



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes:** FFL MNRL

### **Introduction**

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

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

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties were also clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour. Both parties confirmed that they understood.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing. In accordance with section 89 of the *Act*, I find that the tenant duly served with the landlord's application. All parties confirmed receipt of each other's evidentiary materials, and that they were ready to proceed.

### **Preliminary Matter: Does the Residential Tenancy Branch have jurisdiction to hear the dispute between the parties?**

Section 4(c) of the *Act* reads in part as follows:

4        *This Act does not apply to...*

*(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,...*

Both parties confirmed that the landlord did not share the bathroom or kitchen facility with the tenant during this tenancy. Accordingly, I find that I do have jurisdiction to consider this application.

### **Preliminary Issue: Counterclaims**

In the tenant's response to the landlord's application, the tenant requested compensation and monetary orders related to this tenancy.

Rule 2.11 of the RTB Rules of Procedure states the following about the crossing of applications.

#### **2.11 Filing an Application for Dispute Resolution to counter a claim**

To respond to an existing, related Application for Dispute Resolution, respondents may make a cross-application by filing their own Application for Dispute Resolution.

The issues identified in the cross-application must be related to the issues identified in the application being countered or responded to.

A party submitting a cross-application is considered the cross-applicant and must apply as soon as possible and so that the respondent to the cross-application receives the documents set out in Rule 3.1 [*Documents that must be served with the Notice of Dispute Resolution Proceeding Package*] not less than 14 days before the hearing and so that the service provisions in Rule 3.15 [*Respondent's evidence provided in single package*] can be met.

In this case, although the tenant did have the option to file a counter claim, the tenant did not file their own application to be crossed with the landlord's.

A party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case. To proceed with any additional claims that were not properly the Arbitrator at the time of the scheduled hearing would be a breach of the principles of natural justice and procedural fairness. For this reason, the hearing proceeded to deal with the landlord's monetary claims only. The tenant is at liberty to file their own application. Liberty to apply is not an extension of any applicable timelines.

**Issue(s) to be Decided**

Is the landlord entitled to monetary compensation for monetary and losses?

Is the landlord entitled to recover the filing fee for this application from the tenant?

**Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy was to begin on May 1, 2021 and end on September 30, 2021. Monthly rent was set at \$350.00, payable on the first of the month. The tenant paid a security deposit in the amount of \$175.00, which the landlord still holds. It is undisputed that the tenant informed the landlord by text message on May 7, 2021 that they had decided not to continue with this tenancy.

The landlord filed this application to recover the loss of rental income for the months of June 2021 to September 2021 as the tenant ended the tenancy before the end of the fixed term, and did not pay rent for the remaining months. The landlord submitted evidence to show that they advertised the shared accommodation for rent, but was unable to fill the vacancy. The landlord testified that this was by far the cheapest accommodation in town, but due to the pandemic, they had difficulty filling the vacancy. The landlord submitted proof of at least 49 inquiries, but testified that because of Covid-19, potential tenants were uncomfortable with the nature of the shared accommodation.

The tenant testified that they had decided not to move in as they felt unsafe. The tenant notes that there was a broken window, and that other occupants in the home were doing drugs and smoking marijuana. The tenant felt that the accommodation looked like a "frat house", and was not as advertised. The tenant was concerned that the landlord was not physically around to assess and address the issues that the tenant noticed. The tenant submitted a receipt to show that they had to spend money in order to find alternate accommodation as they did not feel comfortable residing at the rental. The tenant also noted that the landlord did not attempt to mitigate the loss of rent as they prioritized the renting of other empty beds over the tenant's.

### **Analysis**

Section 44 of the *Residential Tenancy Act* reads in part as follows:

**44** (1) A tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:...
- (b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
- (c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

**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.

The tenant ended the tenancy by way of text message on May 7, 2021, well before the end of this fixed-term agreement. Although the tenant noted several issues they had with the tenancy, the tenant did not obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy, nor were any applications filed by the tenant for dispute resolution in regards to this tenancy. The landlord did not mutually agree to end this tenancy in writing,

Although I sympathize with the tenant's concerns about their safety, I do not find that sufficient evidence was submitted to establish that the tenant's safety was truly at risk. Although I accept the fact that the tenant's expectations were not met, the tenant made the decision to enter into the tenancy agreement before viewing the property, or sending an agent on their behalf. I find that the tenant had failed to exercise their due diligence before entering into the fixed term agreement, and then failed to comply with the *Act* in

ending this fixed term tenancy. I do not find that the evidence sufficiently supports that the landlord had misled the tenant. Although I sympathize with the tenant, I find that they had moved out instead of disputing the matter, giving the landlord the opportunity to address any outstanding issues, or giving proper notice under sections 44 and 45 the Act. I must now consider whether the landlord is entitled to the loss of rental income for June 2021 to September 2021.

The landlord testified that they mitigated their losses by advertising and attempting to fill the vacancy with a suitable tenant as soon as possible, but due to circumstances beyond their control, they have been unable to fill the vacancy, even after the end of the fixed-term. The landlord provided reasons for why the rental unit remains vacant, such as high vacancy rates due to the pandemic, and the shared nature of the living space. The landlord supported their efforts by submitting copies of advertisements and numerous responses to their advertisement.

Residential Tenancy Policy Guideline #5 addresses a landlord's duty to minimize loss and states the following:

*"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<sup>1</sup>. 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. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation<sup>2</sup>. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.*

*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.*

*The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed.”*

In consideration of whether the landlord fulfilled their obligations to make reasonable attempts to minimize the losses claimed, I find that the landlord did provide supporting documentation to show that they made some effort to fill the vacancy. I do note, however, that the evidence shows that the landlord could have taken more reasonable steps to fill minimize or prevent the losses claimed. I find that although the tenant was to pay monthly rent in the amount of \$350.00 per month, the landlord advertised the rental for \$390.00 per month. Although the landlord did receive numerous inquiries, the landlord was unable to find a tenant. Although the increase in monthly rent may not have been the only factor for why the landlord was unable to find a new tenant, I find that the increased rental amount, especially in light of the difficult rental market, would have only made it more difficult to re-rent. I am not satisfied that the landlord provided a reasonable explanation for why they were asking for \$40.00 more in monthly rent, which amounted to an 11% increase in monthly rent. Although the landlord's belief was that the increase in monthly rent did not affect the interest in the accommodation, as supported by the numerous inquiries, it is clear that despite continuous efforts to re-rent the accommodation at the increased amount, the landlord was unable to re-rent the accommodation at this monthly rate. The landlord did not make any efforts to reduce the advertised monthly rent back to \$350.00, despite several months of advertising without any success in filling the vacancy.

I also note that the landlord had informed the tenant that “as I'm already advertising for the rest of the empty beds in the accommodation and obviously I'll have to fill those first”. I find the evidence clearly shows that the landlord did not make filling this particular vacancy a priority.

In light of the evidence and testimony before me, I am not satisfied that the landlord had made a reasonable effort to mitigate the tenant's exposure to the landlord's monetary losses as is required by section 7(2) of the *Act*. I find that although it was a difficult rental market, and although the landlord did provide evidence to show that they advertised the accommodation for rent, I find that the landlord decided to increase the monthly rent by a substantial amount. The landlord also clearly communicated to the tenant that they would fill other vacancies first. Despite the fact that the tenant did not end the tenancy in a manner that complies with the *Act*, I find that the landlord failed in their obligations to minimize the losses claimed. For this reason, I dismiss the landlord's claims for loss of rent for the months of June 2021 to September 2021 without leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the landlord was unsuccessful with their application, I find that the landlord is not entitled to recover the \$100.00 filing fee paid for this application. The landlord must bear the cost of this filing fee.

As the landlord still holds the tenant's security deposit of \$175.00, I order that the landlord return this deposit to the tenant.

**Conclusion**

The landlord's entire application is dismissed without leave to reapply.

I issue a Monetary Order in the amount of \$175.00 in the tenant's favour for the return of their security deposit.

The tenant is provided with this Order in the above terms and the landlord must be served with a copy of this Order as soon as possible. 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: November 30, 2022

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Residential Tenancy Branch