Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Real Property Management Central
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

1. A Monetary Order for compensation - Section 67;
2. An Order to retain the security deposit - Section 38; and
3. An Order to recover the filing fee for this application - Section 72.

The Parties were each given full opportunity under oath to be heard, to present evidence and to make submissions.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Background and Evidence

The following are agreed facts: the tenancy under written agreement started on September 1, 2020 for a fixed term to end August 31, 2021. The tenancy ended on October 31, 2020. Rent of $1,600.00 was payable on the first day of each month. At the outset of the tenancy the Landlord collected $850.00 as a security deposit and $850.00 as a pet deposit. On October 25, 2020 the Landlord received the Tenants' notice to end the tenancy for October 31, 2020 by email. On November 2, 2020, at the move-out inspection, the Landlord received the Tenants' forwarding address.

The Landlord states that despite the email it was not sure if the Tenants were leaving on October 31, 2020 as written notice was required and not received. The Landlord states that it became certain that the Tenants were leaving when they called for a move-out inspection. The Landlord states that on November 3, 2020 it placed online advertisements for the unit at the same monthly rent. The Landlord states that the unit was rented for January 15, 2020 at monthly rent of $1,550.00. The Landlord states that the unit did not rent sooner as the market slows as of November 1 each year. The Landlord claims lost rental income for November 2020 of $1,600.00. The Landlord also claims lost rental income for the period December 1, 2020 to January 14, 2021. The Landlord confirms that it did not amend the application to increase its monetary claim for this period.

The Landlord claims $800.00 as re-rental costs. The Landlord states that this is the amount the owner is charged by its agent for carrying out the re-rental of the unit, made up of marketing costs and time. The Landlord confirms that it did not provide a copy of an invoice.

The Tenant states as follows: They were assured at the outset of the tenancy that their unit was quiet and given their work hours, this was an important consideration. They experienced loud noise at all hours of the night and day from the upper unit that disturbed their sleep and ability to work. They informed the Landlord of the noise problems on October 22, 2020 by email. The Landlord then immediately called the upper tenants without first responding to the Tenants and they became concerned as the upper tenants had told them that only they should be contacted about problems and not to contact the Landlord. The Tenants became uncomfortable with the situation when the upper tenants told them to “go screw yourselves”.

The Landlord states that within minutes of receiving the Tenants’ email about noise the upper tenants were called. They were also given a warning by email. The Landlord

states that the Tenants were informed by email that the Landlord needed time to deal with the issue.

Analysis

Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. This section further provides that where a landlord or tenant claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement the claiming party must do whatever is reasonable to minimize the damage or loss.

Although the Landlord's evidence indicates that it could not rely on the Tenants' email giving their notice, the Landlord also provided evidence that it responded to another of the Tenants' email about noise by acting immediately and without speaking to the Tenants first about their email. This indicates that the Landlord could rely on email correspondence from the Tenants. It appears from this evidence that the Landlord choose not to respond to the Tenants' email of their notice to end tenancy and did nothing, including contacting the Tenants to confirm the notice or to inform them that a different method of sending their notice was required. The Landlord waited until after the start of the next month to advertise when the Landlord, according to the Landlord's own evidence, knew that the ability to re-rent the unit would then be limited significantly. For this reason I find that, although the Tenants breached the fixed term and although I consider that ending the tenancy only after a couple of days after the noise complaint does not give the Landlord reasonable time to remedy the situation, the Landlord contributed to the losses caused by the breach of the fixed term by failing to act upon obtaining the email notice and by waiting to advertise the unit for re-rental. In this situation I find that the Landlord contributed equally to its losses and that the Landlord has therefore only substantiated an entitlement to **$800.00** representing one half of its claim for lost rental income for November 2020.

Rule 2.3 of the Residential Tenancy Branch Rules of Procedure provides that claims are limited to what is stated in the application. Rule 4.2 provides that in circumstances that can be reasonably anticipated, an application may be amended at the hearing. The Landlord did not make an application to amend its original application to increase the claim for lost rental income. Lost rental income is not the same claim as reasonably anticipated unpaid rent that accumulates when a tenant remains in a unit and continues to not pay rent after the landlord has made an application for unpaid rent. Lost rental income cannot therefore be reasonably anticipated allowing an amendment at the hearing. For these reasons I dismiss the Landlord's claim for lost rental income for December 2020 to January 15, 2021.

As the Landlord is responsible under Section 7 of the Act for mitigating any losses being claimed, I find that the costs to carry out this responsibility remains with the Landlord. I therefore dismiss the claim for re-rental costs of $800.00.

Section 19(1) of the Act provides that a landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement. Given the undisputed evidence of the monthly rent of $1,600.00 I find that by collecting $850.00 for each of the security and pet deposit the Landlord breached the Act. For this reason, I decline to award the Landlord with recovery of the filing fee and this claim is dismissed.

Deducting the Landlord's entitlement of $800.00 from the combined security and pet deposits plus zero interest of **$1,700.00** leaves **$900.00** to be returned to the Tenants forthwith.

Conclusion

I Order the Landlord to retain **$800.00** from the security deposit plus interest $1,700.00 in full satisfaction of the claim.

I grant the Tenant an order under Section 67 of the Act for **$900.00**. If necessary, this order may be filed in the Small Claims 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 Act.

Dated: March 3, 2021

Residential Tenancy Branch