



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* (the *Act*) for:

- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- a Monetary Order for damage or compensation, pursuant to section 67;
- authorization to retain the tenant's security deposit, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 1:45 p.m. in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 p.m. The landlord and the landlord's agent attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord, the agent and I were the only ones who had called into this teleconference.

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

The landlord confirmed his email address for service of this decision and order.

The agent testified that the tenant was served with this application for dispute resolution and evidence via registered mail on May 22, 2021 and via email. The landlord entered into evidence the Canada Post delivery confirmation for the above registered mailing which states that it was delivered on May 26, 2021. I find that the tenant was served

with the landlord's application for dispute resolution and evidence on May 26, 2021 in accordance with sections 88 and 89 of the *Act*.

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to retain the tenant's security deposit, pursuant to section 38 of the *Act*?
4. 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 the landlord and the agent, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The agent provided the following undisputed testimony. This tenancy began on October 26, 2019 and ended on September 30, 2020. This was a fixed term tenancy agreement set to end on October 31, 2020. Monthly rent in the amount of \$1,575.00 was payable on the first day of each month. A security deposit of \$787.50 was 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 landlord applied for dispute resolution on May 4, 2021. The agent testified that no portion of the tenant's security deposit has been returned to the tenant. The agent testified that the tenant provided the landlord with her forwarding address in writing on September 30, 2020 on the move out condition inspection report. The agent testified that he thought the move out condition inspection report was entered into evidence; however, it was not uploaded to the Residential Tenancy Branch. The agent testified that it was sent to the tenant in the May 22, 2021 mailing. The agent entered into evidence a photograph of the contents of the May 22, 2021 mailing in which the move

out condition inspection report can be seen. I find that the tenant was served with the move out condition inspection report in the May 22, 2021 mailing.

In the hearing I told the landlord and the agent that they had 24 hours to submit the move out condition inspection report for consideration in this decision. I find that the tenant is not prejudiced by the acceptance of late evidence as the tenant was served with it more than 14 days before this hearing.

The landlord and or agent uploaded the move out condition inspection report within 24 hours of the hearing. The move out condition inspection report is signed by the landlord and the tenant. The tenant's forwarding address is on the move out condition inspection report. The agent testified that the tenant provided the landlord with written authorization to deduct \$490.00 from the tenant's security deposit on the move out condition inspection report. The move out condition inspection report states that the tenant agrees to a deduction of \$490.00 from her security deposit; however, this statement was not signed by the tenant.

The agent testified that in March of 2020 the tenant reached out to the landlord and informed the landlord that she lost both of her jobs and was not able to pay rent. The agent testified that the landlord agreed to allow the tenant to pay \$500.00 for the months of April and May 2020, with the balance of rent owing for those months, in the amount of \$2,150.00 due by June 30, 2020. The agent entered into evidence a rent deferral agreement signed by the tenant and the agent which states same.

The agent testified that the tenant did not pay the outstanding \$2,150.00 by June 30, 2020.

The agent testified that the landlord and the tenant signed an agreement pertaining to the termination of the lease, on August 24, 2020. The "LEASE TERMINATION CONDITIONS", signed by the tenant and the landlord states:

The attached Mutual Agreement To End Tenancy will be enforceable upon the completion of the Conditions:

- 1) The Tenant completes the Move Out Inspection with the Landlord or Landlord's Agent on or prior to the Termination Date
- 2) The Tenant leaves the home in such a condition that more than \$0.00 of the security deposit on hand is due back to the Tenant

3) The Tenant has cleaned the home as per the attached scope of work or by hiring a professional cleaning service and providing the receipt for payment

4) At the Move Out Inspection, the Tenant provides 4 post dated cheques payable to the Landlord for the outstanding balance (\$2,350.00 as of August 24, 2020) with the following amounts and dates:

- October 1 2020: \$587.50
- November 1 2020: \$587.50
- December 1 2020: \$587.50
- January 1 2020: \$587.50

5) The Tenant agrees that the Landlord does not need to return the security deposit until January 15, 2021 once all post-dated cheques have been cashed and have cleared the bank

6) At the Move Out Inspection, the Tenant must provide their physical forwarding address and up to date email address to the Landlord or Landlord's Agent.

The Mutual Agreement to End Tenancy signed by the tenant and the landlord states that the tenant agrees to vacate the above-named premises/site at 1:00 p.m. on the 30th day of September, 2020. The Mutual Agreement to End Tenancy also states:

This form is not a notice to end tenancy. Neither the landlord nor tenant are under any obligation to sign this form. By signing this form, it means that you understand and agree that your tenancy will end with no further obligations between you and the other party. If you are a tenant, this may mean that you are foregoing any right to compensation that may have been available to you if you were to be served with a notice to end tenancy. If you have questions about your rights and responsibilities under the Residential Tenancy Act or the Manufactured Home Park Tenancy Act, contact the Residential Tenancy Branch by using the contact information at the bottom of this form.

The agent testified that the tenant did not provide the post-dated cheques as set out in section 4 of the "LEASE TERMINATION CONDITIONS" agreement. The agent testified that since the tenant did not abide by section 4 of the above lease, the Mutual Agreement to End Tenancy is void and the tenant is required to pay October 2020's rent because the tenant ended the tenancy one month before the end of the fixed term.

The landlord testified that the subject rental property was not advertised for rent for October 2020 because it was listed for sale in August of 2020. The landlord testified that the subject rental property was sold but could not recall when.

The agent testified that the tenant signed a "Form K" agreement at the start of the tenancy. The signed "Form K" agreement was entered into evidence. Section 3 of the "Form K" agreement states:

If a tenant or occupant of the strata lot, or a person visiting the tenant or admitted by the tenant for any reason, contravenes a bylaw or rule, the tenant is responsible and may be subject to penalties, including fines, denial of access to recreational facilities, and if the strata corporation incurs costs for remedying a contravention, payment of those costs.

The agent testified that the tenant disposed of a mattress in the common garbage room of the subject rental property contrary to the bylaws of the subject rental strata. A strata contravention letter dated December 5, 2019 stating same was entered into evidence. The contravention letter states that the subject rental property has received a \$200.00 fine for the contravention.

The agent entered into evidence an email dated December 5, 2019 informing the tenant of the contravention letter and attaching a copy of the December 5, 2019 contravention letter. The agent entered into evidence subsequent email correspondence from the tenant in which she agrees she left a mattress in the garbage room. The agent testified that the landlord is seeking to recover \$200.00 for the fine.

Analysis

Section 26(1) of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*.

Residential Tenancy Branch Policy Guideline 52 states:

If the tenancy has ended and the landlord wants to pursue an amount of unpaid affected rent, the landlord does not have to give the tenant a repayment plan. The landlord may apply to the RTB for a monetary order

“Affected rent” is rent that becomes due to be paid by a tenant in accordance with a tenancy agreement during the “specified period” between March 18, 2020 and August 17, 2020.

Based on the agent’s undisputed testimony and the rent deferral agreement, I find that the tenant did not pay full rent for April and May 2020. I find that the tenant breached the rent deferral agreement by not paying outstanding rent in the amount of \$2,150.00. I find that the tenant breached the “LEASE TERMINATION CONDITIONS” agreement by failing to provide the landlord with the required post-dated cheques at the end of this tenancy. As this tenancy has ended, I find that the landlord is entitled to recover the entirety of outstanding rent owed by the tenant, including “affected rent”. I award the landlord \$2,150.00 in unpaid rent for April and May 2020.

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.

I find that the landlord failed to mitigate damages for October 2021's rent because the landlord did not advertise the subject rental property for rent. The landlord elected to sell the subject rental property rather than rent it out again. I find that since the landlord did not attempt to find a new renter for October 2021, the landlord is not entitled to recover that month's rent from the tenant. The landlord's claim for October 2021's rent is dismissed without leave to reapply for failure to mitigate damages.

I find, pursuant to the "Form K" Agreement that the tenant was responsible for any strata fines incurred during the tenancy. Based on the strata contravention letter and the emails to the tenant regarding the contravention, I find that the tenant was informed of the \$200.00 fine and is required to pay it. I award the landlord \$200.00 for the strata fine.

Based on the agent's undisputed testimony and the move out condition inspection report entered into evidence, I find that the tenant provided the landlord with her forwarding address in writing on September 30, 2020.

Section 38 of the Act requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the Act, equivalent to double the value of the security deposit.

However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

Section C(3) of Policy Guideline 17 states that unless the tenants have specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act.

I find that the landlord made an application for dispute resolution more than 15 days after the end of the tenancy and the tenant's provision of her forwarding address is writing. I find that the landlord has not provided any written authorization to retain any amount from the tenant's security deposit. I find that the authorization to retain \$490.00 in the condition inspection report was not signed by the tenant and is therefore not enforceable. Pursuant to section 38(6)(b) of the *Act*, I find that the tenant is entitled to the return of double the security deposit in the amount of \$1,575.00.

I note that while section 5 of the "LEASE TERMINATION CONDITIONS" agreement states:

5) The Tenant agrees that the Landlord does not need to return the security deposit until January 15, 2021 once all post-dated cheques have been cashed and have cleared the bank

The *Act* states at section 5:

- 5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
- (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that section 5 of the "LEASE TERMINATION CONDITIONS" agreement attempts to contract out of section 38 of the *Act*, by altering the landlord's obligations regarding the security deposit under section 38 of the *Act*. As stated in section 5 of the *Act*, any attempt to avoid or contract out of this *Act* is of no effect. I therefore find section 5 of the "LEASE TERMINATION CONDITIONS" agreement to be void and unenforceable.

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

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
Unpaid rent April and May 2020	\$2,150.00
Stata fine	\$200.00
Filing fee	\$100.00
Less doubled security deposit	-\$1,575.00
TOTAL	\$875.00

The landlord is provided with this Order 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: November 02, 2021

Residential Tenancy Branch