Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, MNRL-S, FFL, MNSDS-DR, FFT

Introduction

This hearing dealt with cross-applications filed by the parties. On September 15, 2020, the Landlord applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the "*Act*"), seeking to apply the security deposit towards these debts pursuant to Section 38 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

On November 1, 2020, the Tenant made an Application for Dispute Resolution seeking a return of the security deposit pursuant to Section 38 of the *Act* and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

K.E. and C.G. attended the hearing as agents for the Landlord. The Tenant attended the hearing as well. All parties in attendance provided a solemn affirmation.

K.E. advised that she served the Notice of Hearing package and some evidence to the Tenant on September 22, 2020 by registered mail. The Tenant confirmed that he received this package. Based on this undisputed testimony, I am satisfied that the Tenant was sufficiently served the Landlord's Notice of Hearing package and some evidence.

She also advised that the Tenant was served additional evidence by hand on December 23, 2020 and the Tenant confirmed that he received this package. As service of this evidence complied with the timeframe requirements of Rule 3.14 of the Rules of Procedure, I have accepted all of the Landlord's evidence and will consider it when rendering this Decision.

The Tenant advised that he served the Notice of Hearing and evidence package to the Landlord on or around November 4, 2020 by registered mail. K.E. confirmed that the Landlord received this package. Based on this undisputed testimony, I am satisfied that the Landlord was sufficiently served the Tenant's Notice of Hearing and evidence package. As service of this evidence complied with the timeframe requirements of Rule

3.15 of the Rules of Procedure, I have accepted all of the Tenant's evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order for compensation?
- Is the Landlord entitled to apply the security deposit towards these debts?
- Is the Landlord entitled to recover the filing fee?
- Is the Tenant entitled to recover the security deposit?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on July 1, 2020 as a fixed term tenancy ending on June 30, 2021. However, the tenancy ended when the Tenant gave up vacant possession of the rental unit on September 1, 2020. Rent was established at $2,300.00 per month and was due on the first day of each month. A security deposit of $1,150.00 was also paid. A copy of the tenancy agreement was submitted as documentary evidence.

They also agreed that a move-in inspection report was conducted on June 30, 2020. Regarding the move-out inspection report, K.E. stated that the Tenant sent an email on July 27, 2020 advising that he would be ending the tenancy effective August 31, 2020. C.G. advised that he replied to this email on July 30, 2020 confirming the Tenant's intentions. He sent an email to the Tenant on August 26, 2020 stating that he could not meet the Tenant for a move-out inspection as his company was too busy with other tenants, so he requested an alternate time to meet. The Tenant emailed back on August 30, 2020 advising that he could not meet with the Landlord. He submitted that he had a phone call with the Tenant and told him to leave the keys behind. He stated this was told to the Tenant with the "understanding" that a move-out inspection would be coordinated later. K.E. stated that the Tenant only returned the extra keys by sending them in the mail on September 23, 2020, so the Landlord was forced to change the locks for the new tenant.

C.G. confirmed that he never provided the Tenant with at least two opportunities to conduct a move-out inspection, nor did he serve the Tenant with a Notice of Final Opportunity to attend a move-out inspection in accordance with Section 17 of the *Residential Tenancy Regulations* (the "*Regulations*").

The Tenant agreed that he gave notice to end his tenancy on July 27, 2020, and he acknowledged during the hearing that he made a poor, uninformed decision when he rented the unit. He stated that he attempted to coordinate a move-out inspection on August 30, 2020 but he did not hear back from the Landlord. He advised that he left some keys in the rental unit as instructed by C.G., locked the doors behind him, and he was not told what to do with the extra keys. He eventually mailed them back to the Landlord.

All parties also agreed that the Tenant provided a forwarding address by email on September 1, 2020.

K.E. advised that the Landlord is seeking compensation in the amount of **$1,073.33** because the Tenants signed a fixed term tenancy starting on July 1, 2020 that was to end on June 30, 2021. However, he gave notice to end his tenancy on July 27, 2020 and gave up vacant possession of the rental unit on September 1, 2020. She advised that she was able to re-rent the rental unit on September 15, 2020 so the amount the Landlord is seeking is for the half month of rental loss that the Landlord suffered.

She stated that she started advertising the rental unit on August 2, 2020, that multiple prospective tenants were shown the rental unit, and that many applications were given out. However, there were few qualified applicants, and none were interested in renting for September 1, 2020. On August 20, 2020, a tenancy agreement was signed with a new tenant to commence on September 15, 2020. She stated that the Tenant may have attempted to advertise the rental unit himself, but there is no evidence that these prospective tenants were quality applicants or were ever directed to the Landlord's attention.

The Tenant advised that the area of the rental unit is very desirable, and the Landlord should not have had difficulty re-renting it. It is his belief that the Landlord did not do enough to re-rent the unit. In mid-August 2020, he put up an ad and a sign, and he commenced showing the rental unit. He stated that there was lots of interest; however, he did not screen these prospective tenants or check to see if they would even qualify to be able to rent the unit. He did not provide the Landlord with any contact information for any of these prospective tenants, but he claimed to have given them the Landlord's information. He did not submit any evidence to support his position. It is his belief that the Landlord did not update him to the fact that a new tenant could not be found for September 1, 2020.

K.E. advised that the Landlord is seeking compensation in the amount of **$114.41** for the cost of outstanding utilities and the Tenant confirmed that he owed this amount.

Finally, K.E. advised that despite the tenancy agreement indicating that a charge of $2,300.00 is owing for liquidated damages, the Landlord is seeking compensation in the amounts of **$41.93** for the cost of four credit checks, and **$1,207.50** for the cost of Tenant placement fees. She submitted invoices as documentary evidence to support these costs.

The Tenant advised that he told the Landlord that it was his belief that the amount of liquidated damages on the tenancy agreement was too much and would be considered a penalty. He stated that the Landlord compromised and only then asked for approximately half that amount. He stated that the amount of liquidated damages noted on the tenancy agreement is not a genuine pre-estimate of the Landlord's loss.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 23 of the *Act* states that the Landlord and Tenant must inspect the condition of the rental unit together on the day the Tenant is entitled to possession of the rental unit or on another mutually agreed day.

Section 35 of the *Act* states that the Landlord and Tenant must inspect the condition of the rental unit together before a new tenant begins to occupy the rental unit, after the day the Tenant cease to occupy the rental unit, or on another mutually agreed day. As well, the Landlord must offer at least two opportunities for the Tenant to attend the move-out inspection report.

Section 21 of the *Regulations* outlines that the condition inspection report is evidence of the state of repair and condition of the rental unit on the date of the inspection, unless either the Landlord or the Tenant has a preponderance of evidence to the contrary.

Sections 24(2) and 36(2) of the *Act* state that the right of the Landlord to claim against a security deposit for damage is extinguished if the Landlord does not complete the condition inspection reports in accordance with the *Act*.

I find it important to note that the Landlord is required to complete the inspection reports in accordance with the *Act*. As well, the *Act* requires that it is the Landlord's responsibility to coordinate the inspections if they want to ensure their ability to make a claim against the deposit.

While C.G. claimed to be too busy to attend a move-out inspection report, by shirking this responsibility, he is simply putting the Landlord at a disadvantage as the right to claim against the security deposit would be extinguished. Furthermore, by making a

claim against the deposit after this right has been extinguished, the deposit will automatically be doubled in favour of the Tenant. As a note, the Landlord has the ability to set a final opportunity for the Tenant to attend an inspection by using the approved form. I do not find it acceptable that the property manager's failure to manage their business efficiently would be considered a reasonable excuse for not scheduling a move-out inspection.

Section 38 of the *Act* outlines how the Landlord must deal with the security deposit at the end of the tenancy. With respect to the Landlord's claim against the Tenant's security deposit, Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenant's forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with Section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must pay double the deposit to the Tenant, pursuant to Section 38(6) of the *Act*.

Based on the consistent and undisputed evidence before me, the Landlord received the Tenant's forwarding address on September 1, 2020. Furthermore, the Landlord made an Application, using this same address, to attempt to claim against the deposit on September 15, 2020. While the Landlord made this Application within 15 days of receiving the Tenant's forwarding address in writing, the Landlord extinguished the right to claim against the deposit as they failed to comply with the *Act* with respect to coordinating a move-out inspection report. However, I note that extinguishment applies to damage claims. As the Landlord sought compensation for rental arrears, liquidated damages, and utilities, I do not consider these to be damage to the rental unit. As such, I am satisfied that the doubling provisions do not apply to the security deposit in this instance.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

Regarding the Landlord's claim for lost rent of $1,073.33 for half of September 2020 rent, there is no dispute that the parties entered into a fixed term tenancy agreement from July 1, 2020 for a period of one year, ending on June 30, 2021. Yet, the tenancy effectively ended when the Tenant gave up vacant possession of the rental unit on September 1, 2020.

I find it important to note that Policy Guideline # 5 outlines a Landlord's duty to minimize their loss in this situation and that the loss generally begins when the person entitled to

claim damages becomes aware that damages are occurring. Moreover, in claims for loss of rental income in circumstances where the Tenant ends the tenancy contrary to the provisions of the Legislation, the Landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit.

Based on the undisputed evidence before me, I am satisfied that the Tenant gave notice to end the tenancy at the end of July 2020. At this point in the month, I find it reasonable to conclude that many prospective tenants looking for a new place to rent for September 1, 2020 had given notice earlier and likely would have secured a tenancy already. Thus, I am satisfied that by giving notice this late in the month, it would have reduced the Landlord's likelihood of re-renting for September 1, 2020.

While the Tenant purported that there was a lot of interest in the rental unit, he did not provide sufficient evidence to support this. He made claims that he had many prospective tenants view the rental unit, but he did not provide any evidence to corroborate that these potential tenants were in any way qualified, nor did he provide any evidence that he directed these people to the Landlord for approval. Furthermore, the basis for the Tenant's submissions with respect to this claim is that he just does not believe that the Landlord did their best to mitigate this loss to find a tenant for September 1, 2020.

I find it important to note that the Tenant gave notice to end the fixed term tenancy within the first month of renting. Moreover, the reason for this is because he acknowledged that he did not do his due diligence in researching a suitable place to rent and furthermore, he attempted to cast blame on the Landlord for not informing him about the neighbourhood. In my view, I find that there is a clear pattern here where the Tenant does not take responsibility for his own actions and is attempts to deflect the consequences of his decisions on another party. On the whole, I find the Tenant's submissions to be weak, unpersuasive, and to have no merit.

Consequently, I prefer the Landlord's evidence. I am satisfied that the Landlord made reasonable efforts, effectively mitigated this loss, and re-rented the unit as quickly as possible. Therefore, I am satisfied that the Tenant is responsible for the first half of September 2020 rent. Consequently, I grant the Landlord a Monetary Order in the amount of **$1,073.33** to satisfy this claim.

With respect to the Landlord's claim for utilities owing of $114.41, as the Tenant confirmed that he was responsible for this amount, I grant the Landlord a Monetary Order in the amount of **$114.41** to rectify this claim.

Finally, regarding the Landlord's claims for compensation in the amounts of $41.93 and $1,207.50, clearly these are costs associated with re-renting the unit after the Tenant broke the fixed term tenancy. Moreover, a liquidated damages clause in a tenancy agreement is generally what would apply to these types of expenses. Furthermore, I find it important to note that the Landlord included a charge for liquidated damages in

the tenancy agreement as “1 month’s rent” and highlighted this clause in the tenancy agreement that was submitted as documentary evidence. Finally, in the Landlord’s Application, it is noted in the description of the claim that “He confirms he understands he is responsible for the rent until it is re-rented and understands the liquidated damages from clause 12.”

Policy Guideline # 4 states that 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” and that the “amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into”. This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- 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.

While K.E. claimed that the Landlord was only seeking compensation for $41.93 and $1,207.50, it is clear to me that this claim is related to the liquidated damages clause in the tenancy agreement. As such, this claim will be addressed in relation to this clause.

Based on the undisputed evidence before me, there was a liquidated damages clause in the tenancy agreement that both parties had agreed to. However, this amount is meant to be calculated as a genuine pre-estimate of the Landlord’s loss to re-rent the rental unit. Furthermore, the Landlord presented evidence that the loss suffered to re-rent the unit was $1,249.43. Given that the amount of liquidated damages is noted in the tenancy agreement simply as “1 month’s rent”, I find that the Landlord failed to explain how the notation of “1 month’s rent” is a genuine pre-estimate of this loss. It does not appear to me that this amount is a genuine pre-estimate of this loss, but rather simply an amount chosen as it happened to be conveniently equivalent to one month’s rent.

I do not find it reasonable that the Landlord can include a liquidated damages clause in a tenancy agreement, and then attempt to claim a lesser amount if the genuine pre-estimate on the tenancy agreement was too high in the first place. Furthermore, as the amount listed on the tenancy agreement is noted as “1 month’s rent”, I am satisfied that little thought was actually put into what would be considered a genuine pre-estimate of loss. As such, I find that the amount of liquidated damages noted on the tenancy agreement constituted a penalty, and I dismiss this claim in its entirety.

As the Landlord was partially successful in these claims, I find that the Landlord is entitled to recover the $100.00 filing fee paid for this Application. Under the offsetting

provisions of Section 72 of the *Act*, I allow the Landlord to retain the security deposit in partial satisfaction of these claims.

As it was not necessary for the Tenant to make an Application, and as the security deposit was awarded to the Landlord on the Landlord's Application, I do not find that the Tenant was successful in his Application. As such, I find that the Tenant is not entitled to recover the $100.00 filing fee paid for this Application.

Pursuant to Sections 38, 67, and 72 of the *Act*, I grant the Landlord a Monetary Order as follows:

Calculation of Monetary Award Payable by the Tenant to the Landlord

Portion of September 2020 rent owed	$1,073.33
Cost of utilities	$114.41
Filing fee	$100.00
Security deposit	-$1,150.00
TOTAL MONETARY AWARD	**$137.74**

Conclusion

The Landlord is provided with a Monetary Order in the amount of **$137.74** in the above terms, and 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: January 8, 2021

Residential Tenancy Branch