Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNRL-S, FFL

Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for a monetary Order for unpaid rent, to keep all or part of the security deposit, and to recover the fee for filing this Application for Dispute Resolution. The Application for Dispute Resolution was filed on October 09, 2019, which is less than 15 days after the rental unit was vacated.

The Agent for the Landlord stated that the Dispute Resolution Package was served to the Tenant by registered mail, although she does not recall the date of service. The Tenant stated that he received these documents by registered mail, although he cannot recall the date they were received. On the basis of the undisputed evidence, I find that these documents have been served in accordance with section 89 of the *Residential Tenancy Act (Act*).

In October of 2019 the Landlord submitted evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that this evidence was served to the Tenant, via registered mail, on October 18, 2019. The Tenant acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

In January of 2020 the Tenant submitted evidence to the Residential Tenancy Branch. The Tenant stated that this evidence was served to the Landlord, via registered mail, on January 10, 2020. The Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

In January of 2020 the Landlord submitted evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that on January 22, 2020 this evidence was personally served to a male at the Tenant's home address. She stated that the male informed her that he lived with the Tenant.

The Tenant stated that he does not live with a male and he did not receive any evidence that was allegedly served to a male on January 22, 2020.

As there is no evidence to corroborate the submission that the aforementioned documents were served to a male who lived with the Tenant, I cannot conclude that the evidence was served in accordance with section 88 of the *Act*. The parties were advised that I could not accept the evidence that was allegedly served on January 22, 2020, as the Tenant did not acknowledge receipt of it and I am unable to conclude it was served in accordance with section 88 of the *Act*.

The Agent for the Landlord was advised that she could discuss this evidence during the hearing and that if, at any point during the hearing, the Landlord deemed it necessary for me to physically view the evidence submitted to the Residential Tenancy Branch on January of 2020, the Landlord could request an adjournment for the purposes of re-serving this evidence. The hearing was concluded without the Landlord requesting an adjournment.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each party affirmed that they would provide the truth, the whole truth, and nothing but the truth at these proceedings.

All documents accepted as evidence for these proceedings have been reviewed, however they are only referenced in this decision if they are directly relevant to the decision.

Preliminary Matter #1

The parties submitted evidence regarding a counter claim filed by the Tenant.

The parties were advised that the issues in dispute in the Tenant's Application for Dispute Resolution will not be considered at these proceedings. The Tenant's Application for Dispute Resolution is scheduled to be heard in June of 2020, at which time the Tenant's claims will be considered.

The issues being considered at these proceedings will be limited to the claims being made by the Landlord.

Preliminary Matter #2

With the consent of both parties, the Application for Dispute Resolution was amended to reflect the correct spelling of the Tenant's first name, as he provided it at the hearing.

Issue(s) to be Decided

Is the Landlord entitled to compensation for unpaid rent and to keep all or part of the security deposit?

Background and Evidence

The Landlord is seeking compensation for lost revenue for October of 2019, because proper notice to end the tenancy was not provided.

The Agent for the Landlord and the Tenant agree that:

- the parties signed a tenancy agreement that names the Applicant (Landlord) and the Respondent (Tenant);
- the tenancy agreement was provided to the Tenant electronically, for the purposes of signing it;
- a third party, whom I will refer to as "KW", acted on behalf of the Landlord when this tenancy agreement was negotiated;
- the tenancy began on July 03, 2019;
- the tenancy agreement stipulates that the tenancy is for a fixed term, the fixed term of which ended on September 30, 2019;
- the tenancy agreement stipulated that the tenancy continued on a month-to-month basis after September 30, 2019;
- a security deposit of $4,247.50 was paid;
- the Tenant agreed to pay monthly rent of $8,495.00 by the first day of each month;
- the Tenant did not give written notice of his intent to end the tenancy;
- on September 29, 2019 the Tenant emailed an agent for the Landlord, advising that the rental unit was vacated;
- the Tenant verbally agreed that the Landlord could retain the Tenant's security deposit; and

- the parties never agreed, in writing, that the Landlord could retain any portion of the security deposit.

The Tenant stated that:

- when he discussed the terms of the tenancy agreement with KW, he understood that he was required to vacate the rental unit at the end of the fixed term of the tenancy, which was September 30, 2019;
- he did not give notice to end the tenancy because he believed he was required to vacate the unit by September 30, 2019;
- he did not read the agreement prior to signing it because he assumed it correctly reflected the verbal terms that he had discussed with KW;
- he does not know if he could have printed the tenancy agreement before, or after, he signed it;
- he was never provided with a copy of the tenancy agreement after it was signed, until it was provided to him as evidence for these proceedings;
- he was never provided with an email with a copy of the signed tenancy agreement attached;
- he vacated the rental unit on September 28, 2019;
- the Landlord was unable to re-rent the unit for October of 2019 because they were asking an excessive amount of rent;
- he only agreed to pay the excessive amount of rent because he had an urgent need for furnished accommodations; and
- in July of 2019 the Agent for the Landlord told him, by text message, that the unit was “not rentable” in October.

The Agent for the Landlord stated that:

- after both parties sign the tenancy agreement, the company that KW works for sends an email to each party, in which a copy of the signed tenancy agreement is attached;
- there was never an agreement that the Tenant was required to vacate the rental unit at the end of the fixed term of the tenancy;
- the rental unit was vacated on September 29, 2019;
- the company that KW works for began advertising the rental unit on October 06, 2019;
- the rental unit was advertised for rent in October of 2019, for a monthly rate of $4,247.50;
- the rental unit was re-rented on December 21, 2019 for a monthly rate of $4,247.50;

- when she sent the text message to the Tenant in July regarding the rental not being “rentable” in October of 2019, she meant that this was a slow time for rentals of this nature; and
- because October and November are typically slow months for renting, she typically does not agree to fixed term tenancies that end in these months.

The Landlord submitted an email from KW, which she contends was served to the Tenant in January of 2020. The Tenant did not acknowledge receiving this document as evidence.

The Landlord read out the email from KW during the hearing. The Tenant stated that he is willing to permit me to consider this document as evidence and that he does not require an adjournment for the purposes of being served with the document.

In the email KW declares, in part, that the company she represents allows signatories to download a copy of a lease once it is signed and the Tenant had the ability to review the terms of the lease prior to signing it.

The Tenant submitted a copy of an email he wrote to the company KW represents, dated October 25, 2019. In this email he indicates he does not have a copy of the agreement in “his account”.

The Tenant submitted a copy of an email he received from the company KW represents, dated October 26, 2019. In this email a representative of the company indicates that the document was deleted on September 17, 2019 and that she cannot access a copy of it.

Analysis

On the basis of the undisputed evidence, I find that the parties signed a tenancy agreement in which they agreed to enter into a fixed term tenancy, the fixed term of which ended on September 30, 2019.

On the basis of the testimony of the Tenant, I find that the tenancy agreement was provided to the Tenant, electronically, for the purpose of his reviewing and signing it.

I find that the Tenant signed the tenancy agreement without reading it at his own peril.

I find that it is irresponsible for a party to not read the terms of a written agreement and to simply presume that the terms that were verbally discussed would be reflected in the agreement. The primary purpose of creating a written agreement is to confirm the terms of the agreement, which in most cases have been discussed prior to creating the agreement.

As the Tenant was provided with a copy of the tenancy agreement and he signed that agreement, I find that he was obligated to comply with the terms of the tenancy agreement.

Residential Tenancy Branch Policy Guideline #30 reads, in part:

Effective December 11, 2017, a tenancy agreement may only include a requirement that the tenant vacate the rental unit at the end of a fixed term if:

- The tenancy agreement is a sublease agreement; or
- The tenancy is a fixed term tenancy in circumstances prescribed in section 13.1 of the Residential Tenancy Regulation.

The Legislation allows for limited circumstances where a vacate clause in a tenancy agreement is enforceable:

- The tenancy agreement is a sublease agreement;
- The tenancy is a fixed term tenancy in circumstances prescribed in section 13.1 of the Residential Tenancy Regulation; or
- If one of the following occurred before October 26, 2017:

(i) the landlord entered into a tenancy agreement, to begin after the expiry of an existing tenancy agreement that includes a requirement to vacate the rental unit6, with a new tenant for the rental unit, or

(ii) the director granted an order of possession to the landlord on the basis of a requirement to vacate the rental unit in an existing tenancy agreement.

Residential Tenancy Branch Regulation 13.1(2) stipulates that a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term if the landlord is an individual, and the landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

As there is no evidence that this tenancy was a sublet; that the Landlord or a close family member of the Landlord intended to move into the rental unit; that the unit had been re-rented to another person prior to the end of the fixed term, or that the Landlord had been granted an Order of Possession for the rental unit, I find that the tenancy agreement could not include a term that required the Tenant to vacate at the end of the fixed term of the tenancy. Rather, this tenancy agreement could only declare that the tenancy continued on a month-to-month basis after the fixed term of the tenancy ended.

I therefore find that even if there was a verbal agreement that required the Tenant to vacate on September 30, 2019, the verbal agreement was not enforceable, as that term contravenes section 13.1(2) of the *Act*.

On the basis of the undisputed evidence I find that the tenancy agreement stipulated that this tenancy was to continue on a month-to-month basis after September 30, 2019.

On the basis of the undisputed evidence, I find that this tenancy ended on September 28, 2019 or September 29, 2019, pursuant to section 44(1)(d) of the *Act*, when the Tenant vacated the rental unit.

I find that the Tenant did not have the right to end the tenancy prior to the end of the fixed term of the tenancy. I find that the Tenant was obligated to comply with section 45 of the *Residential Tenancy Act (Act*) if the Tenant wanted to end the tenancy on, or after, September 30, 2019.

Section 45 of the *Act* stipulates that a tenant may end a periodic tenancy by providing the landlord with written notice to end the tenancy on a date that is not earlier than one month after the date the Landlord received the notice and is the day before the date that rent is due.

On the basis of the undisputed evidence, I find that the Tenant breached the section 45 of the *Act* when he ended the tenancy without providing proper written notice.

I find that the Tenant's failure to provide proper notice to end the tenancy may have contributed to the loss of revenue the Landlord experienced in October of 2019. Had the Tenant provided the Landlord with proper notice of his intent to vacate the rental unit by September 30, 2019, I find it possible that the Landlord may have been able to find a new tenant for October of 2019.

Section 13(3) of the *Act* stipulates that within 21 days after a landlord and tenant enter into a tenancy agreement, the landlord must give the tenant a copy of the agreement. On the basis of the testimony of the Tenant and in the absence of evidence to the contrary, I find that the Landlord did not give the Tenant a copy of the tenancy agreement.

In determining this matter, I have considered the Agent for the Landlord's testimony that the company that KW works for sends an email to each party, in which a copy of the signed tenancy agreement is attached. I find that there is no evidence to corroborate this testimony and I specifically note that a copy of this email was not submitted in evidence.

In determining this matter, I have considered the emails exchanged between the Tenant and the representative for the company KW represents in October of 2019. I find that email, dated October 25, 2019, in which he declares that he does not have a copy of the agreement in "his account" supports the Tenant's testimony that he did not receive a fully executed copy of the agreement.

In determining this matter, I have considered the email written by KW, which declares, in part, that the company she represents allows signatories to download a copy of a lease once it is signed. I find that providing a party with an opportunity to download a document is significantly different than providing them with a copy of that document. I find it entirely possible, for example, that a party would simply not have the ability to print a document that is available to them by downloading it.

Section 88 of the *Act* stipulates that all documents, other than those referred to in section 89 of the *Act*, that are required or permitted under this *Act* to be given to or served on a person must be given or served in one of the following ways:
(a) by leaving a copy with the person;
(b) if the person is a landlord, by leaving a copy with an agent of the landlord;
(c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
(d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
(e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
(f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
(g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;

(h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
(i) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;
(j) by any other means of service prescribed in the regulations.

I specifically note that section 88 of the *Act* does not permit a landlord to give a copy of the tenancy agreement to a Tenant by email or text message.

I find that the Landlord breached section 13(3) of the *Act* when the Landlord did not give the Tenant a copy of the signed tenancy agreement, in accordance with section 88 the *Act*, within 21 days of both parties signing it.

Section 7(2) of the *Act* stipulates, in part, that a landlord who claims compensation for damage or loss that results from a tenant's non-compliance with the Act, the regulations, or their tenancy agreement, must do whatever is reasonable to minimize the damage or loss. In these circumstances, I find that the Landlord did not take reasonable steps to minimize their loss.

I find that the Landlord did not take reasonable steps to minimize their lost revenue, in part, because they breached section 13(3) of the *Act.*

On the basis of the testimony of the Tenant and the electronic communications he exchanged with the Landlord, I am satisfied that the Tenant believed he was required to vacate the rental unit by September 30, 2019.

Had the Tenant been provided with a physical copy of the tenancy agreement after it was signed by both parties, he may have read it. I find that it is quite common for people to review hard copies of documents after they have been signed, particularly when they are viewed and signed electronically. Had the Tenant read the tenancy agreement after it was signed by both parties, I find it entirely possible that he would have understood that the tenancy continued, on a month-to-month basis, after September 30, 2019 and that he was required to give notice to end the tenancy.

In determining this matter, I was influenced by the email from the representative of the company KW represents, dated October 26, 2019, in which she declares the tenancy agreement was deleted on September 17, 2019. The fact the Tenant was unable to remotely access the tenancy agreement to confirm his obligations under the tenancy

agreement prior to the tenancy ending, in my view, supports the decision that the Landlord failed to mitigate their loss when they failed to provide the Tenant with a physical copy of the tenancy agreement.

I find that the Landlord did not take reasonable steps to minimize their lost revenue, in part, because they did not advertise the rental unit until October 06, 2019. The Landlord was aware the rental unit had been vacated by September 29, 2019 and I find that the 6 day delay in advertising could have contributed to the Landlord's inability to find a new tenant for October of 2019, given that most people are looking for new accommodations at the beginning of the month.

I find that the Landlord has failed to establish the merit of the Application for Dispute Resolution and I dismiss the claim to recover the fee for filing this Application for Dispute Resolution.

As the Landlord has failed to establish that the Landlord is entitled to retain any portion of the security deposit, I find the entire security deposit must be returned to the Tenant.

Conclusion

I grant the Tenant a monetary Order for $4,247.50, which is the amount of the security deposit the Landlord is required to return to the Tenant. In the event the Landlord does not voluntarily 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: February 09, 2020

Residential Tenancy Branch