Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL, FFL

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The landlord applied for:

- a monetary order for loss under the Act, the regulation or tenancy agreement, pursuant to section 67; and
- an authorization to recover the filing fee for this application, under section 72.

Both parties attended the hearing. Tenant SP represented tenant KH. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: “A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000.”

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 71, 88 and 89 of the Act.

Issues to be Decided

Is the landlord entitled to:

1. a monetary order for loss?
2. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlord's obligation to present the evidence to substantiate the application.

Both parties agreed they entered into a fixed term tenancy from March 01, 2021 to February 28, 2022. The tenants vacated the rental unit on June 30, 2021. Monthly rent was $1,600.00, due on the first day of the month. At the outset of the tenancy a security deposit (the deposit) of $800.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It states the fixed term tenancy was from March 01, 2021 to February 28, 2022 and monthly rent was $1,600.00.

Both parties agreed they scheduled a move out inspection for June 30, 2021 at 4:30 P.M. The landlord inspected the rental unit alone before the scheduled time and texted the tenants to communicate there was no need for the tenants to attend the move out inspection because the landlord will not submit a claim against the deposit.

Both parties agreed the tenants served their forwarding address in writing on June 26, 2021 and the landlord received it. The tenants did not authorize the landlord to retain the deposit. The landlord submitted this application on July 15, 2021.

The landlord is claiming for loss of rental income for July 2021 in the amount of $1,600.00.

The landlord confirmed receipt of the tenants' email dated May 14, 2021: "I would like to formally give you our notice that we will be moving out June 30th 2021". The landlord replied on May 16, 2021: "Thank you for providing a formal notice and informing me of your intensions [SIC]. Will now act in accordance with your move-out date of June 30th 2021."

Both parties agrees that after the tenants served notice to end tenancy they did not inform he landlord that they intended to continue the tenancy past June 30, 2021.

The landlord advertised the rental unit on June 08, 2021 asking for monthly rent of $1,700.00. The landlord affirmed she did not advertise earlier because the tenants could

not end the tenancy early and it was her obligation to rent the rental unit to the tenants until the end of the fixed term tenancy.

The landlord testified she signed a new tenancy agreement in early July 2021 for a new tenancy starting on August 01, 2021. The landlord confirmed the new tenant paid monthly rent of $1,700.00 from August 01, 2021 to January 01, 2022.

The tenant stated the landlord breached material terms of the tenancy agreement. The tenant did not inform the landlord that he would end the tenancy if the landlord did not stop breaching material terms of the tenancy agreement.

Analysis

Section 7 of the Act states:

> Liability for not complying with this Act or a tenancy agreement
> (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.

Residential Tenancy Branch 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:
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> - 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 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 the case is on the person making the claim.

Loss of rental income

I accept the uncontested testimony offered by both parties and the tenancy agreement that the parties had a fixed term tenancy agreement from March 01, 2021 to February 28, 2022 and the tenancy ended early on June 30, 2021, per section 44(1)(d) of the Act. I find the tenancy ended contrary to section 45(2)(b) of the Act:

> (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.
>
> (emphasis added)

Section 45(3) of the Act states:

> 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.

Residential Tenancy Branch Policy Guideline 8 states the tenant must give the landlord a deadline related to the breach of the material term:

> **To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:**
> - that there is a problem;
> - that they believe the problem is a breach of a material term of the tenancy agreement;
> - **that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and**
> - that if the problem is not fixed by the deadline, the party will end the tenancy.
>
> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as

> a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.
>
> **(emphasis added)**

I accept the tenant's testimony that he did not give the landlord a deadline to stop breaching a material term of the tenancy agreement. I find the tenants could not end the tenancy per section 45(3) of the Act.

Based on the landlord's convincing testimony, I find the tenants failed to comply with the tenancy agreement and the landlord suffered a loss of rental income in the amount of $1,600.00 from July 01 to 31, 2021 because of the tenants' failure to comply with the tenancy agreement.

Residential Tenancy Branch Policy Guideline 3 sets conditions for loss of rental income claims. It states:

> Where a tenant vacates or abandons the premises before a tenancy agreement has ended, the tenant must compensate the landlord for the damage or loss that results from their failure to comply with the legislation and tenancy agreement (section 7(1) of the RTA and the MHPTA). This can include the unpaid rent to the date the tenancy agreement ended and the rent the landlord would have been entitled to for the remainder of the term of the tenancy agreement.

Further to that, Policy Guideline 5 provides:

> When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:
> 1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
> 2. re-rent the unit as soon as possible.
>
> **For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November.** Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear.
>
> If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.

Based on the landlord's testimony and the May 16, 2021 email, I find the landlord partially mitigated her losses, as the landlord was aware on May 16, 2021 that the

tenants' planned to move out on June 30, 2021 and only started advertising the rental unit on June 08, 2021. The landlord could have advertised the rental unit as early as May 16, 2021.

Considering that the landlord only partially mitigated her losses, I find it reasonable to award the landlord 50% of the amount claimed.

Residential Tenancy Branch Policy Guideline 3 states:

> In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent or damages, but any remainder is not recoverable by the tenant.

Based on the undisputed testimony offered by the landlord, I find that as a consequence of the tenants' breach of the tenancy agreement the landlord received more rent from the new tenant between August 2021 and January 2022 in the total amount of $600.00 ($100.00 x 6 months). I am not considering February 2022 rent payment, as I cannot predict if this rent payment will be received by the landlord.

Thus, per sections 7 and 67 of the Act, and considering Policy Guidelines 3, 5 and 16, I set off $600.00 from the amount the tenants are owing to the landlord and award the landlord $200.00 for loss of rental income ($1,600.00 x 0.5 subtracted $600.00).

Move-out inspection

Section 35 of the Act states:

> (**1)The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit**
> **(a)on or after the day the tenant ceases to occupy the rental unit, or**
> **(b)on another mutually agreed day.**
> (2)The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
> **(3)The landlord must complete a condition inspection report in accordance with the regulations.**
> **(4)Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.**
> (5)The landlord may make the inspection and complete and sign the report without the tenant if

> (a)the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
> (b)the tenant has abandoned the rental unit.
>
> (emphasis added)

Regulation 14 states:

> The landlord and tenant must complete a condition inspection described in section 23 or 35 of the Act [condition inspections] when the rental unit is empty of the tenant's possessions, unless the parties agree on a different time.

I accept both parties' uncontested testimony that they agreed on conducting a move out inspection on June 30, 2021 at 4:30 P.M. and the landlord texted the tenants to communicate they do not need to attend the move out inspection. Thus, I find the landlord did not comply with regulation 14 and sections 35(3) and (4) of the Act.

Section 36(2) of the Act states:

> Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord:
> (a)does not comply with section 35 (2) [2 opportunities for inspection],
> (b)having complied with section 35 (2), does not participate on either occasion, or
> (c)having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

As the landlord did not comply with section 35(3) and (4) of the Act, I find the landlord extinguished her right to claim against the deposit, per section 36(2)(b) of the Act.

Security deposit

Section 38(1) of the Act requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

The forwarding address was provided in writing on June 26, 2021 and the tenancy ended on June 30, 2021. The landlord retained the deposit in the amount of $800.00 and submitted this application on July 15, 2021.

In accordance with section 38(6)(b) of the Act, as the landlord did not return the deposit within the timeframe of section 38(1) of the Act, the landlord must pay the tenants

double the amount of the deposit. I note that the landlord could submit a claim for loss of rental income, but she had to return the deposit within 15 days from the end of the tenancy, per section 38(1) of the Act. As the landlord extinguished her right to claim against the deposit she is not entitled to retain the deposit.

Residential Tenancy Branch Policy Guideline 17 is clear that the arbitrator will double the value of the deposit when the landlord has not complied with the 15 day deadline. It states:

> 9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
> - to file a claim against the deposit for any monies owing for other than damage to the rental unit;
>
> Unless the tenant has 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:
> […]
> whether or not the landlord may have a valid monetary claim.

Under these circumstances and in accordance with section 38(6)(b) of the Act, I find the tenants are entitled to $1,600.00 (double the deposit of $800.00).

Filing fee and summary

As the landlord was successful in this application, the landlord is entitled to recover the $100.00 filing fee.

The landlord is awarded $300.00. The tenants are awarded $1,600.00.

Residential Tenancy Branch Policy Guideline 17 sets guidance for a set-off when there are two monetary awards:

> 1. Where a landlord applies for a monetary order and a tenant applies for a monetary order and both matters are heard together, and where the parties are the same in both applications, the arbitrator will set-off the awards and make a single order for the balance owing to one of the parties. The arbitrator will issue one written decision indicating the amount(s) awarded separately to each party on each claim, and then will indicate the amount of set-off which will appear in the order.
> 2. The Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord.

In summary:

Award for the tenants	$1,600.00
Award for the landlord	$300.00
Final award for the tenants	**$1,300.00**

Conclusion

Pursuant to sections 38 and 67 of the Act, I grant the tenants a monetary order in the amount of $1,300.00.

The tenants are provided with this order in the above terms and the landlord must be served with this order. 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: February 01, 2022

Residential Tenancy Branch