# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNDCL-S, FFL

Introduction

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

- a Monetary Order for damage or compensation, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

The landlord's agent (the "agent") and the 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.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this decision and order.

Both parties agree that the agent served the tenant with the landlord's application for dispute resolution via registered mail. I find that the tenant was served with the landlord's application for dispute resolution in accordance with section 89 of the *Act.*

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to retain the tenant's security and pet damage deposits, pursuant to section 38 of the *Act*?
3. Is the landlord entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*?

Background and Evidence

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

Both parties agreed to the following facts. This fixed term tenancy began on August 15, 2021 for a one-year term. The tenant moved out of the subject rental property at the end of February 2021, and the keys were returned to the landlord on February 28, 2021. Monthly rent in the amount of $1,500.00 was payable on the first day of each month. A security deposit of $750.00 and a pet damage deposit of $750.00 (the "deposits") were paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The tenant testified that the landlord was served with the tenant's forwarding address via registered mail on March 22, 2021. A Canada Post registered mail receipt stating same was entered into evidence. The agent testified that he received the tenant's forwarding address via registered mail sometime in early April 2021 before April 5, 2021. The Canada Post website states that the package was delivered on March 25, 2021 and that a signature is available for delivery confirmation.

The tenant testified that he informed the agent that he wanted to move out of the subject rental property via text message on January 11, 2021. The tenant testified that he wanted to move because of drug related activity in the neighbourhood. Both parties agree that they communicated via text and that the agent informed the tenant that the tenant would be responsible for any loss of rental income suffered by the landlord.

The agent testified that he started advertising the subject rental property for rent in early February or late January 2021 at the same rental rate of $1,500.00. The following text messages dated January 11, 2021 were entered into evidence:

- Tenant:
    - [Agent], do you think the landlord would let me break my lease early? I'm really unhappy here. I'll tough it out of I had to but honestly would rather not…
- Agent:
    - Hello [tenant] let me look for a new tenant and speak to landlord boss.
    - I'll begin looking

The following text message dated January 16, 2021 were entered into evidence:

- Tenant:
    - Ok. Did you happen to mention to [the landlord] that I wanted to move?
- Agent:
    - Hello sir
    - Can you refresh my memory when your lease ends sir.
- Tenant:
    - Not until August 15.
- Agent:
    - Okay
    - Let me as boss man again

- Tenant:
    - Yeah that's totally fine. I have no problem fulfilling my lease agreement but if I don't have to then I prefer not to. Thank you
    - If you can for March 1st, that would be ideal.
- Agent:
    - I will begin my search

In a text message exchange between the agent and the tenant dated January 31, - February 1, 2021 the tenant informs the agent that he has posted an online advertisement for the subject rental property. The agent then requests the tenant to provide him with the contact information for any interested parties. The agent also seeks permission to show the subject rental property on February 2, 2021 to a prospective tenant.

The agent testified that in mid March 2021 they found a new tenant to move into the subject rental property for April 1, 2021 at a rental rate of $1,500.00. The new tenancy agreement starting April 1, 2021 was entered into evidence. The agent testified that the landlord is seeking March 2021's rent in the amount of $1,500.00 from the tenant for loss of rental income stemming from the tenant's breach of the fixed term tenancy agreement.

The agent testified that the new tenant asked him if he could move his belongings into the subject rental property early. The agent testified that, as a courtesy, he allowed the new tenant to move his belongings into the subject rental property on March 22, 2021. The agent testified that the new tenant did not start sleeping at the subject rental property until April 1, 2021 and did not pay any rent for March 2021.

The tenant testified that the new tenant moved in on March 19, 2021 and that he should not be responsible for rent from March 19-31, 2021 because someone else was living at the subject rental property at that time. The tenant testified that he first noticed someone had moved in on March 22, 2021 when he saw a cat in the window of the subject rental property. The tenant entered into evidence text messages dated March 22, 2021 in which he asks the agent who has moved in and why there is a cat in the window.

Both parties agree that on March 22, 2021 the agent, the tenant and the new tenant had a three-way call. The tenant testified that the new tenant told him on that call that he moved in on March 19, 2021.

The agent submitted that since the new tenant was not charged rent for March 2021, the landlord still suffered a loss of rental income for the month of March 2021 due to the tenant's breach of the tenancy agreement.

The agent testified that the landlord is also seeking to recover from the tenant the re-leasing fee of $360.00. The agent testified that he charges the landlord for each new tenant found pursuant to the following calculation:

(rent) X (6) X (.04) = re-leasing fee

The agent testified that for the subject rental property, the releasing fee was:

$1,500.00 (rent) X 6 X .04 = $360.00.

No documentary evidence to support this testimony was provided such as an invoice or contract providing the details of the re-leasing fee calculation.

The agent testified that he made a math mistake when initially calculating the re-leasing fee and that this application for dispute resolution claims $330.00 instead of the $360.00 that is actually owed.

Both parties agree that they completed joint move in and out condition inspections. Both parties agree that the tenant agreed to allow the landlord to retain $100.00 from the tenant's security deposit for damage to the subject rental property.

Analysis

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

Policy Guideline 5 states that where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided. The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved.

Policy Guideline 3 states that the damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy.

In this case, the tenant ended a one-year fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement for the month of March 2021. Pursuant to section 7, the tenant is required to compensate the landlord for that loss of rental income. However, the landlord also has a duty to minimize that loss of rental income by re-renting the unit at a reasonably economic rate as soon as possible.

Section 52 of the *Act* states that in order to be effective, a notice to end a tenancy must be in writing and must

> (a)be signed and dated by the landlord or tenant giving the notice,
> (b)give the address of the rental unit,
> (c)state the effective date of the notice,
> (d)except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
> (d.1)for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
> (e)when given by a landlord, be in the approved form.

Based on the text messages entered into evidence and the agent's testimony I find that the tenant first informed the agent that he wished to end the fixed term tenancy early on January 11, 2021. I find that the January 11, 2021 text message is more in the nature of an inquiry regarding the possibility of ending the tenancy as it does not conform to the form and content requriements of section 52 of the *Act* and notable, does not provide an end date for the tenancy.

I find that the January 16, 2021 text message does not meet the form and content requirements of section 52 of the *Act.* Nonetheless, I find that the agent acted on the tenant's January 16, 2021 text message and started looking for new tenants at the end

of January 2021, which is supported by the February 1, 2021 text message in which the agent first asks the tenant for permission to show the subject rental property on February 2, 2021.

Pursuant to my above findings, I find that the landlord attempted to mitigate its losses by advertising the subject rental property for rent shortly after the tenant provided a preferred move out date in the January 16, 2021 text message.

I found the tenant's testimony to be credible and straight forward. I accept the tenant's testimony that the new tenant told him that he moved into the subject rental property on March 19, 2021. I accept the agent's testimony that the new tenant did not pay rent for March 2021 and that the agent allowed the new tenant to move in early as a courtesy.

I find that while the tenancy agreement with the new tenant states that the tenancy started on April 1, 2021 and that rent was due on April 1, 2021, I find that the new tenancy started on the day the new tenant moved themselves and or their belongings in, that being March 19, 2021. The landlord is under no obligation to charge the new tenant pro-rated rent for March 2021 but is not permitted to charge the tenant for loss of rental income when another person and or that other persons' belongings, are residing in the unit and the landlord has elected not to charge them rent.

I find that pursuant to section 7 of the *Act* and Residential Tenancy Branch Policy Guidelines 3, 5 and 16, the tenant is responsible for the loss of rental income suffered by the landlord from March 1-18, 2021 pursuant to the following calculation:

> $1,500.00 (rent) / 31(days in March) = $48.39 (daily rate)
>
> $48.39 (daily rate) X 18 (days subject rental property vacant) = $871.02

<u>Re-leasing fee</u>

Section 67 of the *Act* states:

> 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.

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To be successful in a monetary claim, the applicant must establish all four of the following points:

1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Failure to prove one of the above points means the claim fails.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that 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.

The agent testified that the landlord is seeking $360.00 for the cost of re-renting the subject rental property. I find that the landlord has failed to prove the value of the loss or damage suffered as no receipts, invoices or other documents providing the cost of the re-renting fee were entered into evidence. The landlord's application to recover the $360.00 leasing fee is dismissed without leave to reapply.

Deposits and filing fee

Based on the registered mail receipt and Canada post website, I find that the agent received the tenant's forwarding address on March 25, 2021. The landlord filed for dispute resolution for authorization to retain the tenant's deposits on April 1, 2021.

Section 38(1) of the *Act* states that within 15 days after the later of:

(a)the date the tenancy ends, and

(b)the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c)repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security deposit pursuant to section 38(1)(a) and 38(1)(b) of the *Act.*

As the landlord was successful in this application, I find that the landlord is entitled to recover the $100.00 filing fee from the tenant, pursuant to section 72 of the *Act.*

As both parties agree that the tenant owes the landlord $100.00 for damage to the rental unit, I allow the landlord to retain $100.00 from the tenant's deposits.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain $1,071.02 pursuant to the following calculation:

| **Item** | **Amount** |
|---|---|
| Loss of rental income March 1-18, 2021 | $871.02 |
| Agreed damages to property | $100.00 |
| Filing fee | $100.00 |
| **Total** | **$1,071.02** |

I order the landlord to return the remaining $428.98 of the deposits, to the tenant.

Conclusion

The landlord is entitled to retain $1,071.02 of the tenant's deposits.

I issue a Monetary Order to the tenant in the amount of $428.98.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: August 30, 2021

Residential Tenancy Branch