



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Skyline Living
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: FFL MNRL-S

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("the *Act*") for:

- a monetary order for monetary loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

GM ('landlord') appeared and testified on behalf of the landlord in this hearing. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing and evidence package. In accordance with sections 88 and 89 of the *Act*, I find that the tenant duly served with the landlord's application and evidence. The tenant did not submit any written evidence for this hearing.

Issue(s) to be Decided

Is the landlord entitled to monetary compensation for money owed or losses?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This fixed-term tenancy began on September 14, 2019, and was to end on September 30, 2020. Monthly rent was set at \$1,615.00, payable on the first day of the month. The

landlord collected a security and pet damage deposit in the amount of \$770.00 each deposit, which the landlord still holds. The tenant gave written notice on June 15, 2020 that she would be vacating the rental unit on June 30, 2020, and the tenant moved out as per the tenant's notice. The landlord provided a copy of the written notice dated June 1, 2020, but which was not received until June 15, 2020 from the tenant. The landlord testified that they advertised the suite for rent immediately on several websites, and were able to re-rent the rental unit for September 1, 2020, with monthly rent set at \$1,540.00. The landlord is seeking monetary compensation for loss of rental income for the months of July and August 2020, and liquidated damages as set in the tenancy agreement to cover the costs of filling the vacancy.

The tenant does not dispute that they had moved out before the end of the fixed-term tenancy, but testified that she had no choice but to move out early as she could no longer afford the monthly rent due to Covid-19, and she did not qualify for any subsidies. The tenant testified that she had tried to mitigate the landlord's losses by assisting the landlord with filling the vacancy. The tenant testified that there the building contained many vacant rental units, and despite this, she was able to find several prospective tenants, all of whom were declined by the landlord. The landlord testified that the prospective tenants were required to go through the application and screening process, which was not completed. The landlord testified that they did not automatically decline any prospective tenants, and that they attempted to fill the vacancy as soon as possible with a suitable tenant, as they did for September 1, 2020.

Analysis

Section 44 of the *Residential Tenancy Act* reads in part as follows:

44 (1) A tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:...
- (b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
- (c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

45 (2) 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.

While the tenant did notify the landlord of the early termination of this tenancy, they did not end it in a manner that complies with the *Act*, as stated above. The landlord did not mutually agree to end this tenancy in writing, nor did the tenant obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy. No application for dispute resolution have been filed by the tenant. The tenant moved out earlier than the date specified in the tenancy agreement.

It is undisputed that the tenant did not comply with the *Act* in ending this fixed term tenancy. The tenant, however, feels that the landlord failed to mitigate their losses by considering and selecting from the prospective tenants the tenant referred to the landlord, and therefore feels that the landlord is not entitled to the monetary compensation requested for the loss of rental income.

I have considered the testimony of both parties as well as the evidence provided for this hearing. The main arguments brought up by the tenant was that there were several prospective tenants whom the landlord did not select to fill the vacancy. The landlord testified that these prospective tenants failed to complete the application and screen process. The landlord testified that they did mitigate their losses by advertising and attempting to fill the vacancy with a suitable tenant as soon as possible, which they feel they did.

Residential Tenancy Policy Guideline #5 addresses a landlord's duty to minimize loss and states the following:

"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 loss¹. 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. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation². Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

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.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."

I have considered the fact the tenant's concerns that the landlord did not select a tenant from the prospective tenants the tenant had referred to the landlord. The landlord testified that these tenants failed to complete the application and screening process, and that the landlord had fulfilled their obligations to mitigate their losses by filing the vacancy as soon as possible. I find the landlord's testimony to be credible and reasonable, and I accept the landlord's explanation for why they were unable to fill this vacancy for an earlier date.

Although the landlord has a duty to mitigate their losses by filing the vacancy as soon as possible, they must also balance this obligation with their need to screen and find a suitable tenant. In light of the disputed testimony, I am not satisfied that the tenant provided sufficient evidence to support that these prospective tenants completed the application and screening process required, and met the requirements for filling the vacancy. I find the application and screening process to be an important decision made by the landlord in an effort to mitigate their losses by filling the tenancy as soon as possible, while balancing their duty and right to protect themselves from possible issues with the tenant(s) in the future. I find that the landlord had made an effort to mitigate the tenant's exposure to the landlord's monetary losses as is required by section 7(2) of the

Act. I, therefore, allow the landlord's monetary claim or loss of rental income for the months of July and August 2020 in the amount of \$3,230.00.

I must now consider whether the landlord is entitled to the \$1,615.00 in the liquidated damages.

Residential Tenancy Branch Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum...

I have reviewed the written tenancy agreement submitted by the landlord, and although the tenancy agreement references an administration and processing fee of \$250.00 in respect of the landlord's expenses associated with the granting of consent to a sublet or assignment, I am not satisfied that the agreement clearly stipulates that the tenant would be responsible for liquidated damages in the amount of one month's rent in the event that the tenant ended the tenancy before the end of the fixed term. In order to claim for liquidated damages, both parties must enter into an agreement that the tenant pay the sum indicated on the agreement as liquidated damages in the event of a breach

of the tenancy agreement. I must then consider whether this stipulated sum meets the requirements as set out in the policy guideline above.

In this case I am not satisfied that the landlord had clearly stipulated on the tenancy agreement that the tenant would be responsible for the amount claimed by the landlord as liquidated damages. On this basis, I dismiss the landlord's monetary claim in the amount of a month's rent in satisfaction of a liquidated damages clause. I do note that the landlord did suffer a monetary loss of rent for the month of September 2020.

Although the landlord was able to re-rent the suite for September 1, 2020, the landlord was only able to re-rent the suite for \$1,540.00 per month. As the landlord suffered this monetary loss due to the early end of this tenancy contrary to the Act, I find the landlord is entitled to a monetary order for the rent differential of \$75.00 for the month of September 2020.

I find that the landlord is entitled to recover the \$100.00 filing fee paid for this application.

The landlord continues to hold the tenant's security and pet damage deposit of \$770.00 each deposit. In accordance with the offsetting provisions of section 72 of the Act, I allow the landlord to retain the deposits in partial satisfaction of the monetary awards.

Conclusion

I allow the landlord's monetary claim for loss of rental income as set out in the table below, as well as \$100.00 for recovery of the filing fee. In accordance with the offsetting provisions of section 72 of the Act, I allow the landlord to retain the tenant's security and pet damage deposit in partial satisfaction of the monetary awards.

Loss of Rental Income for July and August 2020	\$3,230.00
Rent Differential for September 2020	75.00
Recovery of Filing Fee	100.00
Less Deposits Held by Landlord	-1,540.00
Total Monetary Order	\$1,865.00

The landlord is provided with this Order in the above terms and the tenant must be served with a copy of 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: November 16, 2020

Residential Tenancy Branch