



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

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

- a monetary order for unpaid rent and for compensation under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord and the two tenants, female tenant ("tenant") and "male tenant," attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The hearing began at 1:30 p.m. with me and the two tenants present. The landlord called in at 1:31 p.m. The hearing ended at 2:16 p.m.

At the outset of the hearing, I informed both parties that they were not permitted to record this hearing, as per Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure* ("Rules"). The landlord and the two tenants all affirmed under oath that they would not record this hearing.

During the hearing, I explained the hearing and settlement processes to both parties. Both parties had an opportunity to ask questions. Both parties confirmed that they were ready to proceed with the hearing, they did not want to settle this application, and they wanted me to make a decision regarding this application. Neither party made any adjournment or accommodation requests.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing package and amendment and the landlord confirmed receipt of the tenants' evidence. In accordance with sections 88, 89 and 90 of the *Act*, I find that both tenants were duly served with the landlord's application and amendment and the landlord was duly served with the tenants' evidence.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's application to increase his monetary claim from \$4,800.00 to \$5,137.95. The tenants confirmed that they received and had notice of the landlord's amendment and updated monetary order worksheet with the increased monetary claim.

Issues to be Decided

Is the landlord entitled to a monetary order for unpaid rent and for compensation under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to retain the tenants' security deposit?

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

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on December 1, 2018 and ended on February 28, 2019. A written tenancy agreement was signed by both parties. Monthly rent in the amount of \$2,400.00 was payable on the first day of each month. A security deposit of \$1,200.00 was paid by the tenants and the landlord continues to retain this deposit in full. Move-in and move-out condition inspection reports were completed for this tenancy. The tenants did not provide a written forwarding address to the landlord. The landlord did not have written permission to keep any amount from the tenants' security deposit. The landlord's application to retain the tenants' security deposit was filed on February 26, 2021.

The landlord seeks a monetary order of \$5,137.95, to retain the tenants' security deposit of \$1,200.00, and to recover the \$100.00 application filing fee. The tenants dispute the landlord's application.

The landlord testified regarding the following facts. He seeks \$2,400.00 for a loss of March 2019 rent. The tenants gave notice on February 6, 2019 to move out. The parties have a fixed term tenancy agreement. The landlord showed the rental unit for many days in February 2019. He had 15 to 20 applicants, but people had to give monthly notice to vacate their current unit. On April 1, 2019, the landlord found new tenants to rent the unit and they moved in on March 31, 2019. There is a clause in the tenancy agreement that provides for liquidated damages, which is one month's rent of \$2,400.00, that the tenants agreed to pay when they signed it. The tenants left the property in a mess, the carpets were not shampooed, and the unit was not cleaned. The carpet company made a report. The landlord thinks that the tenants had a pet in the unit. When the move-out condition inspection was done, the tenants did not provide a forwarding address. The landlord added notes on the move-out condition inspection report. The male tenant was "belligerent" and refused to sign the report. The landlord had difficulty tracking down the tenants and thinks they left the rental unit because they bought a new place.

The tenant testified regarding the following facts. When she was eight months pregnant, the landlord was constantly calling, sending text messages, and accessing the rental unit without 24 hours' notice. The landlord refused to give proper entry notice and he would only speak with the male tenant. The tenants' son was born in January 2019. The tenant was living alone in the rental unit for a lot of the time because the male tenant was travelling. She felt unsafe because the landlord wanted constant access to the rental unit, and he had a key. The tenants filed a police report because they think that the landlord took their son's passport. The tenants moved out because of "harassment" by the landlord. They gave notice on February 6, 2019 to move out. They offered a sublease to the landlord. The landlord showed the rental unit for 6 hours to 20 people. The landlord wanted to complete renovations to the rental unit, since it was old, before re-renting it to new tenants. The tenants provided access for the landlord to show the rental unit to prospective tenants, despite having a two-month-old baby. The rental unit was clean and there were no damages when the tenants moved out. The tenants did not have a pet in the unit. They did not provide a forwarding address because they felt unsafe. The landlord could have sent an e-transfer of the tenants' security deposit, as e-transfer was used for rent payments. The tenants own multiple properties that they rent out and it is easy to find tenants. Usually only three to five people are shown the unit and it is re-rented.

The male tenant testified regarding the following facts. The tenants did not receive a copy of the move-out condition inspection report from the landlord, except when they received this application. The original move-out condition inspection report did not note any damages, but the landlord added information later. The landlord was “mad” that no forwarding address was provided by the tenants, but he could have emailed information and used e-transfer to return the security deposit. The male tenant left the move-out inspection because the landlord was “aggressive.” The tenants moved out because of the landlord’s “harassment.” The tenants allowed the landlord to show the rental unit for 6.5 hours to prospective tenants. The tenants cleaned the rental unit and there were no damages when they moved out.

Analysis

Pursuant to section 60(1) of the *Act*, I find that I have jurisdiction to decide this application, as it was filed on February 26, 2021, which is within two years from the end of tenancy date of February 28, 2019.

Legislation and Rules

At the outset of this hearing, I notified the landlord that as the applicant, he was required to present his application and prove his claims on a balance of probabilities.

The following RTB *Rules* state, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party’s agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

I find that the landlord did not properly present his evidence, as required by Rule 7.4 of the RTB *Rules*, despite having the opportunity to do so during the hearing, as per Rules 7.17 and 7.18 of the RTB *Rules*. During the hearing, the landlord failed to properly go through specific claims, the amounts for each claim, and the documents he submitted for this hearing.

The hearing lasted 46 minutes, so the landlord had ample opportunity to present his application. However, the landlord did not go through any of his documents during the hearing. Both parties were more focussed on arguing with each other about the landlord's wife serving documents to the tenants and the tenants' son's missing passport police claim.

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

- 1) Proof that the damage or loss exists;
- 2) Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
- 3) Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- 4) Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

On a balance of probabilities and for the reasons stated below, I make the following findings based on the testimony and evidence of both parties.

Rent Loss

Subsection 45(2) of the *Act* sets out how tenants may end a fixed term tenancy:

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.

The above provision states that tenants cannot give notice to end the tenancy before the end of the fixed term. If they do, they may have to pay for rent losses to the landlord.

In this case, the tenants ended the tenancy, prior to the end of the fixed term on November 30, 2019. The landlord did not indicate this fixed term end date or review the tenancy agreement during this hearing. However, the landlord provided a copy of the written tenancy agreement for this hearing.

I find that the tenants breached the fixed term tenancy agreement. As such, the landlord may be entitled to compensation for losses he incurred as a result of the tenants' failure to comply with the terms of the tenancy agreement and the *Act*.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

At the hearing, both parties agreed that the landlord received notice from the tenants on February 6, 2021, that they were vacating the rental unit on February 28, 2019. The landlord did not explain what costs, if any, were incurred by the landlord, to re-rent the unit. He did not indicate if or when any advertisements were posted or provide copies of any advertisements. He did not provide copies of any inquiries or applications from prospective tenants and he did not indicate the dates of such showings or inquiries. The landlord did not provide a copy of a new written tenancy agreement that was signed by any new tenants. The landlord did not reference any documents relating to his efforts to re-rent the unit.

Both parties agreed that the landlord completed numerous showings of the rental unit, which the landlord said was 15 to 20 showings. Both parties agreed that the tenants accommodated the landlord's showings at the rental unit. However, the landlord provided insufficient evidence to show why he was unable to re-rent the unit to new tenants for March 1, 2019, despite numerous applications for same. I find that the landlord failed to mitigate his losses in this regard.

For the reasons stated above, I dismiss the landlords' application of \$2,400.00 for a loss of rent, without leave to reapply.

Liquidated Damages

Residential Tenancy Policy Guideline 4 provides information regarding liquidated damages. 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.

I find that the cost of re-renting a unit to new tenants is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants, numerous times.

In this case, the landlord did not indicate what specific section of the tenancy agreement provided for liquidated damages. Liquidated damages are not included in the parties' written tenancy agreement that was provided by the landlord for this hearing, as a standard RTB form was used. Liquidated damages are referenced in the parties' addendum to the tenancy agreement, but the landlord did not reference this document during the hearing. He did not indicate what section of the addendum referenced liquidated damages or explain the wording or intention of this section at all.

As noted above, the landlord did not provide copies of any advertisements posted to re-rent the unit, nor did he indicate if, when or how any advertisements were posted. The landlord did not explain how the \$2,400.00 amount, which equals one full month of rent, is not a penalty. Although the tenants vacated the rental unit prior to the end of their fixed term on November 30, 2019, I find that the landlord did not show how the \$2,400.00 claimed for liquidated damages was a genuine pre-estimate of the loss.

For the above reasons, I dismiss the landlord's claim of \$2,400.00 for liquidated damages, without leave to reapply.

Cleaning and Other Costs

I dismiss the landlord's application of \$260.00 for "cleaning of suite" and \$77.95 for "cleaning of carpets," without leave to reapply.

The above amounts were indicated in the landlord's monetary order worksheet, which was not reviewed by the landlord during the hearing. The landlord did not state these

amounts during the hearing, nor did he review any receipts, invoices or other documentary evidence to substantiate these claims during the hearing.

The landlord failed to provide photographs to show the condition of the rental unit when the tenants moved in and out. I accept the affirmed testimony of both tenants that they properly cleaned the rental unit before they vacated.

As the landlord was mainly unsuccessful in this application, I find that he is not entitled to recover the \$100.00 filing fee from the tenants.

Tenants' Security Deposit

The landlord continues to hold the tenants' security deposit of \$1,200.00. Over the period of this tenancy, no interest is payable on the deposit.

Section 39 of the *Act* states the following:

Landlord may retain deposits if forwarding address not provided

39 Despite any other provision of this Act, if a tenant does not give a landlord a forwarding address in writing within one year after the end of the tenancy,

(a) the landlord may keep the security deposit or the pet damage deposit, or both, and

(b) the right of the tenant to the return of the security deposit or pet damage deposit is extinguished.

It is undisputed that the tenants did not provide a forwarding address to the landlord. It is also undisputed that the tenancy ended on February 28, 2019, more than two years prior to this hearing on July 16, 2021.

Therefore, as per section 39 of the *Act* above, I find that the landlord is entitled to retain the tenants' entire security deposit of \$1,200.00 and the right of the tenants to the return of their security deposit is extinguished.

Accordingly, I order the landlord to retain the tenants' entire security deposit of \$1,200.00.

Conclusion

I order the landlord to retain the tenants' entire security deposit of \$1,200.00.

The remainder of the landlord's application is dismissed without leave to reapply.

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: July 16, 2021

Residential Tenancy Branch