



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRL-S, FFL**

Introduction

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent in the amount of \$8,705 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties 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 landlord testified he served that the tenant with the notice of dispute resolution form and supporting evidence package via registered mail. The tenant confirmed receipt of this package, but stated that the evidence was on a DVD, and that he was unable to view it. He stated that, nevertheless, he consented to the documents being admitted into evidence.

Issues to be Decided

Is the landlord entitled to:

- 1) a monetary order for \$8,705;
- 2) recover the filing fee;
- 3) retain the security deposit in partial satisfaction of the monetary orders made?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written, fixed-term tenancy agreement starting June 28, 2019 and ending June 30, 2020. Monthly rent was \$2,260 and was payable on the first of each month. The tenant paid the landlord a security deposit of \$1,330, which the landlord continues to hold in trust for the tenant.

The parties agree on the essential facts of the case. The tenant vacated the rental unit on September 9, 2019. The tenant did not pay any rent for September 2019. The landlord was not able to re-rent the rental unit until December 1, 2019, and when he did, the new occupant paid \$1,985 in monthly rent. The landlord submitted a copy of the new tenancy agreement into evidence. It is for a fixed term, ending June 30, 2020.

The landlord testified that he advertised the rental unit for re-rent starting September 19, 2019. He testified that he initially offered it for rent for \$2,200 per month, in an effort to re-rent it quickly, but was unable to do so. He eventually was able to re-rent the rental unit for \$1,985 per month. The landlord submitted copies of over thirty online adverts he posted into evidence.

The landlord seeks a monetary order of \$8,075 as follows:

- 1) \$2,260 for unpaid rent for September 2019
- 2) \$4,520 for loss of ability to generate rent from the rental unit for October and November 2019, due to the tenant breaching the fixed term tenancy agreement for October and November 2019; and
- 3) \$1,925 for the landlord seeks a monetary order seeking the difference between the tenant's monthly rent and the new occupant's monthly rent for December 2020 to June 2021 (\$275/month x 7 months).

The tenant testified that, at the beginning of September 2019, he advised the landlord that he had "an emergency situation" and he would have to move out of the rental unit. He testified that he entered a "guilty" plea to criminal charges as part of a plea bargain and was incarcerated in a federal institution from September 2019 to May 2020. He testified that prior to going to jail he was in the process of putting together a "consumer proposal" in an attempt to avoid bankruptcy. He testified that due to his incarceration he was unable to complete this process and that he would likely be filing for bankruptcy soon.

The tenant argued that it would be unfair to him to have to continue to pay for the rental unit after he went to jail.

Additionally, he argued that the landlord had trouble renting the rental unit in October and November 2019 because he was asking too much for rent. When I pointed out to the tenant that the landlord was asking a lower amount for monthly rent than what the tenant agreed to pay under the tenancy agreement, the tenant stated that he was overpaying for the rental unit, but that, when he entered into the tenancy agreement, he could afford to.

Analysis

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

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

(the “**Four Part Test**”)

The tenancy agreement sets out a fixed term of one year, ending June 30, 2020. It is undisputed that the tenant vacated the rental unit, thus ending the tenancy pursuant to section 44(1)(d) of the Act, prior to this date.

Sections 45(2) and (3) set out how a tenant may end a fixed term tenancy:

Tenant's notice

45(2) 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.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

The tenant did neither of these. As such, the tenant did not validly end the tenancy by operation of the Act.

Residential Tenancy Branch Policy Guideline 34 considers the doctrine of “frustration”. It states:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the

contract are discharged or relieved from fulfilling their obligations under the contract.

Although not explicitly argued as such, I understand the tenant's position to be that the tenancy agreement should be considered frustrated due to his being incarcerated, which amounted to an unforeseeable event that radically changed his circumstances.

I do not find this argument persuasive, however, as a requirement of contractual frustration is that neither party bear fault for the event that give rise to the frustration. In this case, the event that changed the tenant's circumstances was his accepting of a plea bargain and entering a "guilty" plea (or, in the alternative, undertaking the criminal act to which he pled guilty). I find that by accepting the plea bargain and entering a guilty plea, the tenant bears the fault for the events which changed his circumstances. As such, the doctrine of frustration does not apply.

Furthermore, I cannot see how the tenant going to jail was unforeseeable at the start of the tenancy. While the tenant did not submit evidence as to when he was charged with the crime, I note that the tenant accepted a plea bargain a little over two months after entering into the tenancy. I find it is reasonable to infer that the tenant was aware of the possibility that he could go to jail at the time he entered into the tenancy agreement. As such, his incarceration was would not have been "unforeseeable".

I accept the landlord's undisputed testimony that the tenant failed to pay September 2019 rent, as required by the tenancy agreement. This amounts to a breach of the tenancy agreement causing the landlord a loss of \$2,260. The tenant must compensate the landlord for this loss.

Additionally, I find that due to the tenant vacating the rental unit prior to the end of the fixed term, in breach of the tenancy agreement, the tenant caused the landlord to lose the ability to generate rental income from the rental unit in the amount of \$2,260 for the months of October and November 2019. I find that the landlord acted reasonably in reposting the rental unit for rent in less than two weeks after the tenancy ended.

I am not persuaded by the tenant's argument that the landlord was asking too high a price for the rental unit when he initially advertised the rental unit for rent. The tenant provided no evidence to support his testimony that \$2,200 was an unreasonable amount of monthly rent. I find it was entirely reasonable for the landlord to ask \$60 less a month than he was receiving from the tenant for the rental unit when initially posting the rental unit. The landlord was able to command \$2,260 monthly rent in June 2019, so I see no reason why it would be unreasonable for him to think he could command a similar price in October 2019. I find the landlord acted reasonably to minimize his loss.

As such, the tenant must compensate the landlord for the loss of rental income for the months of October and November 2019.

I also find that the tenancy agreement entitled the Landlord to generate \$2,260 per month in rental income for the duration of the term of the tenancy agreement (that is, until June 2020). I accept that the landlord re-rented the rental unit for monthly rent of \$1,985. This represents a loss of \$275 per month in rental income for the months of December 2019 to June 2020 (inclusive). I do not find that the landlord acted unreasonably in accepting a lower monthly rent for the rental unit after he was unsuccessful in re-renting the rental unit for two months, despite significant advertising efforts. In the circumstances I found he took reasonable steps to minimize his loss as a result of the tenants breaking the fixed term lease. As such, the tenant must compensate the landlord for this loss.

Pursuant to section 72(1) of the Act, as the landlord has been successful in the application, he may recover the filing fee from the tenant.

Pursuant to section 72(2) of the Act, the landlord may retain the security deposit in partial satisfaction of the monetary orders made above.

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the tenant pay the landlord \$7,475, representing the following:

Description	Amount
Unpaid September 2019 Rent	\$2,260.00
Loss of Rent (October and November 2019)	\$4,520.00
Loss of difference in rent (December 2019 to June 2020)	\$1,925.00
Filing fee	\$100.00
Security deposit credit	-\$1,330.00
Total	\$7,475.00

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 10, 2021

Residential Tenancy Branch