Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR, FF

Introduction

A hearing was convened on February 06, 2018 in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for a monetary Order for unpaid rent or utilities; a monetary Order for money owed or compensation for damage or loss, to retain all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution.

The hearing on February 06, 2018 was adjourned for reasons outlined in my interim decision of February 06, 2018. The hearing was reconvened on April 12, 2018 and was concluded on that date.

At the hearing on February 06, 2018 the Landlord stated that sometime in early August of 2017 the Application for Dispute Resolution, the Notice of Hearing and documents the Landlord submitted with the Application for Dispute Resolution were sent to the Tenant, via registered mail, although he cannot recall the date of service. The Tenant acknowledged receipt of these documents and the evidence was accepted as evidence for these procedures.

The Tenant submitted no evidence in regards to this Application for Dispute Resolution.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. The parties were advised of their legal obligation to speak the truth during these proceedings.

All of the evidence submitted by the parties for these proceedings has been reviewed.

Issue(s) to be Decided

Is the Landlord entitled to a monetary Order for unpaid rent/lost revenue?
Is the Landlord entitled to keep the security deposit?

Background and Evidence

The Landlord and the Tenant agree that:

- this tenancy began on August 08, 2016;

- the parties signed a tenancy agreement for a fixed term, the fixed term of which ended on August 08, 2017;
- the Tenant was required to pay monthly rent of $2,400.00 by the eighth day of each month;
- on October 09, 2016 the Tenant sent the Landlord an email, in which the Tenant declared that he would like to end the tenancy on November 22, 2016;
- the rental unit was vacated on November 21, 2016; and
- the Tenant paid $1,200.00 in rent for the period between November 08, 2016 and December 08, 2016.

The Landlord submitted several emails exchanged between the parties.

The Tenant stated that on the basis of the emails exchanged between the parties he understood the Landlord was mutually agreeing to end the tenancy. The Landlord stated that he did not mutually agree to end the tenancy and that none of his emails suggested that he was agreeing to end the tenancy.

The Landlord stated that after the Tenant provided his notice to end the tenancy he negotiated with a third party for the sale of the property. He stated that those negotiations did not result in a sale and he was able to find sublet the rental unit to a new tenant who was willing to move into the rental unit on a short term basis. He stated that the new tenant occupied the rental unit in December of 2016 and January of 2017, for which he collected rent of $3,600.00. The Tenant does not dispute that the rental unit was rented in December and January.

The Landlord stated that the rental unit had been advertised for rent on a popular local website and that he stopped advertising in January because he was not receiving any responses to the advertisement. He stated that he did not continue to advertise the rental unit after January of 2017 because he decided to renovate and sell the unit. He stated that the rental unit was sold in November of 2017. The Tenant does not dispute that the rental unit was renovated and sold.

The Tenant stated that he finds it very difficult to believe that the Landlord could not find a new renter for the unit for February of 2017, as he understands that the rental vacancies in this area are very low.

On the Monetary Order Worksheet the Landlord declared that he has collected $14,708.00 in rent.

The Landlord and the Tenant agree that this tenancy agreement was the subject of a previous dispute resolution proceeding. The file number for this matter is recorded on the cover page of this decision. The parties agree that a decision was rendered in that matter on October 23, 2017. Legal Counsel for the Tenant summarized some of the findings during this hearing.

Analysis

On the basis of the tenancy agreement submitted in evidence I find that the Tenant entered into a fixed term tenancy agreement with the Landlord, the fixed term of which ended on August 08, 2017.

On the basis of the undisputed evidence I find that the Tenant agreed to pay monthly rent of $2,400.00 by the eighth day of each month.

Section 44(1)(c) of the *Residential Tenancy Act (Act*) stipulates that a tenancy ends if the Landlord and the Tenant agree, in writing, to end the tenancy. I find that this tenancy did not end by mutual consent.

In concluding that this tenancy did not end by mutual consent I was heavily influenced by the absence of a written agreement that clearly establishes the parties mutually agreed to end the fixed term tenancy and by the Landlord's testimony that he did not agree to end the tenancy.

I find that the Tenant should have understood that the Landlord was not agreeing to end the tenancy by mutual consent when he received the email of October 10, 2016, in which the Landlord advised the Tenant "you will be responsible for costs associated with the break of the lease".

Section 45(2) of the *Act* allows a tenant to end a fixed term tenancy by giving the landlord notice to end the tenancy that is effective on a date that is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and 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.

I find that the Tenant did not comply with section 45(2) of the *Act* when he served the Landlord with notice to end this fixed term tenancy on a date that was earlier than the end date specified in the tenancy agreement.

Had the Tenant not vacated the rental unit prior to the end of the fixed term tenancy, I find that the Landlord would have collected $7,200.00 in rent for the Tenant for the period between November 08, 2016 and February 08, 2017.

On the basis of the undisputed evidence I find that the Tenant paid $1,200.00 in rent for the period between November 08, 2016 and December 08, 2016.

On the basis of the undisputed evidence I find that the Landlord was able to sublet the rental unit for December of 2016 and January of 2017, and that he collected $3,600.00 in rent for those months.

As the Landlord collected a total of $4,800.00 in rent for the period between November 08, 2016 and February 08, 2017 and he would have collected $7,200.00 if the Tenant had not vacated the unit prior to the end of the fixed term tenancy, I find that the Landlord experienced lost revenue of $2,400.00 during this period.

On the basis of the undisputed evidence I find that the Landlord did not collect any rent after January 31, 2017. As the Landlord would have collected a total of $14,400.00 in rent for the period between February 08, 2017 and August 08, 2017 if the Tenant had not vacated the unit prior to the end of the fixed term tenancy, I find that the Landlord suffered a loss in revenue for this period in the amount of $14,400.00.

Section 67 of the *Act* authorizes me to order a tenant to pay compensation to a landlord if the landlord experiences damage or loss as the result of the tenant not complying with the *Act.*

Residential Tenancy Branch Policy Guideline #3 reads, in part:

> If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.
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> The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy. For example, a tenant has agreed to rent premises for a fixed term of 12 months at rent of $1000.00 per month abandons the premises in the middle of the second month, not paying rent for that month. The landlord is able to re-rent the premises from the first of the next month but only at $50.00 per month less. The landlord

> would be able to recover the unpaid rent for the month the premises were abandoned and the $50.00 difference over the remaining 10 months of the original term.
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> In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale. (Emphasis added)

I find that the email the Landlord sent to the Tenant on October 10, 2016, in which he advised the Tenant "you will be responsible for costs associated with the break of the lease" served as notice that the Landlord intended to pursue costs associated to the Tenant vacating the unit prematurely, including lost revenue.

I find that the Landlord is entitled to compensation of $1,714.32 for the loss of revenue he experienced for the period between November 08, 2016 and January 31, 2017. $1,714.32 is the amount of revenue lost between November 08, 2016 and February 08, 2017 ($2,400.00), less lost revenue for the period between February 01, 2017 and February 08, 2018. Lost revenue for the period between February 01, 2017 and February 08, 2018 was $685.68 (8 days X $85.71 which was the per diem rent for February).

I find that the Landlord is not entitled to any compensation for lost revenue for the period between February 01, 2017 and August 08, 2017, as he did not properly mitigate his losses after January 31, 2017.

Section 7(2) of the *Act* stipulates, in part, that when a landlord claims compensation for damage or loss as a result of a tenant's non-compliance with the *Act,* the regulations, or their tenancy agreement, the landlord must do whatever is reasonable to minimize the damage or loss.

Residential Tenancy Branch Policy Guideline #5 reads, in part,:

> 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. 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. ….
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> 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. Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent

> the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect. Oral notice is not effective to end the tenancy agreement, and the landlord may require written notice before making efforts to re-rent. Where the tenant has vacated or abandoned the rental unit or site, the landlord must try to rent the rental unit or site again as soon as is practicable. (Emphasis added)

I find that the Landlord took reasonable steps to mitigate his lost revenue for the period between November 22, 2016 and January 31, 2017 by finding a sub-tenant for December of 2016 and January of 2017. I find that the Landlord did not take reasonable steps to locate a new tenant after the rental unit was vacated on January 31, 2017.

In concluding that the Landlord did not take reasonable steps to locate a new tenant after the rental unit was vacated on January 31, 2017, I was heavily influenced by the Landlord's testimony that he did not continue to advertise the rental unit after January of 2017 because he decided to renovate and sell the unit, and that the unit was sold in November of 2017. As the Landlord stopped looking for a tenant after January of 2017, I find that could not have had any reasonable expectation of mitigating his revenue losses after January 31, 2017.

On the basis of the Landlord's Monetary Order Worksheet I find that the $9,908.00 in rent and "rental deposits" were paid for the period prior to November 08, 2016. As $2,400.00 of this payment was for a security deposit and $300.00 was for a pet damage deposit, I find it reasonable to conclude that $7,208.00 of the money paid prior to November 08, 2018 was for rent for the period between August 08, 2016 and November 07, 2016. I therefore find that the Tenants have overpaid their rent for this period by $8.00.

I find that the compensation of $1,714.32 that the Landlord is entitled to for lost revenue must be reduced by $8.00, as the rent has been overpaid by that amount. After deducting this amount I find that the Landlord is entitled to compensation of $1,706.32 for lost revenue.

I have reviewed the decision made by the Arbitrator on October 23, 2017, which relates to this tenancy. As the Arbitrator concluded that the tenancy did not end when the rental unit was vacated in November of 2016 and that the Landlord had not accepted the Tenant's repudiation of the tenancy agreement by December 19, 2017, I find those matters have been decided and that I do not have authority to reconsider those issues.

In his decision of October 23, 2017 the Arbitrator left it open for me to determine whether the Landlord accepted the Tenant's repudiation of the lease after December 19, 2016. I concur with the Arbitrators analysis regarding repudiation and, on the basis of the information before me; I find that the Landlord did not accept the Tenant's repudiation prior to August 08, 2017.

Section 38(1) of the *Act* reads:

> *Except as provided in subsection (3) or (4) (a), within 15 days after the later of*

(a) the date the tenancy ends, and
(b) the date the landlord receives the tenant's forwarding address in writing,
the landlord must do one of the following:
(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

As the Landlord had not accepted the Tenant's repudiation of the lease prior to August 08, 2017 and he filed this Application for Dispute Resolution on August 04, 2017, I find that the Landlord complied with section 38(1) of the *Act.*

As the Landlord complied with section 38(1) of the *Act*, I find that is not subject to the doubling penalty established by section 38(6) of the *Act.*

I find that the Landlord's Application for Dispute Resolution has some merit and that he is entitled to recover the fee for filing this Application for Dispute Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of $1,806.32, which includes $1,706.32 for lost revenue and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to keep this amount from the Tenant's security deposit, in full satisfaction of the monetary claim.

As the Landlord has failed to establish a right to keep the full security/pet damage deposit paid by the Tenant, I find that the Landlord must return the remaining $893.68 to the Tenant. Based on these determinations I grant the Tenant a monetary Order for $893.68. In the event 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.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: April 13, 2018

Residential Tenancy Branch