Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SKYLINE LIVING
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, MNDCL-S, 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 unpaid rent, pursuant to section 26;
- a monetary order for loss under the Act, the regulation or tenancy agreement, pursuant to section 67;
- an authorization to retain the security and pet damage deposits (the deposits), under section 38; and
- an authorization to recover the filing fee for this application, under section 72.

Both parties attended the hearing. The landlord was represented by property manager SD. 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 understands the parties are not allowed 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 $5,000.00.”

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 section 89 of the Act.

Issues to be Decided

Is the landlord entitled to:

1. a monetary order for unpaid rent?
2. a monetary order for loss?
3. an authorization to retain the deposits?
4. an authorization to recover the filing fee for this application?

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 February 01, 2021 to January 31, 2022. Monthly rent of $1,760.00 was due on the first day of the month. At the outset of the tenancy a security deposit of $962.50 and a pet damage deposit of $962.50 were collected and the landlord holds them in trust.

The tenant vacated the rental unit on September 26, 2021, prior to the end of the fixed term.

Both parties agreed the tenant paid $165.00 monthly for two assigned parking spots. The tenancy agreement and a separate parking agreement were submitted into evidence. The tenancy agreement indicates the monthly rent is $1,760.00 and parking is $165.00. The landlord affirmed she could have reassigned the parking spot to any other rental unit as soon as the tenant moved out.

The tenant emailed the forwarding address on September 26, 2021. The landlord confirmed receipt of the forwarding address on September 27, 2021.

The tenant did not authorize the landlord to retain the deposits. The landlord submitted this application on October 06, 2021.

The landlord confirmed receipt of the tenant's notice to end the tenancy on August 30, 2021 and served the letter dated August 31, 2021:

> We have received your Notice to Vacate dated August 30th, 2021 that you wish to terminate your tenancy effective September 30th, 2021. The term of your Tenancy Agreement expires January 31st, 2022 (the "Last Day"). Your Tenancy Agreement is for a fixed term and cannot be terminated prior to the Last Day without penalty. Should you vacate prior January 31st, 2022 you will be expected to honour the terms of your

> tenancy agreement, including the payment of monthly rent for your unit until it is re-rented, up to and including the Last Day.

The tenant affirmed she informed the landlord's representative JB that she was moving out on September 26, 2021 probably two weeks in advance and asked to have the move out inspection on September 24, 25 of 26, 2021. JB informed the tenant that the landlord was not available for the move out inspection during these days. The tenant always communicated with JB for tenancy issues. The tenant affirmed that the landlord's representative JA informed her that she could move out and leave the keys in the rental unit.

The landlord affirmed the parties never agreed to a move out inspection date and the landlord did not serve the Notice of Final Opportunity to Schedule a Condition Inspection (hereinafter, RTB22) because the tenant could not terminate the tenancy before the end of the fixed-term period.

The landlord conducted the move out inspection alone on October 04, 2021.

The landlord is claiming one month of loss of rental income in the amount of $1,925.00, as the landlord was only able to re-rent the rental unit on November 01, 2021. The landlord only advertised the rental unit on September 26, 2021, as the landlord was not sure if the tenant would move out and on other occasions tenants did not move out after serving a notice to end tenancy. The landlord re-rented the unit for $1,945.00 monthly (not including parking) and has received this amount monthly since November 2021.

The tenant submitted the emails dated August 31, 2021 into evidence:

> [tenant]: […] Just want to check with you to make sure that everything is ok as we had previously discussed and that I'm being released from my rental agreement term based on the personal situation we discussed.
> [landlord] […] I have emailed the PM [property manager] and it should be fine. I'll make sure everything works out. Signed: JB, resident manager.
> [tenant] I haven't received the move out package yet. Any idea when this will be sent to me? […] I can't afford to pay rent at two different places for more than one month.
> [landlord] I'll send it to you as soon as the PMA sends it. I know it's approved.

The tenant affirmed she was authorized by JB to not pay loss of rental income. The landlord affirmed she did not authorize the tenant to not pay loss of rental income and that JB does not represent the landlord.

The landlord is claiming cleaning expenses in the amount of $75.00, as the tenant did not clean the 935 square feet rental unit. The landlord paid $75.00 to clean the dishwasher, refrigerator, 2 bathrooms, the shower tub and the baseboard heaters. The landlord charges $40.00 per hour of cleaning. The landlord submitted the move out inspection report (the report) and 19 photographs taken during the move out inspection.

The tenant affirmed the rental unit was clean when the tenancy ended.

The landlord submitted a monetary order worksheet indicating a monetary claim in the total amount of $2,000.00.

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:
>
> - 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.

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.

Regulation 17 states:

> (1)A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
> (2)If the tenant is not available at a time offered under subsection (1),
> (a)the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
> (b)the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

Section 44(1)(d) states: “A tenancy ends only if one or more of the following applies: (d) the tenant vacates or abandons the rental unit”.

Based on the testimony offered by both parties, I find the tenancy ended on September 26, 2021, per section 44(1)(d) of the Act.

Based on the testimony offered by both parties and the tenancy agreement, I find the tenant was aware the tenancy was for a fixed term from February 01, 2021 to January 31, 2022, and the tenant ended the tenancy early, 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)

Based on the testimony offered by both parties and the August 31, 2021 letter, I find the tenant served a notice to terminate the tenancy effective on September 30, 2021 and verbally informed the landlord that she was vacating the rental unit on September 26, 2021. The landlord must comply with section 35(2) of the Act and Regulation 17, even when the tenant serves a notice to end tenancy during a fixed-term tenancy.

As the landlord did not serve the form RTB22, I find the landlord did not comply with section 35(2) of the Act and Regulation 17.

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.

I find the landlord extinguished her right to claim against the deposits, per section 36(2)(a) of the Act.

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.

Regulation 21 states:

> In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

I find the report has no evidentiary weight, as the landlord did not serve the form RTB22 and completed the move out inspection alone.

Deposit

Section 38(1) of the Act requires the landlord to either return the tenant's 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 landlord confirmed receiving the forwarding address on September 27, 2021 and the tenancy ended on September 26, 2021, per section 44(1)(d) of the Act. The landlord retained the deposits in the total amount of $1,925.00 and submitted this application.

In accordance with section 38(6)(b) of the Act, as the landlord extinguished her right to claim against the deposits and did not return them within the timeframe of section 38(1) of the Act, the landlord must pay the tenant double the amount of the deposits.

Under these circumstances and in accordance with section 38(6)(b) of the Act, I find the tenant is entitled to a monetary award of $3,850.00 (double the security deposit of $962.50 and pet damage deposit of $962.50).

Loss of rental income

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 testimony offered by both parties, I find that due to the tenant's failure to pay rent until the end of the fixed term tenancy agreement on January 31, 2021, the landlord incurred a loss of rental income from October 01 to 31, 2021.

I accept the uncontested testimony that monthly rent was $1,760.00 and parking was $165.00.

Based on the landlord's testimony, I find the landlord failed to prove, on a balance of probabilities, that the landlord could not re-rent the two assigned parking spots on October 01, 2021.

I accept the landlord's convincing testimony that she was not sure if the tenant would move out on September 30, 2021 and because of this the landlord only advertised the rental unit on the day the tenant moved out.

Based on the August 31, 2021 email, I find that JB represented the landlord. I further find that JB did not state that the tenant was authorized to not pay loss of rental income. The August 31, 2021 letter clearly states the tenant is responsible for loss of rental income and the August 31, 2021 email is vague.

Thus, I find the landlord suffered a loss of rental income in the amount of $1,760.00 from October 01 to 31, 2021 because the tenant ended the fixed-term tenancy early, contrary to section 45(2)(b) of the Act.

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 landlord's testimony, I find the landlord was able to re-rent the rental unit on November 01, 2021 and received a higher rent from the tenant from November 01, 2021 to January 31, 2022 in the total amount of $555.00 ($1,945.00-1,760.00 = 185.00 x 3 months)

Thus, per sections 7 and 67 of the Act, and considering Policy Guidelines 3, 5 and 16, I set off $555.00 from the amount the tenant is owing to the landlord and award the landlord $1,205.00 for loss of rental income ($1,760.00 subtracted $555.00).

Cleaning

Section 37(2) of the Act states:

> Leaving the rental unit at the end of a tenancy
> 37(2) When a tenant vacates a rental unit, the tenant must
> (a)leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear

Residential Tenancy Branch Policy Guideline 1 states:

> The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy Act.

Based on the photographs submitted into evidence, I find the landlord did not prove, on a balance of probabilities, that the tenant did not leave the rental unit reasonably clean.

Thus, I dismiss the landlord's claim without leave to reapply.

Filing fee and summary

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

The tenant is awarded $3,850.00. The landlord is awarded:

Loss of rental income	$1,205.00
Filing fee	$100.00
Total	$1,305.00

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 tenant	$3,850.00
Award for the landlord	$1,305.00
Final award for the tenant	**$2,545.00**

Conclusion

Pursuant to section 38(6)(b) of the Act, I grant the tenant a monetary order in the amount of $2,545.00.

The tenant is 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: May 30, 2022

Residential Tenancy Branch