Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AQUILINI PROPERTIES LP and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S FFL

Introduction

The landlord seeks compensation for unpaid rent pursuant to sections 26 and 67 of the *Residential Tenancy Act* ("Act"). In addition, the landlord seeks recovery of the filing fee under section 72 of the Act.

A representative for the landlord, the tenant, and a co-tenant (the tenant's guarantor) attended the hearing. No issues with the service of evidence were raised and Rule 6.11 of the *Rules of Procedure* was explained to the parties.

Issues

1. Is the landlord entitled to compensation for unpaid rent?
2. Is the landlord entitled to recover the cost of the application filing fee?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issues of this dispute, and to explain the decision, is reproduced below.

The tenancy began on January 31, 2020, and the tenancy was a fixed-term tenancy that was supposed to end on January 31, 2021. Monthly rent was $2,095.00 (due on the first of the month) and the tenant paid a security deposit of $1,047.50. This security deposit is currently held in trust by the landlord pending the outcome of this dispute.

A copy of the written tenancy agreement was submitted into evidence.

On August 14, 2020, the tenant gave written notice to the landlord that she intended to end the tenancy effective September 30, 2020. A copy of the tenant's notice was in evidence; the notice indicated that the pandemic caused the tenant to be unable to have sufficient funds to meet her rent obligations.

In this application, the landlord seeks compensation equivalent to four months rent for the period of October 1, 2020 until January 31, 2021, for a total of $8,380.00. A copy of the tenant's ledger was provided into evidence, showing the accumulated arrears.

The landlord's agent testified that the landlord discussed the option of the tenant assigning the lease. The tenant at one point notified the landlord that a subtenant had been secured. However, the landlord was unable to track down the application made by the subtenant. In early October, the landlord started advertising the rental unit on Craigslist. A new tenant was eventually found for a tenancy that began February 2021.

The tenant argued that it is somewhat surprising that the landlord did not start risk mitigation by advertising until October. And, while the tenant gave written notice on August 14, it was not until four days before she planned on moving out that the landlord representative ("Kyle") contacted her and threatened legal action.

A new, potential subtenant was secured by the tenant, and there was a viewing. This subtenant was prepared to take occupancy on October 1, 2020. However, Kyle was on vacation and ultimately the subtenant did not go through the sublet application process. According to the subtenant (recognizing that whatever the subtenant may have said is hearsay evidence), the application process was "too complicated."

In addition, the tenant argued that other rental units were being listed at lower rents, which lessened the landlord's ability to mitigate the loss of rent. Though, the tenant also submitted that the rental unit ought not to have been listed at the full rent, and that by lowering the rent the landlord could have found a tenant sooner. Indeed, the tenant remarked that she found it odd that the landlord did not secure a new tenant until after January 31.

In her testimony, the tenant briefly raised the matter of a broken patio door, which she argued affected the ability to get the rental unit rented out. Apparently, the landlord was rather slow in responding to her requests to fix the door. And that in having the broken patio door go unfixed for a period of time the tenant experienced greater difficulty in mitigating losses.

In rebuttal, the landlord testified that they could not advertise the rental unit while the tenant was still living in the rental unit. Rather, it is the landlord's practise to ask the tenant to take care of the advertising for a potential assignment of the tenancy. In respect of the advertising, the landlord's representative testified that there will always be some variation in prices between the rental unit in question and other available units. Finally, the landlord explained that the main method for advertising is through Craigslist.

In closing, the tenant said that when she gave her notice in August there was "no process" for assigning the tenancy. And, that it was not until September 27 that the landlord stated an intention to take legal action.

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.

1. Claim for Loss of Rent

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 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) *[director's authority respecting dispute resolution proceedings]*, 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.

First, then, we must ask: did the tenant fail to comply with the tenancy agreement, the Act, or the regulations?

Section 45(2) of the Act deals with the method by which a tenant is to end a fixed term tenancy. This section of the Act reads as follows:

> A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (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
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> (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.

In this case, the tenant ended the tenancy effective September 30, 2020, which is earlier than the date specified in the tenancy agreement as the end of the tenancy. Thus, the undisputed evidence of the parties leads me to conclude that the tenant breached the tenancy agreement, and section 45(2)(b) of the Act, by ending the tenancy earlier. Thus, the first criterion has been proven.

At this point, I must state that I am not unsympathetic to the tenant's reasons for wanting to end the tenancy related to the pandemic. Unfortunately, inability to pay the rent (for whatever reason) is not a recognized exception to having to meet one's obligations under a tenancy agreement and the Act.

Next, we must ask: did the loss or damage result from the non-compliance? Having found that the tenant breached the Act, I must next determine whether the landlord's 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 respondent's wrongful

act and the applicant's loss. It is this connection that justifies the imposition of responsibility on the negligent respondent.

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 respondent's 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 or not the respondent was negligent, their negligence is not a cause-in-fact.

In this case, I find that but for the tenant's breach of the Act and the tenancy agreement, the landlord would not have experienced loss of rent. The second criterion is therefore satisfied.

Third, has the landlord proven the amount or value of their damage or loss?

The answer is a resounding "yes." The amount of loss is the loss in rent that the landlord suffered from the time that the tenant breached the Act by ending the tenancy earlier than permitted, until the time that the fixed term tenancy expired. This amount is equivalent to $8,380.00.

Last, did the landlord do whatever was reasonable to minimize the loss?

I find that the landlord, in not taking active steps to advertise the rental unit until early October, failed to do whatever was reasonable to minimize the loss of rent. At least, that is, for the month of October. However, the landlord did, I find, take reasonable steps to minimize the loss of rent for November, December, and January.

Several copies of advertisements for the rental unit were in evidence, and they reflect reasonable efforts by the landlord to find a new tenant. While the tenant argued that they took efforts to find a new tenant, the obligation to minimize a loss of rent falls on the landlord, not on the tenant. Despite the landlord's position that they leave the advertising up to a tenant, it is unreasonable in my mind to shift the entire burden of risk mitigation to a tenant. A landlord must take a more active role in minimizing a potential loss of rent, and not leave it to a tenant to find a new tenant, and, not begin advertising until after the tenant has left.

In summary, 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 landlord has met the onus of proving their claim for loss of rent.

However, given the above findings in respect of the landlord's failure to take reasonable steps on an earlier date (the landlord was aware of the tenant's notice to end tenancy in mid-August), I must reduce the amount of the loss by an amount equivalent to the rent for October. A reduced award of $6,285.00 is therefore given.

As an aside, while both parties explained their respective positions on the damaged patio door, there is insufficient before me to find that the damaged door actually negatively impacted parties' ability to secure a new tenant. For this reason, the award granted is not affected by the issue of the patio door.

2. Claim for Application Filing Fee

Section 72 of the Act permits me to order compensation for the cost of the filing fee to a successful applicant. As the landlord succeeded in their application, I grant them $100.00 in compensation to cover the cost of the filing fee.

Summary of Award, Retention of Security Deposit, and Monetary Order

The landlord is awarded a total of $6,385.00.

Section 38(4)(b) of the Act permits a landlord to retain an amount from a security or pet damage deposit if "after the end of the tenancy, the director orders that the landlord may retain the amount."

As such, I order that the landlord may retain the tenant's security deposit of $1,047.50 in partial satisfaction of the above-noted award.

The balance of the award is issued by way of a monetary order in the amount of $5,337.50. This order, which must be served by the landlord on both tenants (that is, a copy must be served on the tenant's guarantor), is issued to the landlord in conjunction with this decision.

Conclusion

The landlord's application is granted.

I hereby award the landlord a total of $6,385.00 and authorize the landlord to retain the tenants' $1,047.50 security deposit.

I hereby grant the landlord a monetary order in the amount of $5,337.50, which must be served on the tenants. If the tenants fail to pay the landlord the amount owed, the landlord may file and enforce the order in the Provincial Court of British Columbia.

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: August 6, 2021

Residential Tenancy Branch