue the other co-tenant for recovery of all or part of the liability paid to the landlord in the appropriate forum, such as civil Resolution Tribunal.

During a fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties. In this case, there was no mutual agreement to end tenancy. Also, the landlord did not end the tenancy for cause and neither did the tenants. A tenant may end a tenancy for cause by giving the landlord a written notice that the landlord is in breach of a material term of the tenancy agreement and set a deadline for the landlord to correct its breach, otherwise the tenant will end the tenancy, as provided in section 45(3) of the Act]. The tenants did not give the landlord a written notice of a breach of a material term on part of the landlord and I find the tenants did not end the tenancy for cause. Rather, from what I heard, RK sought to end her co-habitation with SS in the rental unit due to her view that SS was not adequately or properly managing her parasitic infection; however, that is a dispute between the co-

tenants that is not within my jurisdiction to resolve and I make no findings as to whether RK's position concerning SS's actions or neglect has merit.

RK was of the position the tenancy became frustrated on the basis the rental unit became uninhabitable; however, I reject that position. Residential Tenancy Policy Guideline 34: Frustration provides information and policy statements with respect to a frustrated tenancy agreement. Below, I provide excerpts from the policy guideline:

> A contract is frustrated where, without the fault of either party, a contract 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. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.
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> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.
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> [My emphasis underlined]

In keeping with the policy guideline, I find a tenancy agreement becomes frustrated when neither party can perform their obligation under the tenancy agreement due to circumstances that were unforeseen and unexpected. In this case, SS wanted to remain in the rental unit and looked for a new roommate which contradicts RK's position that the rental unit was uninhabitable. Further, RK argued that RK mismanagement of her parasitic infection resulted in the unit becoming uninhabitable to her; however, if I were to accept RK's position then the reason this tenancy ended early was the fault of SS and the tenants cannot argue frustration due to the actions or neglect of the tenants. I am of the view that RK no longer wanted to reside with SS because RK was of the position SS was not properly managing her parasitic infection and perhaps their roommate arrangement became frustrated; however, but that does not amount to a frustrated tenancy agreement with the landlord.

Undeniably, the tenants brought the tenancy to an end effective February 29, 2020 and in keeping with the Act, I find the tenants did not end the tenancy for cause and the tenancy agreement with the landlord was not frustrated. Therefore, I find the tenants to be in breach of their fixed term tenancy agreement and I proceed to analyze whether the landlord's losses.

I heard consistent evidence that the tenant paid rent for March 2020 and liquidated damages but that there was no payment for rent after March 2020. The evidence points to the landlord making efforts to re-rent the unit and he succeeded in securing replacement tenants starting May 1, 2020 for the lesser monthly rent of $1750.00. As such, I accept that the landlord suffered loss of rent for the month of April 2020 in the amount of $1950.00 plus the rent differential of $200.00 per month for the months of May 2020 through August 2020.

Co-tenant RK was of the view the landlord did not sufficiently mitigate losses and I proceed to analyze the landlord's mitigation efforts further.

Residential Tenancy Policy guideline 5 provides information and policy statements with respect to the duty to mitigate losses. Below, I have reproduced excerpts from the policy guideline:

> **B. REASONABLE EFFORTS TO MINIMIZE LOSSES**
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> A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss. Usually this duty starts when the person knows that damage or loss is occurring. The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided.
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> In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss. For example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:
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> • remove and dry the possessions as soon as possible;
> • promptly report the damage and leak to the landlord and request repairs to avoid further damage;
> • file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.

Compensation will not be awarded for damage or loss that could have been reasonably avoided.

Partial mitigation

Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. If in the above example the tenant reported the leak, the landlord failed to make the repairs and the tenant did not apply for dispute resolution soon after and more damage occurred, this could constitute partial mitigation. In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.

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.

After the landlord received RK's notice and put the tenants on notice that they would be held responsible for rent for the remainder of the fixed term, or until such time the unit was re-rented, SS contacted the landlord on January 24, 2020 to notify the landlord she would be looking for a new roommate as she wished to continue to rent the unit. Since SS and the landlord already had a tenancy history, and SS was in possession of the rental unit, I am of the view that the landlord entertaining this option is reasonable. As such, I find the landlord's delay in starting his own advertising efforts until February 12,

2020, when SS informed the landlord she did not find a new roommate and she would be moving out at the end of February 2020, is reasonable as this is the date the landlord knew a loss of rent would be likely unless he commenced efforts to re-rent.

When the landlord commenced his advertising efforts on February 12, 2020 he advertised for the monthly rate of $1950.00, presumably because this was the amount the tenants were paying under their tenancy agreement; however, the landlord did not perform a market analysis until a number of weeks later after receiving little to no response to his advertisements.

The landlord had acknowledged that most of his past tenants for this property were university students given the location of the rental unit. SS also pointed to university students as being a likely source for a new roommate but that given the semester had already started there was not a lot of interest from students. Given the timing of the end of the tenancy and the likelihood of prospective tenants being university students, I am of the view the landlord should have considered that in marketing the rental unit in mid-February 2020. The landlord did not perform a market analysis for several weeks later and the unit was re-rented not long after the landlord reduced the advertised rate by $200.00 per month. Therefore, I am of the view that $1950.00 per month was above the market rent at that time of year.

In addition to advertising the unit for an amount higher than the market would bear, and the landlord indicting the unit was not available until April 1, 2020 when in fact it had been vacant since February 29, 2020, I find the landlord partially mitigated losses.

The market analysis and reaction of the rental market supports that the economic rent for the unit at that time of year was $1750.00. However, had the tenants fulfilled their fixed term tenancy they would have paid the landlord $1950.00 per month. Thus, their decision to end the tenancy early caused a loss of rent of $200.00 per month for the landlord and I find the landlord entitled to recovery the rent shortfall of $200.00 per month from the tenants.

Had the landlord marketed the unit for the market rent at its economic rent and as being available from March 1, 2020 onwards, I find it reasonably likely the unit may have rented sooner than it did. Therefore, I limit the award for April 2020 to the rent differential of $200.00.

As for the late fee for April 2020, the late fee is payable under the tenancy agreement when the tenant fails to pay rent when due. However, the tenants vacated the rental

unit on February 29, 2020 which brings the tenancy agreement to an end under section 44(1)(d) of the Act. After the end of the tenancy, the landlord is entitled to pursue the tenants for loss of revenue for April 2020, which I have considered and awarded, in part, above. Therefore, I find the landlord is not entitled to a late fee with respect to April 2020.

The landlord had some success in this Application for Dispute Resolution and I award him recovery of the $100.00 filing fee from the tenants.

In light of all of the above findings and reasons, I provide the landlord a Monetary Order to sere and enforce upon the tenants, calculated as follows:

Loss of revenue for April 2020	$ 200.00
Rent differential for May 2020 - August 2020	800.00
Filing fee	100.00
Monetary Order	$1100.00

Conclusion

The landlord has been provided a Monetary Order in the sum of $1100.00 to serve and enforce upon the tenants.

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: September 2, 2020

Residential Tenancy Branch