



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OPB, MNDC, MND, MNR, MNSD, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the tenants' application for dispute resolution in which the tenant has requested compensation for rent paid in advance, return of the pet and security deposits and to recover the filing fee cost from the landlord.

The landlord applied for dispute resolution, requesting compensation for unpaid rent, an order of possession, compensation for damage to the rental unit, to retain the security deposit and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to make submissions during the hearing. I have considered all of the relevant evidence provided.

Preliminary Matters

The landlord has possession of the rental unit and does not require an order of possession.

The landlord claimed the cost of hiring an agent to act on the landlords' behalf, in the sum of \$1,700.00. An applicant can only recover damages for the direct costs of breaches of the Act or the tenancy agreement in claims under section 67 of the Act. "Costs" incurred with respect to filing a claim for damages are limited to the cost of the filing fee, which is specifically allowed under Section 72 of the Residential Tenancy Act. As a result, the portion of the claim for agents' fees is denied.

The detailed calculation of the claim submitted by the landlord did not provide a sum claimed for damage to the rental unit. As the tenant was not served with notice of the

sum claimed for damage I find that portion of the application is dismissed with leave to reapply.

The parties confirmed receipt of evidence, applications, and the tenants' amended application within the required time limits.

Issue(s) to be Decided

Is the tenant entitled to compensation in the sum of \$5,100.00 representing an advance payment made for the last three months of the tenancy?

Is the landlord entitled to compensation for the loss of rent revenue in the sum of \$5,800.00?

Is the landlord entitled to retain the security deposit or must the landlord be ordered to return the deposit to the tenant?

Background and Evidence

This fixed term tenancy agreement commenced on March 1, 2016, ending on February 28, 2017 when the tenant was required to vacate. Rent was \$1,700.00 due on the first day of each month. The landlord is holding a pet and security deposit in the sum of \$850.00 each. A copy of the tenancy agreement was supplied as evidence.

The parties confirmed that at the start of the tenancy the tenant paid an additional \$5,100.00. The tenant has applied requesting return of those funds, referred to in the tenancy agreement addendum as a security deposit payable due to the tenants' lack of rental history in Canada. The tenant referred to this sum as a rent payment for the final three months of the fixed term.

The parties each supplied copies of electronic messages sent to each other.

There was no dispute that on August 31, 2016 the tenant sent notice to the landlord that the tenancy would end effective October 31, 2016. The landlord responded on August 31, 2016 offering the tenant two options. The tenant could seek out a sub-tenant and remain liable for the tenancy to the end of the fixed term or the landlords' agent would be hired to rent the home out effective November 1, 2016. In that case the tenant would pay one month's rent and no longer be liable for the rent of the term.

The landlord said that she always signed one year leases with tenants.

The tenant initially chose to seek out a sub-tenant. The tenant was to locate a new tenant to pay \$1,700.00 rent to the end of the term, at which point the rent would increase by \$400.00 per month. On September 9, 2016 the tenant confirmed the unit would be advertised on a popular web site.

The tenant had interest from potential renters, demonstrated by emails sent on September 11 and 12, 2016. On September 13, 2016 the tenant emailed the landlord regarding two "great candidates" for the unit.

The tenant located a couple, S. and N., who were willing to rent the unit for \$1,950.00 per month for a one year term.

S. and N. emailed the tenant on September 17, 2016, indicating interest in the unit. On September 24, 2016 S. and N. offered \$1,950.00 per month, with a one year lease. This message was sent to the landlord on the same date. The landlord replied that she would do a contract to July 2017 at \$2,000.00 per month. The landlord asked for their credit information and to be put in touch with them. The tenant presented the offer to S. and N. but on September 24, 2016 they declined. S. and N. wanted a one year lease.

The tenant submitted a November 10, 2016 letter issued by S. and N. confirming they had made an offer to rent the unit at \$1,950.00 per month for one year, but could not accept the \$2,100.00 rent that had been advertised.

On October 2, 2016 the tenant informed the landlord that with the rent increase that would follow the current tenancy term the tenant had decided to allow the landlords' agent to rent the unit. The tenant found that an increase of \$400.00 effective March 1, 2017 was too high to attract tenants. The tenant wrote that it would be better that the landlord try to sign a new lease effective November 1, 2016. The tenant asked the landlord to waive the one month penalty as it could be recouped over the four remaining months of the term. The landlord replied that it was not the best time of year to find new tenants and that her agent would be called to assist.

On October 2, 2016 the landlord advertised the unit at \$2,000.00 per month and after several weeks reduced rent sought to \$1,900.00. The landlord offered a one year term to potential tenants. The landlord repeatedly emphasized that it was not the level of rent sought, but the fact that the timing of the vacancy was poor; people did not want to move at that time of year. The sum of rent sought was the market value at the time. The landlord supplied copies of advertisements' of comparable units; with rent demonstrating what the landlord sought was reasonable. The landlord did not supply copies of advertisements for the unit. The landlord had given the current tenant consideration and had not set the rent as high as it could have been.

The tenant replied that it was a 24% rent increase that was the issue, not the time of year or the market.

On October 14, 2016 the landlord confirmed that the agent was looking for a renter for the end of October. Showings of the unit occurred during October, 2016. The landlord was able to rent the unit, effective December 1, 2016.

As a result of the rental achieved effective December 1, 2016 the landlord confirmed that the loss of rent revenue would be for the month of November 2016 only. The

landlord said it was the tenant who had breached the contract and that the landlord did her best to help and be fair.

Analysis

Section 45(2) of the Act provides:

Tenant's notice

45 (2)

(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.

(3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

As the tenant ended the tenancy effective October 31, 2016, when the term was to end effective February 28, 2017, I find that the tenant breached section 45(2) of the Act. The landlord had not breached a material term of the tenancy; the tenant ended the tenancy by choice.

The tenants' breach of the Act does not entitle the landlord to an automatic right to compensation. Where the landlord or tenant breaches a term of the tenancy agreement or Act the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate and is set out in section 7 of the Act, which provides:

Liability for not complying with this Act or a tenancy agreement

7 (1) *If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(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.*

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. In this case the tenant must also take steps to mitigate a potential loss as the tenant breached the Act by ending the tenancy prior to the end of the fixed term.

I find that the tenant demonstrated efforts to mitigate the loss by attempting to locate new tenants. I accept that those efforts were somewhat hampered by the landlords' intention to increase the rent from \$1,700.00 to \$2,000.00 at the end of the term. However the tenant had agreed to accept a fixed term tenancy and then breached the terms of that agreement.

I find that the tenant did locate a couple who appeared interested in renting for a one year term; which the landlord stated was the term she always accepted. However, these prospective tenants did not wish to commence the tenancy at \$1,950.00. The tenant did not provide evidence as to when these individuals could take possession but they indicated interest in September, 2016, which would have reasonably allowed notice to be given for a move effective November 1, 2016.

I find that when the landlord rejected the potential of a one year tenancy with S. and N. the landlord failed to properly mitigate. It would have been reasonable for the landlord to enter into negotiations with that interested party, but the landlord clearly indicated the rent would be \$1,950.00 during the remaining period of the fixed term, and beyond.

The landlord did not supply copies of advertisements but confirmed that rent sought effective October 2, 2016 was \$2,000.00 per month with a reduction several weeks later to \$1,900.00. The landlord did not offer the unit at the rent paid by the tenant to the end of the term, February 28, 2017, and insisted on an increase beyond the \$1,700.00 the tenant paid. It would have been reasonable to offer the unit at \$1,700.00 to February 2017. The landlord would then be free to include a term increasing rent effective March 1, 2017.

I have also considered the tenants decision to cease attempting to locate a sub-tenant, by informing the landlord on October 2, 2016 that he wished to turn the search over to the landlord. This decision was made at a point where the landlord was left at a disadvantage, as the landlord was now faced with trying to locate a tenant by the end of that month. I find that the decision made by the tenant on October 2, 2016 impacted the

tenants' obligation to mitigate a potential loss, when the tenant had originally accepted responsibility for locating a sub-tenant for the balance of the tenancy.

As explained during the hearing, a reasonable attempt to mitigate would have included the landlord advertising at a rent no more than the sum of rent payable by the tenant, to the end of the tenancy term. It was also explained that another example of mitigation is to advertise at a lower rate of rent for the balance of the term and to then seek compensation for the loss, up to the rent that had been payable by the tenant.

Taking into account the tenants' obligation to mitigate by locating a sub-tenant at the same rent for the balance of the term; the short notice given by the tenant to the landlord that he would no longer make those efforts and the landlords failure to mitigate by advertising at a comparable rent, I find that both parties failed to reasonably mitigate their potential loss. As a result I find that the responsibility for the loss of November 2016 rent revenue must be shared.

Therefore, pursuant to section 67 of the Act I find that the landlord must assume responsibility for one-half of the \$1,700.00 loss of November 2016 rent revenue and that the tenant is responsible for the balance of the November 2016 rent revenue loss.

Therefore, I find that the landlord may retain the \$850.00 security deposit held in trust, in satisfaction of the claim.

Pursuant to section 72 of the Act I find that the tenant is entitled to return of the \$850.00 pet deposit.

In relation to the advance payment equivalent to three months' rent, I find that payment, referenced as a security deposit in the tenancy addendum breached section 19 of the Act. A landlord may accept a pet and security deposit in the sum equivalent to one-half of one months' rent. Any overpayment of a deposit may be deducted from rent owed.

Therefore, I find pursuant to section 62(3) of the Act that the tenant is entitled to return of the sum of \$5,100.00 paid at the start of the tenancy.

As each application has merit I find that the filing fees are set off against the other.

Based on these determinations I grant the tenant a monetary order in the sum of \$5,950.00 (\$850.00 pet deposit; \$5,100.00 equivalent to three months' rent.) In the event that the landlord does not comply with this order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an order of that Court.

The balance of each claim is dismissed.

Conclusion

The landlord is entitled to compensation for loss of November 2016 rent revenue in the sum of \$850.00.

The landlord may retain the security deposit in satisfaction of the claim.

The balance of the landlords' application is dismissed.

The tenant is entitled to return of the \$850.00 pet deposit and the three months advance payment made in the sum of \$5,100.00. The tenant's claim for return of the security deposit is dismissed.

Filing fee costs are set off against the other.

This decision is final and binding and 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: December 19, 2016

Residential Tenancy Branch