Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid rent; loss of rent; liquidated damages; and, authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally, and to respond to the submissions of the other party in accordance with the Rules of Procedure.

Preliminary and Procedural Matters

On the first scheduled hearing date of June 20, 2012 the tenants raised an issue with service of hearing documents and evidence upon them. Upon hearing from the parties, I determined that all of the named respondents had not been sufficiently served in a manner that complies with the Act. Service addresses were given to the landlords for three of the respondents and the service addresses for the other two respondents were confirmed to be correct.

The hearing was adjourned and the landlords given instructions to serve the hearing packages and evidence upon the respondents. The respondents were given authorization to provide written responses and/or evidence to me and the landlords upon receipt of the landlords' documents. The landlords were also authorized to provide written responses or submissions to the tenants' position. Both parties were informed that any documents to be considered must be served upon each other and the Branch within the deadlines established by the Rules of Procedure.

On July 19, 2012 the hearing re-convened. I was satisfied all of the respondents had been sufficiently served with the landlord's application and evidence except for the landlord's most recent written submission. The landlord's most recent submission had been emailed to the respondents. Most of the respondents stated they were unaware of the email or had not seen the email. As evidence must be served in one of the ways permissible under section 88 of the Act and email is not a permissible method of service, I informed the parties that I would not accept or consider the landlord's latest

written submission. Rather, the landlords would be provided the opportunity to respond to the tenants' submissions orally during the hearing.

I confirmed that the tenants' written submission was personally served upon the male landlord more than five days before the re-convened hearing.

In light of the above, I have considered the written submissions and/or evidence of the landlords, except for the most recent submission, and I have considered the tenants' written submission and/or evidence in reaching this decision. I have further considered all of the relevant verbal testimony provided to me during the hearing.

Issue(s) to be Decided

1. Have the landlords established an entitlement to recover unpaid rent and/or loss of rent from the tenants?
2. Are the landlords entitled to collect liquidated damages from the tenants?
3. Are the landlords authorized to retain the tenants' security deposit or should it be returned to the tenants?

Background and Evidence

The following information was undisputed: The tenancy commenced September 1, 2011. The tenants paid a $995.00 security deposit and were required to pay rent of $1,990.0 per month. The tenants sent an email communication to the landlord on March 26, 2012 with respect to ending their tenancy. Emails were exchanged between the parties and then on March 29, 2012 the tenants gave the landlord a written notice to end the tenancy effective April 30, 2012. The landlords re-rented the unit for a fixed term of May 2012 through August 2012 at the reduced rate of $1,400.00 per month.

The landlords are seeking to recover loss of rent of $2,360.00 plus $500.00 for liquidated damages. The loss of rent is calculated as $590.00 per month [$1,990.00 - $1,400.00] for the months of May 2012 through August 2012.

The landlords also sought recovery of $400.00 for administrative costs associated to this application. As costs incurred for preparing or participating in a dispute resolution proceeding are not recoverable, except for the filing fee, I dismissed this portion of the landlord's claim summarily.

Upon review of the tenancy agreements provided by each party I noted that the tenant's copy is not signed by the landlord(s). The landlord's copy does show a signature for the

landlord. The landlord's copy also provides for a term that does not appear in the tenant's copy of the tenancy agreement, which is: "Included in the suite is a breakfast bar and 3 bar stools". Neither party raised these discrepancies as an issue. Rather, both parties presented their cases on the basis a fixed term tenancy with an expiry date of August 31, 2012 was agreed upon. Accordingly, I proceeded to hear the matter on the basis that a fully executed one-year fixed term tenancy agreement exists, even if a copy of that fully executed agreement was not provided to the tenants.

The tenancy agreement provides for a liquidated damages clause that states:

> *In the case of early termination of tenancy by tenant(s), the landlord will be seeking liquidated damages for re-rental of the suite and any rental income lost in the interim for the lease duration. The liquidated damages requested will be either: five hundred dollars for the labor involved in re-renting (answering calls and showing the suite to prospective tenants) or agency fee if agent is used to rent the suite.*

In this section of the tenancy agreement the following statement appears:

> *Rental for May-August is also lower demand and with the higher city vacancy for the season a drop in the rent may be required to ensure occupancy for the remainder of the lease term.*

Both parties made detailed submissions, in writing and orally, of their respective positions. Below, I have summarized the position of each party.

Landlords' position

Since the tenants terminated the tenancy agreement before the expiry date of the fixed term the landlords are entitled to liquidated damages of $500.00 and recovery of loss of rent for the remainder of the fixed term pursuant to the tenancy agreement. The landlords submitted that the landlords went to great lengths to mitigate rental losses as follows:

The landlords gave permission to the tenants to sublet the rental unit. The landlords also started advertising the rental unit on April 3, 2012. Despite knowledge that the tenants were advertising the rental unit for sublet at the rate of $1,990 per month the landlords posted advertisements for the rental unit and reduced the advertised rental rate to attract a prospective tenant for May 2012 as follows:

Dates	Advertised monthly rent
April 16 – 18, 2012	$1,650.00
April 18 – 22, 2012	$1,400.00

The landlords acknowledged that the tenants referred prospective tenants to them; however, the prospective tenants were not suitable for various reasons. On April 19, 2012 the tenants advised the landlord that they were stopping advertising efforts for sub-tenants and that the landlord should proceed to find replacement tenants.

The landlords entered into a new fixed term tenancy agreement April 22, 2012 set to commence May 1, 2012 and expire August 31, 2012. The landlords have made it clear to the new tenants that rent for the unit will resume to $1,990.00 starting September 1, 2012.

The landlords explained that they prefer to have the fixed term tenancy agreements for all of their rental units expire on August 31 as demand for their units is highest at that time of year and because tenants sometimes move between units. The landlords submitted that demand for fixed terms greater than one year are not attractive to prospective tenants so a fixed term of 1 year and four months was not considered in this case.

Further, the landlords' experience has shown them that interest in an available unit is greatest at the beginning of a month. The landlords were also keeping watch of other available units after the tenants gave their notice and they were noticing units with lower advertised rents remaining vacant. For these reasons the landlords acted quickly to advertise and reduce the advertised rate as opposed to face a vacancy for one or more months. Accordingly, the landlords were of the position they mitigated their losses.

Tenants' position

The tenants submitted that the rental unit is located in a desirable area and that they received a lot of interest from their advertisements but that they lost control and the possibility of subletting or assigning the tenancy agreement to the landlords. In support of this position the tenants pointed out that they did not ask the landlords to start advertising the unit so soon and the tenants had even requested the landlords provide them with 15 days to find replacements but the landlords refused. Further, the landlords also reduced the advertised rent very quickly which undermined their advertising efforts.

The tenants submitted that the landlords' actions to reduce the advertised rent so quickly was at the expense of the tenants yet the tenants had no influence over the landlords' actions. Now the landlords are seeking to recover the loss associated to the

greatly reduced rent from the tenants. The tenants pointed to the landlords' advertisement showing the monthly rent as being $1,400.00 per month and reads:

> "*This suite is being offered at substantially reduced rent to August 31. The current tenants have a fixed term leas to the end o August but have decided to not stay. They will be paying the balance of the rent for this time period. If you are interest in saving some money and living in a nice place for the summer please contact us*."

The person that ended up signing a subsequent tenancy agreement had scheduled a viewing with the tenants pursuant to their advertisement. However, the new tenant cancelled the viewing scheduled with the tenants and showed up with the landlord instead. The tenants presented email evidence showing the subsequent tenant had contacted them on April 3, 2012 in response to their advertisement and scheduled a showing.

Finally, the landlords' communications to them were very confusing and the tenants were uncertain as to what the landlords would approve of in order to release them from the lease. For instance, the landlords encouraged the tenants to find sub-letters and then the landlord began advertising. Also, the landlord provided the tenants with information about sub-letting and assignment yet the landlord stated that an assignment would not be permitted.

Analysis

Upon consideration of the evidence before me, I provide the following findings and reasons with respect to the landlords' claims for loss of rent and liquidated damages.

Loss of rent

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the other party's violation caused the party making the application to incur damages or loss;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

I find it undeniable that by ending the fixed term tenancy early the tenants violated their tenancy agreement. I also find the amount claimed by the landlords for loss of rent has also been verified by the tenancy agreements. Thus, I find the landlords have met the first and third criteria above. However, based upon the submissions before me, I find a further analysis is necessary in order to determine whether the landlords suffered a loss because of the tenants' actions and that the landlords took reasonable steps to mitigate their loss.

Section 7(2) of the Act provides for the requirement to mitigate or minimize damages or loss. It provides:

> (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.
>
> [my emphasis added]

The word "reasonable" has been purposely inserted into the legislation. Residential Tenancy Policy Guideline 5 deals with the requirement to minimize losses. Echoed throughout the policy guideline is the requirement for efforts to minimize losses to be "reasonable". For instance, in three separate places the policy guideline refers to the requirement to take "reasonable" action, as reproduced, in part, below:

> 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 circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make **reasonable** efforts to re-rent the rental unit or site at a **reasonably** economic rent.
>
> [my emphasis added in bold]

The issue of advertising the unit for a reasonably economic rent is more often raised where a landlord increases the advertised rent of a unit for a significant amount and

then claims against the tenant for loss of rent for the months the unit remained vacant. However, I find the requirement to make reasonable efforts to advertise at a reasonably economic rent to be equally applicable where the landlord significantly reduces the rent and then sues the tenant for loss of rent. Therefore, considering the above, I find that re-renting the unit at a greatly reduced rate does not in itself satisfy the requirement to minimize losses.

From the tenant's submissions, I find it apparent the tenants are calling into question whether the landlords' efforts to minimize damages or loss were "reasonable" in the circumstances. I prefer the tenants' position that a $590.00 per month reduction in the advertised rent over a two week period is unreasonable as I find such aggressive reductions not provide reasonable exposure of the unit to the rental market at a reasonably economic rent. Therefore, I am not satisfied the landlords met the fourth criteria outlined in the test for damages described previously.

Upon review of the email communications from the landlord I accept the tenants' position that the landlord's communication was confusing and conflicting. For example: in the same email dated March 28, 2012 the landlord indicates:

- The landlord will try to rent for suite for full value for the first 3 – 4 days of the month [April].
- Then the landlord encourages the tenants find sub-tenants for the remainder of their fixed term and that it "is more acceptable to us than us offering the suite for ultimately a reduced rent for a 4 month lease term with no renewal option".
- As a last resort the landlord would find a short term rental prospect if the tenants attempts failed by the end of March 2012.
- The landlord wishes the tenant luck in finding people to sublet and then states she will begin advertising on March 30.

In contrast, I found the tenant's communications to clear and indicative of efforts to explore all options available to them to reduce the potential for loss of rent; including: subletting, assignment, and referring new tenants to the landlords. For example: despite the landlord's confusing email of March 28, 2012 the tenants respond on March 29, 2012 and indicate they are searching for people to sublet and that it is their hope to assign the lease to new tenants. The tenants also recognize that they may have to reduce the advertised rent if there is no interest at full price. The tenants request that they be permitted to advertise the unit for the full price for longer than the 3-4 days indicated by the landlord. The tenants assure the landlord that reducing the advertised

price sooner or later will not impact the landlord as the tenants are responsible for the loss of rent.

Other confusing and conflicting communications from the landlords included:

- On April 2, 2012 the landlord provides consent for the tenants to "sublet" the rental unit and provides information about subletting and assignment obtained from the Residential Tenancy Office, including: 1) treatment of a sublet agreement as an assignment if the last day of the tenancy is not reserved by the tenants; and, 2) the landlord cannot unreasonably or arbitrarily withhold consent to sublet or assign a tenancy agreement if a request is made.

- On April 5, 2012, the day after the tenant informs the landlord that it is the tenants' intention to assign the tenancy agreement, the landlord responds to the tenant with the statement: "We are not interested in assignment as this goes with considerable expense on our end which we would pass on to you ultimately".

The Act provides that where a tenant has a fixed term of six months or more, the landlord cannot unreasonably withhold consent to assign the rental unit or sublet the rental unit. It is important for the landlords to understand that life's circumstances can result in a tenant needing to terminate a fixed term early and the Act contemplates this by permitting the tenant to seek the landlord's consent to assign or sublet and prohibits the landlord from unreasonably withholding consent. I find the landlord arbitrarily refused to consider an assignment option, which severely hindered one of the tenants' options provided to them under the Act.

Without the ability to obtain assignees it is unknown as to whether a loss could have been avoided and since it is the landlord's actions that resulted in this loss of this option, I find it just as likely the landlord's actions resulted in the loss of rent. Therefore, the landlord has not satisfied the second criteria of the test for damages.

In light of the above, I find the landlords have not proven, on the balance of probabilities, the second and fourth criteria of the test for damages and the landlord's claims for loss of rent against the tenants is dismissed.

Liquidated damages

Residential Tenancy Policy Guideline 4 provides for liquidated damages. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the fixed term by the tenant. If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated

sum unless the sum is found to be a penalty. I find the amount payable under the clause to be a reasonable pre-estimate and is not a penalty. Since the tenants ended the fixed term early, I grant the landlord's request to recover liquidated damages of $500.00 from the tenants.

Filing fee, security deposit and Monetary Order

I make no award for the filing fee given the landlords limited success and I find the tenants were prepared to pay the liquidated damages amount when they gave notice to terminate the tenancy.

The landlord is authorized to deduct the award of $500.00 from the tenants' security deposit. As provided under Residential Tenancy Policy Guideline 17 I order the landlord to return the balance of the security deposit to the tenants. The tenants are provided a Monetary Order in the amount of $495.00 to serve upon the landlords and enforce as necessary.

Conclusion

The landlords have been awarded the amount of the liquidated damages clause and have been authorized to deduct $500.00 from the tenants' security deposit in satisfaction of this award. The landlords are ordered to return the balance of the security deposit to the tenants immediately. The tenants are provided a Monetary Order in the amount of $495.00 to serve upon the landlords and enforce as necessary.

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: August 14, 2012.

Residential Tenancy Branch