Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNRL-S, FFL

Introduction

On June 5, 2022, the Landlord made an Application for a Dispute Resolution Proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the "*Act*"), seeking to apply the security deposit towards this debt pursuant to Section 67 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Landlord attended the hearing and confirmed that her correct legal name was exactly as noted in the Style of Cause on the first page of this Decision. Both Tenants attended the hearing as well. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

All parties confirmed that the Tenants were served with the Landlord's Notice of Hearing and evidence package on or around July 4, 2022, by email as per the Substituted Service Decision dated June 30, 2022. As such, I am satisfied that the Tenants have been duly served this package. Furthermore, based on this undisputed testimony, I have accepted all of the Landlord's documentary evidence and will consider it when rendering this Decision.

Tenant H.C. advised that they did not serve their evidence to the Landlord. As such, the Tenants' documentary evidence will be excluded, and will not be considered when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order for compensation?
- Is the Landlord entitled to apply the security deposit towards this debt?
- Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy was supposed to start on May 1, 2022, for a fixed length of time until August 31, 2022; however, the Tenants never fully moved into the rental unit and returned the keys on May 2, 2022. Rent was established at an amount of $1,885.00 per month and was due on the first day of each month. A security deposit of $942.50 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence for consideration.

The Landlord also submitted a copy of a new tenancy agreement with a new tenant that started on May 15, 2022, for a fixed length of time until April 30, 2023. Rent was established at an amount of $1,500.00 per month and was due on the first day of each month. A security deposit of $750.00 was also paid. A copy of this signed tenancy agreement was submitted as documentary evidence for consideration.

When reviewing these two tenancy agreements, it was noted that the Landlord is exercising the vacate clause in each tenancy agreement, and the reason the Landlord

indicated that the tenant must vacate the rental unit in each of these agreements was because “New tenant move in.” She was informed that the use of this vacate clause for this purpose was no longer permitted, since December 11, 2017, and that attempting to end tenancies for this purpose would be a contravention of the *Act*.

While she claimed that she was unaware that this was in essence illegal, she is cautioned that if she is found to be repeatedly breaching the *Act* in this manner in future, the Compliance and Enforcement Unit of the Residential Tenancy Branch is responsible for administrative penalties that may be levied under the *Act* if this issue continues. They have the sole authority to determine whether to proceed with a further investigation into repeated matters or contraventions of the *Act*, and the sole authority to determine whether administrative penalties are warranted in certain circumstances. Any party may contact the Residential Tenancy Branch to inquire about initiating an investigation by the Compliance and Enforcement Unit should they believe that the Landlord is attempting to circumvent the *Act* intentionally.

The Landlord advised that she was seeking compensation in the amount of **$942.50** because the Tenants signed a fixed term tenancy agreement, but did not honour it. She stated that the Tenants received the keys on or around April 30, 2022, that they did not move in, and that they returned the keys on May 2, 2022. She testified that she immediately re-listed the rental unit on Facebook for $1,500.00 per month, that she coordinated several viewings, and that she signed a new tenancy agreement with a new tenant (as per the tenancy agreement above) on May 7, 2022. She stated that the reason she asked for a lower amount of rent was due to her seeking a longer term tenant. As well, she noted that she charges different amounts of rent depending on the time of year, but this was based on her short-term tenancy agreements using the vacate clause, for which she was informed that this practice was not enforceable as it was an attempt to contract outside of the *Act*.

She confirmed that this new tenant moved in on May 15, 2022, that she paid $750.00 for the balance of May 2022 rent, and that she paid $1,500.00 for each month of June, July, and August 2022 rent. As well, the Landlord acknowledged that the Tenants permitted her to keep their security deposit to apply towards the rent for May 1 to 15, 2022. As a result, when calculating the Landlord’s actual loss of May 2022 rent, given that she received $942.50 from the Tenants, and $750.00 from the new tenant, she actually only suffered a rental loss of **$192.50** for May 2022 rent.

All parties agreed that there was no mutual agreement, or any written document, confirming that both parties agreed to end the fixed-term tenancy early.

H.C. testified that they received the keys from the previous tenant on or around April 30, 2022, and that there were several deficiencies in the rental unit that caused them not to want to move in. As such, they returned the keys to the Landlord on May 2, 2022. However, she confirmed that they did not end the tenancy in accordance with the *Act*. She also acknowledged that they permitted the Landlord to keep their security deposit. She testified that prior to renting the unit, the Landlord claimed that it was a "hot market", and that there were several interested prospective tenants, so the Tenants would have to make a decision quickly about renting.

The Landlord confirmed that it was a "hot market", and it was possible that she could have re-rented the unit for $1,885.00 after the Tenants declined to honour the tenancy agreement.

The Landlord also advised that she was seeking compensation in the amount of **$1,347.50** because the Tenants ended the fixed term tenancy agreement early, and this was the difference in rental loss she suffered for the next three and a half months. However, she then acknowledged that the rental loss she actually suffered was $385.00 for three months, totalling $1,155.00. Upon review, it appears as if once the remaining $192.50 is added to this amount, the total loss she suffered would equal $1,347.50. She referenced the new tenancy agreement submitted to support her claims for rental loss.

H.C. did not make any submissions with respect to this issue. As well, she confirmed that they did not provide the Landlord with a forwarding address in writing.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenants' forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with

Section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must pay double the deposit to the Tenants, pursuant to Section 38(6) of the *Act*.

Based on the totality of the evidence before me, given that the Tenants never provided their forwarding address in writing to the Landlord, I am satisfied that this Section of the *Act* was never initiated. As such, I find that the Landlord has not failed to comply with the *Act* and the doubling provisions do not apply.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

In addition, I note that Policy Guideline # 5 outlines the Landlord's duty to minimize their loss in this situation and that the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. In claims for loss of rental income in circumstances where the Tenants end the tenancy contrary to the provisions of the Legislation, the Landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit.

As well, I have included the following excerpts from this policy guideline that are relevant to this Decision.

> **Loss of Rental Income**
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> 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.
>
> **D. PROOF OF EFFORT TO MINIMIZE DAMAGE OR LOSS**
>
> The person claiming compensation has the burden of proving they minimized the

> damage or loss. If a landlord is claiming compensation for lost rental income, evidence showing the steps taken to rent the rental unit should be submitted or the claim may be reduced or denied. If a landlord is claiming a loss because they rented the rental unit for less money than under the previous tenancy, or they were unable to rent the unit, evidence like advertisements showing the price of rent for similar rental units, or evidence of the vacancy rate in the location of the rental unit may be relevant.

When reviewing the totality of the evidence before me, there is no dispute that the parties entered into a fixed term tenancy agreement for four months starting on May 1, 2022, yet the tenancy effectively ended because the Tenants never fully moved in and gave up vacant possession of the rental unit on May 2, 2022. Sections 44 and 45 of the *Act* set out how tenancies end and also specifies that the Tenants must give written notice to end a tenancy. As well, this notice cannot be effective earlier than the date specified in the tenancy agreement as the end of the tenancy. Section 52 of the *Act* sets out the form and content of a notice to end a tenancy.

There are few ways under the *Act* that the Tenants could break a fixed term tenancy without consequences. One would be if there was a signed mutual agreement to end the tenancy. The other would be if there was a breach of a material term of the tenancy, and if the Tenants then asked the Landlord in writing to correct this breach within a reasonable period of time. Moreover, in that warning letter, the Tenants would stipulate that they would be ending the tenancy if the Landlord did not correct this breach of a material term within that time period.

However, there is no evidence before me of a mutual agreement to end the tenancy in writing, nor was there ever a breach of a material term sequence of events as described above. Furthermore, there is no evidence that the Tenants provided any written notice to end their tenancy, and the Tenants acknowledged that they were in error for the manner with which they ended the tenancy.

While H.C. made submissions about why they believed they were justified in not moving in, it is clear that the Tenants did not want to move into the rental unit simply because of issues that they had concerns with, which is not a valid reason under the *Act*.

Given that the Tenants signed a tenancy agreement binding them to the terms of that agreement, I find their justification for not fulfilling their obligations are wholly unacceptable reasons for validly ending this tenancy without consequences. They elected to sign this agreement of their own volition, and if it there were problems with the rental unit, the Tenants should have informed the Landlord in writing that of these,

and asked her to fix them within a reasonable period of time. If these were not corrected, the remedy for the Tenants would have been to apply for Dispute Resolution to request a repair Order forcing the Landlord to fix the issues, and then potentially forcing the Landlord to compensate the Tenants accordingly for any loss of use of the rental unit. Of course, the burden of proof would be on the Tenants to prove that there was a problem in the first place, and that they suffered a loss because of it.

Regardless, ultimately, I am satisfied that the Tenants were not permitted to break the fixed term tenancy early in the manner with which they did. As such, I do not find that the Tenants ended the tenancy in accordance with the *Act*. Therefore, I find that the Tenants vacated the rental unit contrary to Sections 45 and 52 of the *Act*.

Moreover, I find that the evidence indicates that as a result of the Tenants' actions, the Landlord could have suffered a rental loss. In addition, it is evident that the Tenants gave the Landlord insufficient notification that they were ending the tenancy and not honouring the tenancy agreement. Given that the Landlord was informed that it was the Tenants' intention to break the fixed term tenancy on or around May 2, 2022, I am satisfied that the Landlord was given little notice to start advertising to re-rent the unit.

As the Landlord had been given minimal notification that the Tenants would be ending the fixed term tenancy early, I am satisfied that the Landlord was put in a position that it would have likely been difficult for her to re-rent the unit even for June 1, 2022, for $1,885.00 per month because by that point, most prospective tenants would have already found a new place to live. However, I find it important to note here that the Landlord was obligated to mitigate her loss, and while she did so by re-renting the unit within days, I do not find that she adequately mitigated as contemplated by the *Act* as she acknowledged that she made no efforts to advertise and attempt to find a new tenant for $1,885.00 per month.

In my view, had she made these efforts to advertise immediately for $1,885.00, then demonstrated that there were no interested parties willing to pay that amount and was subsequently forced to lower the rent, I would accept this as adequately mitigating her losses. As she immediately lowered the rent without any legitimate justification, this causes me to question why this arbitrary number was chosen. It appeared as if it was partially due to her mistaken notion of being able to limit the length of tenancies by utilizing the vacate clause. Regardless, as an example, albeit and extreme one, I find the Landlord's actions would be akin to seeking rent for a new tenant at $1.00 per month, and then simply expecting the Tenants to be responsible for the difference. In

my view, had she advertised for the full amount of rent and then demonstrated that the only suitable tenant was willing to pay $1,500.00 per month, then I would agree that she sufficiently mitigated her loss. Without any justification for lowering the rent, I question whether the Landlord adequately mitigated her loss as it is entirely possible that she may have found a new tenant for $1,885.00 per month.

Having said this, I also find it important to note that had the Landlord immediately advertised for $1,885.00 per month, and given that the beginning of the month had already passed, there would have been an increased likelihood that the Landlord would not have been able to find a new tenant willing to pay this much, which would have caused the Tenants to have been responsible for the full amount of rent for May 2022, and possibly longer. As the Landlord did find a new tenant relatively quickly, albeit for a reduced amount of rent, the Landlord did effectively limit the amount of loss that the Tenants could have been realistically responsible for, and the Tenants are fortunate for this as it reduced their potential liability.

Based on my assessment of this situation, the consistent and undisputed evidence before me is that the Tenants breached the *Act* first by ending the tenancy early, rendering them responsible for any potential rental loss suffered by the Landlord. However, on the other hand, I am not satisfied that the Landlord adequately mitigated her loss after the fixed-term tenancy was broken. Ultimately, I find that both parties are culpable here.

As a result, the compensation awarded to the Landlord is broken down as follows. For May 2022 rent, as the Landlord received $942.50 for half of May 2022 rent by way of the Tenants' security deposit, and as the Landlord received $750.00 for May 2022 rent from the new tenant, a difference of $192.50 was still owing. As both parties are negligent here, I grant the Landlord a monetary award in the amount of **$96.25**.

As for June, July, and August 2022 rent, as the Landlord received $1,500.00 per month for those months of rent from the new tenant, a difference of $385.00 per month was outstanding. As both parties are negligent here, I find it reasonable that both parties share in this loss. As such, I grant the Landlord a monetary award in the amount of **$577.50**, which is calculated as $192.50 per month owed by the Tenants.

As the Landlord was partially successful in her claims, I find that the Landlord is entitled to recover $50.00 of the $100.00 filing fee paid for her Application.

Pursuant to Sections 67 and 72 of the *Act*, I grant the Landlord a Monetary Order as follows:

Calculation of Monetary Award Payable by the Tenants to the Landlord

Rental arrears for May 2022	$96.25
Rental arrears for June 2022	$192.50
Rental arrears for July 2022	$192.50
Rental arrears for August 2022	$192.50
Filing fee	$50.00
TOTAL MONETARY AWARD	**$723.75**

Conclusion

The Landlord is provided with a Monetary Order in the amount of **$723.75** in the above terms, and the Tenants must be served with **this Order** as soon as possible. Should the Tenants 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: March 11, 2023

Residential Tenancy Branch