



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BROVAN TITLE LIMITED C/O FIRST SERVICE RESIDENTIAL
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: MNR MNSD MNDC FF

Introduction:

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) A monetary order pursuant to Sections 46 and 67 for unpaid rent and rental loss and breach of a lease;
- b) An Order to retain the security deposit pursuant to Section 38; and
- c) An order to recover the filing fee pursuant to Section 72.

This hearing also dealt with an application by the tenant pursuant to the Residential Tenancy Act (the Act) for orders as follows:

- d) For a return of double the security deposit pursuant to section 38; and
- e) To recover the filing fee for this application.

SERVICE

Both parties attended the hearing and each confirmed receipt of each other's Application for Dispute Resolution. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing.

Issue(s) to be Decided:

The tenant signed a one year fixed term tenancy but never occupied the property. Has the landlord proved on the balance of probabilities that there was a tenancy, that the tenant broke the lease and they are entitled to unpaid rent, rental loss and to recover the filing fee for this application? If so, what is the amount of the compensation?

Is the tenant entitled to twice his security deposit refunded and to recover filing fees for the application?

Background and Evidence:

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. It is undisputed that the tenant and witness

attended the building in December 2014 and were shown a model suite as the suite they proposed to rent needed renovations. It is undisputed that the building manager told them that their rental unit would be renovated similar to the model and would be available for rent to them. The tenant signed an Application to Rent on December 24, 2014 and a Residential Tenancy Agreement on December 29, 2014 to rent the unit from March 1, 2015 on a fixed term to February 29, 2016 at a rent of \$1050 per month; he paid a security deposit of \$525 on January 2, 2015. The lease provided for a payment of \$525 for a breach of the lease as liquidated damages and an agreed pre-estimate of the cost of renting the unit. The tenant initialled as required most of the clauses in the lease.

The tenant and his witness said they came to the premises on February 14, 2015 and the renovations were not completed as promised, namely the kitchen floor had a rip and they understood that neither it nor the bathroom floor would have new floors as promised. On February 14, 2015, the tenant gave notice that he would not be renting the unit "because [he] was 'enduced' to sign the lease based on advertised promises that were failed to be performed". He requested the return of his security deposit and provided his forwarding address in the same note.

The landlord said the whole unit was renovated as promised, not only the kitchen floor. However, the product for the kitchen floor was not in stock in time and they assured the tenant it would be dealt with after they moved in and in fact, it was replaced about February 16, 2015 and definitely before March 1, 2015 when the lease commenced. The tenant said he was told the kitchen floor would just be patched, not replaced and they did not inspect to see if the bathroom floor had been done. The building manager said the tenant had called on February 12, 2015 and asked if he did not take the place, might he have his money refunded? She invited them to come see the unit as it was so nice but the tenant said he was not going to move in as he realized it was too small. The tenant denied this conversation and said that he may have taken a two bedroom sometime in the future but not at this time. This unit was a studio.

The landlord claims lost rent from February 15-28 of \$525 and \$525 for March 1-15, 2015. They were able to re-rent on March 15, 2015. They also claim liquidated damages of \$525 (which they characterized as keeping the deposit for breach of a lease) and recovery of the filing fee.

The tenant claims twice his security deposit refunded in accordance with section 38 of the Act and states the lease should be voided as he was induced to sign it by promises that were not kept.

In evidence are many invoices showing renovations to the unit from December 2014 to February 2015, a USB, an Application to Rent, the tenancy agreement, a Notice cancelling the tenancy from the tenant, photographs and advertisements.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis

The onus is on each applicant to prove on a balance of probabilities their claim. The testimony of the tenant and the landlord is conflicting with regard to their recollection of the events of the matter. As explained to the parties during the hearing, the onus or burden of proof is on the party making a claim to prove the claim. When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails. I find the landlord

Since the sworn oral testimony of the parties is conflicting, I will rely heavily on the written documents provided for evidence. I find the tenant voluntarily signed an Application to Rent followed by a Residential Tenancy Agreement on December 29, 2014. He also paid a security deposit on January 2, 2015. Although it was the landlord's intention to renovate the suite, I find no conditions or any provisions in either of these documents concerning the renovations or any provision as to what was to be replaced in the unit. The tenant provided a recording of a conversation on a USB and a transcript in writing. I considered the conversation. I find in it the tenant or his witness were making decisive statements based on their position of cancelling the lease due to incomplete renovations, the tenant's witness was feeding him the words and the building manager whose second language is English made some acknowledgement but I find her meaning is inconclusive and not clear and she was constantly interrupted by the tenants before she finished her sentences. She did say the kitchen was 'usually floored after the cabinets' and 'they stopped doing lino in the bathroom. Its ah...you know between two period...' and the senior manager when called to the phone said it would be fixed maybe by Monday or Tuesday, they could still move in and they could deal with it and it is not an issue.

Based on the weight of the evidence, I find the tenant signed a fixed term lease voluntarily. I find insufficient evidence of any inducement to sign and in fact, I noticed he initialled many points in the lease which does not indicate to me any hesitation in signing. I find insufficient evidence of any advertisement of a certain quality of renovation. I find the tenant gave notice he was not taking the unit on February 14, 2015 which is two weeks before his lease began (although the parties verbally agreed

that he could take possession on February 15, 2015). Therefore, I find the tenant breached his fixed term lease which commenced on March 1, 2015.

I find the landlord mitigated their damages by re-renting as soon as possible which was on March 15, 2015. I find the landlord entitled to recover rental loss from March 1-15, 2015 in the amount of \$525. As the lease was not to commence until March 1, 2015 and I find no written agreement that the tenant would pay rent or take possession from February 15, 2015, I find the landlord not entitled to rental loss for February 15 to February 28, 2015.

In respect to liquidated damages claimed for breach of the lease, I find the lease provision states that it is \$525 which is a genuine pre-estimate of damages, not a penalty(and not just an automatic keeping of the security deposit as the landlord mistakenly stated in the hearing). The landlord said their estimated costs due to the breach were \$50 for advertising; I find them entitled to this amount and \$50 for filing fee.

On the tenant's application, the onus is on him to prove on the balance of probabilities that twice the security deposit should be refunded in accordance with section 38 of the Act. I find section 38 of the Act provides that the landlord must return the security deposit or file an application to claim against it within 15 days of the later of the end of the tenancy, or the tenant vacating and providing a forwarding address in writing. According to section 45(2) of the Act, a fixed term tenancy does not end until the end of the fixed term. However, I find in this case the landlord mitigated the damages by re-renting and so accepting the end of the tenancy on March 15, 2015. I find the landlord filed their application on February 26, 2015 so the doubling provision of section 38 does not apply. I dismiss his application. I find the security deposit will be used to offset the amount owing.

Conclusion:

I find the landlord entitled to a monetary order as calculated below and to recover the filing fee and retain the security deposit to offset the amount owing.

For the reasons stated above, I dismiss the application of the tenant in its entirety without leave to reapply and I find he is not entitled to recover filing fees for his application due to his lack of success.

Calculation of Monetary Award:

Rental Loss March 1-15 per lease	525.00
Re-renting costs	50.00
Filing fee	50.00

Less security deposit	-525.00
Total Monetary Order to Landlord	100.00

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 17, 2015

Residential Tenancy Branch

