Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCL-S, FFL**

Introduction

This hearing dealt with an application by the landlords under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;

- Authorization to recover the filing fee for this application pursuant to section 72.

The tenant TW attended for the tenants ("the tenants"). The landlords attended. The parties were given a full opportunity to be heard, to present affirmed testimony, make submissions, and call witnesses. I explained the hearing process and provided the parties with an opportunity to ask questions. The parties did not raise any issues regarding the service of evidence.

I have only considered and referenced in the Decision relevant evidence submitted in compliance with the Rules of Procedure to which I was referred.

Issue(s) to be Decided

Is the landlord entitled to the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;

- Authorization to recover the filing fee for this application pursuant to section 72.

Background and Evidence

During the hearing the female tenant became emotional describing the stress and anxiety she experienced as a result of the complaints she and her husband received from the landlords; twenty minutes into the hearing, the Arbitrator placed the hearing on hold for two minutes to allow the female tenant to recover her composure. The hearing then continued.

The parties agreed on the following. The 1-year fixed term tenancy began on February 1, 2020. Monthly rent was $2,700.00 payable on the first of the month. At the beginning of the tenancy, the tenants paid a security deposit of $1,350.00 which is retained by the landlord without the tenants' authorization. The tenants also paid a pet deposit which the landlord has returned to them.

On June 28, 2020, the tenants provided written notice to the landlord that they were vacating the unit on July 31, 2020. The tenants testified they decided to leave because of noise complaints by the landlords who lived in the unit below particularly with respect to their two dogs. A copy of the notice was submitted as evidence and the landlord acknowledged receipt. The tenants paid the rent for July 2020. The landlord brought an application to retain the security deposit on August 11, 2020.

The tenants submitted substantial testimony and supporting evidence as to their offers to assist the landlord in finding a suitable replacement tenant as soon as they gave notice. This included having the unit ready for viewing during their final month in occupancy and advertising on social media. The tenants testified they were aware they

were breaking a fixed term tenancy and wanted to do everything they could to either find a replacement tenant themselves or assist the landlord in doing so.

However, the landlords also submitted ads to the same social media sites which they stated caused confusion among potential new tenants. The landlords testified they were concerned they would not find a suitable tenant to move in when the tenants vacated.

The parties agreed the tenants quickly submitted names of potential new tenants to the landlords. On July 6, 2020, the landlords signed a lease with a new occupant who was referred by the tenants. The new lease is for $200.00 less rent starting August 15, 2020, two weeks after the tenants vacated and changes the pet policy. The landlords testified they were concerned about waiting any longer and doubted there would be other suitable applicants.

The landlords testified that they changed their ideas of what a “suitable tenant” was as a result of their experience with the tenants, particularly their two small dogs. The landlords testified that a requirement of the replacement tenant was that they have no dogs, although their one cat was permitted. The incoming occupant could not have another pet unless the landlords authorized it.

The tenants stated they received many more applications after the landlords accepted the new occupant, many of whom were ready to move in at the end of July 2020. They submitted many copies of communications with the landlord about prospective suitable tenants, copies of which were submitted. One such applicant had two dogs and was rejected by the landlords as being unsuitable under the new pet policy.

The tenants claimed that the landlords are not entitled to two weeks rent for August 2020 because the landlords had ample opportunity to select a suitable new occupant from the list they provided starting August 1, 2020.

The tenants provided their forwarding address to the landlord before they ended the tenancy; the landlords acknowledged receipt and returned the pet deposit to the tenants in a timely manner, that is, within 15 days.

The landlord requested reimbursement of lost rent from August 1 to August 15, 2020. They also requested compensation the filing fee. The landlord requested authorization to apply the security deposit to the award.

The tenants claimed the landlord took inadequate steps to mitigate damages by either not considering all eligible potential occupants and by changing the pet terms of the lease. By limiting the number of pets, the landlords substantially narrowed the pool of suitable potential occupants. They requested the return of their security deposit.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. Has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. If yes, did the loss or damage result from the non-compliance?
3. Has the applicant proven the amount or value of their damage or loss?
4. Has the applicant done whatever is reasonable to minimize the damage or loss?

The above-noted criteria are based on sections 7 and 67 of the Act, which state:

> *7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*
>
> *(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*
> *. . .*
>
> *67. Without limiting the general authority in section 62 (3) [. . .] if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.*

I found that each of the tenants provided credible evidence. The landlord acknowledged quickly accepting a new occupant for the unit without considering all the potential

applicants referred to them by the tenants. They also acknowledged changing the terms of the lease to limit pets.

The tenants provided believable testimony with supporting evidence as to their best efforts to find a replacement occupant who was available to move in on August 1, 2020 right after they planned to move out. They asserted they had in hand eligible applicants who were prepared to move in so the landlords did not incur a loss of rent. I accept the tenants' testimony they were distressed by the landlords' noise complaints as a result of which they believed they had to move as soon as possible, and they made concentrated efforts to find a replacement occupant in a timely manner.

Each of the above four tests are considered.

1. Did the tenants fail to comply with Act, regulations, or tenancy agreement?

Section 44(1) of the Act lists fourteen categories under which a tenancy may be ended, and references section 45 of the Act. Section 45 of the Act deals with a tenant's notice to end a tenancy, and reads, in its entirety, as follows (emphasis added):

> *(1) A tenant may end a periodic 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, and*
> >
> > *(b) 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.*
>
> *(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.*
>
> *(3) 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.*
>
> *(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].*

In this dispute, the tenancy was a fixed term tenancy, so section 45(2) applies. The tenant gave one month's notice to the landlord and stated they would be moving out at the end of July 2020. The notice complied with section 52. The landlords acknowledged receipt of the notice.

In other words, the tenants ended the tenancy on a date that was earlier than the date specified in the tenancy agreement as the end of the tenancy.

Thus, I conclude that the tenant breached section 45(2)(b) of the Act by ending the tenancy early.

2. Did the loss or damage result from non-compliance?

Having found that the tenants breached the Act, I must next determine whether the landlords' loss resulted from that breach. This is known as cause-in-fact, and which focusses on the factual issue of the sufficiency of the connection between the tenants' wrongful act and the landlords' loss. It is this connection that justifies the imposition of responsibility on the tenants.

The conventional test to determine cause-in-fact is the *but for* test: would the applicant's loss or damage have occurred *but for* the respondent's negligence or breach?

If the answer is "no," the tenants' breach of the Act is a cause-in-fact of the loss or damage.

If the answer is "yes," indicating that the loss or damage would have occurred whether the respondent was negligent, their negligence is not a cause-in-fact.

In this case, I find that but for the tenants' ending the tenancy as they did, that the landlord would not have suffered a loss of rent for the first two weeks of August 2020.

3. *Have the landlords proven amount or value of damage or loss?*

The monthly rent was $2,700.00. The landlord testified the unit was vacant from August 1-15, 2020 and they incurred a loss of rent for this period of $1,350.00.

I find that the landlord has proven the loss of rent for the period claimed, being $1,350.00.

4. Have the landlords done whatever is reasonable to minimize damage or loss?

The landlord testified that they initially advertised for new tenants but relied mostly on the tenants' advertising and referrals. The tenants forwarded suitable applicants to the landlords who promptly signed a lease with one such early referral.

The landlords stated that they changed the terms of the lease by decreasing the rent and prohibiting pets without their authorization. They acknowledged there may have been other suitable applicants subsequently referred by the tenants; they made the decision to select the incoming tenant quickly because they only had one small pet, a cat, and, in an abundance of caution, they were concerned there would be no other suitable applicants.

The tenants provided credible testimony and documentary evidence that they submitted subsequent suitable applicants to the landlords who were prepared to move in on August 1, 2020. They testified to their distress that the landlords did not consider these eligible candidates.

Policy Guideline 5 – Duty to Minimize Loss states in part as follows:

> ***B. REASONABLE EFFORTS TO MINIMIZE LOSSES***
>
> *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.*

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:

- *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.

The Policy Guideline also states:

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.

Considering the testimony and evidence, I find the landlords have not met the burden of proof that they took reasonable steps to mitigate their losses. I find that the landlords acted in a rushed manner by selecting the first applicant without dogs. A common-sense approach would have been for the landlord to wait a reasonable time, give the tenants a window of opportunity to locate potential occupants, and then review other suitable applicants who were prepared to move in August 1, 2020. This would have permitted the landlords to assess a few applicants and made a reasonable determination that would include assuring the unit is not vacant.

The landlord not only selected one of the first applicants, but they changed the terms of the lease to restrict pets, thereby narrowing the pool of suitable candidates. The landlords acknowledged rejecting one applicant who was ready to move in at the end of July 2020 but had two dogs, as did the tenants.

The landlord accepted the tenants offers to help find replacement tenants and to have the unit available for viewing during the final month. However, the landlords suddenly stopped relying on the tenants, made an unexpected selection, and did not consider the other suitable applicants the tenants referred to them.

In considering all the evidence and the burden of proof, I find that the landlords submitted insufficient evidence that the landlords made reasonable efforts to minimize the damage or loss. I have concluded that the landlords failed to show that they took practical and common-sense steps to consider the ample number of suitable potential applicants that the tenants referred including those who were prepared to move in August 1, 2020.

Given the circumstances, I find that changing the pet policy at that time may not have been a reasonable step and the changed requirement for suitability may have contributed to the narrowing of the suitability pool.

I therefore find the landlord has not met the burden of proof on a balance of probabilities that they made reasonable efforts reduce or mitigate damage or loss.

Landlord's claim: Conclusion

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the

landlords have not met the onus of proving all criteria in establishing that they are entitled to compensation in the amount claimed.

I therefore dismiss the landlord's claim without leave to reapply and direct the landlord to forthwith return the security deposit to the tenants of $1,350.00. I grant the tenants a monetary order in this amount.

Conclusion

I grant a Monetary Order to the tenants of **$1,350.00.** This Order must be served on the landlord. This Order may be filed and enforced in the courts of the Province of British Columbia.

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: December 2, 2020

Residential Tenancy Branch