



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: MNRL-S, FFL, MNDCL-S
Tenant: MNSDS-DR, FFT

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (the “*Act*”).

The Landlord’s Application for Dispute Resolution was made on July 14, 2020 (the “Landlord’s Application”). The Landlord applied for the following relief, pursuant to the *Act*:

- a monetary order for money owed or compensation for damage or loss;
- a monetary order for unpaid rent;
- an order to retain the security deposit; and
- an order granting recovery of the filing fee.

The Tenant’s Application for Dispute Resolution was made on July 28, 2020 (the “Tenant’s Application”). The Tenant applied for the following relief, pursuant to the *Act*:

- an order granting the return of all or part of the security deposit; and
- an order granting recovery of the filing fee.

The Tenant and the Landlord’s Agent K.Z. attended the hearing at the appointed date and time. At the beginning of the hearing, the parties acknowledged receipt of their respective application packages and documentary evidence. No issues were raised with respect to service or receipt of these documents during the hearing. Pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The parties were given an opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Is the Landlord entitled to a monetary order for unpaid rent, pursuant to Section 67 of the *Act*?
2. Is the Landlord entitled to a monetary order for money owed or compensation for damage or loss pursuant to Section 67 of the *Act*?
3. Is the Landlord entitled to an order granting recovery of the filing fee, pursuant to Section 72 of the *Act*?
4. Is the Landlord entitled to retain the Tenant's security deposit pursuant to Section 38 of the *Act*?
5. Is the Tenant entitled to an order granting the return of the security deposit, pursuant to Section 38 of the *Act*?
6. Is the Tenant entitled to an order granting recovery of the filing fee, pursuant to Section 72 of the *Act*?

Background and Evidence

The parties testified and agreed to the following; the fixed term tenancy was meant to start on July 1, 2020 until June 30, 2021. The parties agreed to a monthly rent in the amount of \$2,200.00 to be paid by the Tenant to the Landlord on the first day of each month. The Tenant paid a security deposit in the amount of \$1,100.00 which the Landlord continues to hold.

The Landlords' Claim MD

The parties agreed that they came together on June 20, 2020 to sign the tenancy agreement, a copy of which was submitted into evidence. The parties met again on June 30, 2020 at which point they completed a move in condition inspection report and the Landlord provided the Tenant with the keys to the rental unit. A copy of the condition inspection was submitted in support.

The Landlord's Agent stated that shortly thereafter, the Tenant notified the Landlord that he was no longer interested in moving into the rental unit due to noise emitting from an

air filtration system in the rental unit. The Tenant stated that he expressed his displeasure with the noise and returned the keys to the Landlord on July 1, 2020. The Tenant did not move into the rental unit.

The Tenant stated that the noise was unbearable which would have prevented him from working at home or from sleeping at night. The Tenant stated that he considered this to be a breach of a material term of the tenancy agreement and felt entitled to ending the tenancy as a result.

The Landlord's Agent stated that the air filtration system installed in the rental unit is required by law, and that the rental unit is brand new and is still under warranty. The Landlord's Agent stated that if there was an issue with the rental unit, it could have been resolved under the warranty at no cost to the Landlord. As such, the Landlord's Agent questions the Tenant's reasoning for ending the tenancy before moving into the rental unit.

The Landlord's Agent stated he immediately advertised the rental unit for rent and conducted several showings, however, as a result of the Tenant ending the tenancy early, the Landlord was unable to re-rent the rental unit until August 15, 2020. The Landlord's Agent stated that the Landlord is seeking \$3,300.00 in unpaid rent for July and half of August 2020.

The Landlord is also claiming \$200.00 in relation to late rent, and NSF charges. The Landlord's Agent referred to the addendum signed by both parties in which parties agreed to:

"The tenant agrees to give the landlord postdated cheques for rent. There will be a \$50 charge for late payment of rent, and a \$50 charge for NSF cheques."

The Landlord's Agent stated that the Tenant put a stop payment on the rent cheques provided to the Landlord which resulted in two NSF charges from the bank for both July and August 2020 rent. Additionally, the Landlord considered the rent to be late as the Landlord felt entitled to the rent until such a time that the Landlord was able to re-rent the rental unit. Finally, the Landlord is seeking the recovery of their \$100.00 filling fee.

The Tenants' Claim SD

The Tenant stated that due to the breach of a material term of the tenancy agreement relating to noise, the Tenant felt entitled to ending the tenancy before moving into the

rental unit. The Tenant does not feel as though the Landlord is entitled to any compensation; therefore, the Tenant has applied for the return of his security deposit in the amount of \$1,100.00. Lastly, the Tenants claimed \$100.00 in recovery of the filing fee paid to make the Tenants' Application.

Analysis

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find:

The Landlord's Claim

In relation to the Landlord's claim to recover loss of rent in the amount of \$3,300.00 for July and half of August 2020, it is important to consider if the Tenant was entitled to ending the fixed term tenancy early, due to the Landlord breaching a material term of the tenancy agreement.

According to Section 45(3) of the Act; if a Landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

The Residential Tenancy Policy Guidelines (the "Police Guidelines") offers some clarity around what constitutes a material term. According to Policy Guideline 8; a material term is a term that the parties both agree at the start of the tenancy, is so important that the most trivial breach of that term gives the other party the right to end the agreement.

Furthermore, Policy Guideline 8 indicates that in order to end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- (a) that there is a problem;*
- (b) that they believe the problem is a breach of a material term of the tenancy agreement;*
- (c) that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*
- (d) that if the problem is not fixed by the deadline, the party will end the tenancy.*

Although the Tenant felt that the noise emitting from the air filtration system in the rental unit was a material term of the tenancy agreement, there is no testimony or documentary evidence before me that the parties understood and agreed either before or at the time the tenancy agreement was entered into, that the noise of the air filtration system was a material term of the tenancy agreement. I further find that there is no evidence before me that the Tenant notified that Landlord in writing that there was a problem, that the problem is a breach of a material term, gave a deadline for fixing it and advised them that if it was not fixed by the deadline, they would end the tenancy.

I find that the Tenant had other remedies available to them such as allowing the Landlord sufficient time to address the noise issue or make an Application for an order requiring the Landlord to make repairs pursuant to Section 32 of the *Act*. I find that the Tenant violated the *Act* by ending their fixed term tenancy early without cause.

I find that the Landlord has provided sufficient evidence to demonstrate that they have suffered a loss of rent in the amount of \$3,300.00 for July and half of August 2020 while the rental unit remained vacant as a result of the Tenant violating the *Act* by ending their fixed term tenancy. As such, I find that the Landlord is entitled to monetary compensation in the amount of **\$3,300.00**.

The Landlord is also claiming \$200.00 in relation to NSF charges and late payment fees. Section 67 of the *Act* empowers me to order one party to pay compensation to the other if damage or loss results from a party not complying with the *Act*, regulations or a tenancy agreement.

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 for in sections 7 and 67 of the *Act*. 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 what was reasonable to minimize the damage or loss.

In this case, the burden of proof is on the Landlord to prove the existence of the damage or loss, and that it stemmed directly from a violation of the *Act*, regulation, or

tenancy agreement on the part of the Tenant. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the Landlord did what was reasonable to minimize the damage or losses that were incurred.

Section 7 of the Residential Tenancy Regulations lists non-refundable fees charged by landlord;

A landlord may charge any of the following non-refundable fees:

- (a) direct cost of replacing keys or other access devices;
 - (b) direct cost of additional keys or other access devices requested by the tenant;
 - (c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
 - (d) subject to subsection (2), **an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;**
 - (e) subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;
 - (f) a move-in or move-out fee charged by a strata corporation to the landlord;
 - (g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.
- (2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

In this case, I find that the Landlord's late and NSF fees contained in the addendum is above the allowable amount of fees that a Landlord can legally charge a Tenant. I further find that the Landlord did not mitigate their loss by attempting to deposit the rent cheques that were post dated and provided to the Landlord prior to the start of the tenancy. I find that it is reasonable to expect that if the Tenant has ended the tenancy, that they would not continue to pay rent to the Landlord. For these reasons, I dismiss this portion of the Landlord's Application without leave to reapply.

Having been partially successful with their Application, I find the Landlord is entitled to the recovery of their **\$100.00** filling fee.

The Tenants' Claim

With respect to the Tenants' claim for the recovery of their security deposit, section 38(1) of the *Act* requires a landlord to repay deposits or make an application to keep them by making a claim against them by filing an application for dispute resolution within 15 days after receiving a tenant's forwarding address in writing or the end of the tenancy, whichever is later. If a landlord fails to repay deposits or make a claim against them within 15 days, section 38(6) of the *Act* confirms the tenant is entitled to receive double the amount of the deposits.

In this case, the parties agreed that the tenancy ended early on July 1, 2020. Therefore, pursuant to section 38(1) of the *Act*, the Landlord had until July 16, 2020, to repay the deposit or make a claim against it. I find that the Landlord submitted their Application on July 14, 2020, which is within the time limit permitted under the *Act*. Accordingly, I find the Tenant is not entitled to the return of double the amount of the deposit.

Having not been successful in their Application, I find the Tenant is not entitled to the recovery of their filing fee.

Pursuant to section 67 of the *Act*, I find that the Landlord has demonstrated an entitlement to retain the security deposit in the amount of \$1,100.00 in partial satisfaction of the monetary award granted. I grant the Landlord with a monetary order for the remaining balance owed in the amount of \$2,300.00 (\$3,400.00 - \$1,100.00 = \$2,300.00).

Conclusion

Pursuant to section 67 of the *Act*, the Landlord is granted a monetary order in the amount of \$2,300.00. The monetary order must be served on the Tenant and may be filed in and enforced as an order of the Provincial Court of British Columbia (Small Claims).

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: November 09, 2020

Residential Tenancy Branch