



Dispute Resolution Services

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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 damages and loss pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The tenant testified that they received the landlord's materials and had not served any materials of their own. Based on their testimonies I find the tenants duly served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to their relief as claimed?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. The parties signed a tenancy agreement for a periodic tenancy agreement to commence on September 1, 2021. The monthly rent would be \$2,200.00 payable on the first of each month. A security deposit of \$1,100.00 was paid on July 28, 2021 and is still held by the landlord.

The tenants never took possession of the rental unit. The landlord was performing work on the property and advised the tenants in August 2021 that the possession date would need to be delayed for an indeterminate time from September 1, 2021 with a possibility of starting the tenancy on September 15, 2021. On August 25, 2021 the tenants suggested a start of tenancy date of October 1, 2021. The parties agreed on that date. The parties agree that no rent was payable for September 1, 2021.

The tenants gave notice on September 10, 2021 stating they would not be taking possession of the rental unit on October 1, 2021 and giving notice to end the tenancy.

The tenants provided their forwarding address in writing on October 19, 2021 and did not consent to any amount of the security deposit being withheld.

The landlord now seeks a monetary award in the amount of \$3,300.00 for the lost rental income from September 15, 2021 to October 31, 2021.

The landlord submitted into documentary evidence copies of the email and text message correspondence between the parties, the original tenancy agreement and a blank Monetary Order Worksheet.

Analysis

Section 38 of the *Act* requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a 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) of the *Act* equivalent to the value of the security deposit.

In the present case the parties provide that the tenants gave a forwarding address in writing on October 19, 2021. The landlord filed their application on November 3, 2021. As such, I find the landlord was within the statutory timeline to file their application for authorization to retain the deposit.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 1 of the *Act* defines a tenancy agreement as:

an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit

I find that an enforceable agreement was entered by the parties on July 28, 2021 when the tenants paid the security deposit and the terms are recorded in the written agreement submitted into evidence.

I further find, from the records of the ongoing correspondence between the parties, that the parties agreed to modify the terms of the written agreement by delaying the date the tenancy commences to October 1, 2021.

I find no other reasonable interpretation of messages stating:

Tenants: ...So we will move in Oct 1 and now this way you won't be rushed either to move out and get it finished and we will all have plenty of time

Landlord: Sounds like a plan

Therefore, I find that the parties agreed to this tenancy commencing on October 1, 2021 with monthly rent becoming payable on that date. I find that previous discussions about the possibility of the tenancy starting on September 15, 2021 are superseded by this meeting of minds of the parties.

Accordingly, I find that the landlord is not entitled to any payment of rent for the month of September 2021. I find the tenants were responsible for paying monthly rent in the amount of \$2,200.00 on October 1, 2021 pursuant to the agreement with the landlord.

A tenant must pay rent when it is due, whether or not the landlord complies with the *Act*, regulations or tenancy agreement pursuant to section 26(1) of the *Act*. Section 45 of the *Act* explains that a tenant may end a periodic tenancy by giving the landlord notice on a date not earlier than one month after the date the landlord receives the notice.

The tenants gave notice to end the tenancy on September 10, 2021 and therefore the effective date of the notice is October 31, 2021. I find that the tenants were obligated to pay the monthly rent in the amount of \$2,200.00 on October 1, 2021 pursuant to the tenancy agreement. I accept the undisputed evidence of the parties that the tenants failed to pay the full rent as required.

Section 67 of the *Act* states, 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. I find that a violation of the tenancy agreement occurred by the tenants who failed to pay the full rent owing on October 1, 2021.

Residential Tenancy Policy Guideline 5 states that while it is not necessary that the party making a claim do everything possible to minimize the loss, some reasonable efforts must be taken. The Guideline further provides that, "Where the tenant has vacated or abandoned the rental unit or site, the landlord must try to rent the rental unit or site again as soon as is practicable."

In the present case I find little evidence of the landlord taking any steps in order to mitigate their rental income losses. While the landlord gave some testimony about advertising the rental unit and vetting potential occupants, they did not submit into written evidence copies of any posting or details on how the suite was marketed or responses received.

I do not find it reasonable that, given the reality of the rental housing market in the province, a landlord given nearly 3 weeks could not find a new occupant for the rental unit. The landlord has not provided sufficient evidence to show that the steps taken to find a new occupant were reasonable under the circumstances. Therefore, as there is insufficient evidence to show that the landlord has taken reasonable steps to mitigate

their loss of rental income when they were given nearly 3 weeks notice by the tenants, I find that a monetary award of \$1,000.00, approximately 45% of the monthly rent to be appropriate.

As the landlord was somewhat successful in their application, they are also entitled to recover their filing fee from the tenants.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenant's security deposit in full satisfaction of the monetary award issued in the landlord's favour.

Conclusion

The landlord is entitled to retain the full amount of the \$1,100.00 security deposit for this tenancy in satisfaction of their monetary award.

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: June 7, 2022

Residential Tenancy Branch