Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the landlords: MNRL-S, FFL
For the tenants: MNSDB-DR, FFT

Introduction

The landlords filed an Application for Dispute Resolution (the "landlords' Application") on February 23, 2020 seeking an order to recover money for unpaid rent and utilities, and the application filing fee. The tenants confirmed receipt of the hearing information and evidence provided by the landlords.

The tenants filed an Application for Dispute Resolution (the "tenants' Application") on March 23, 2020. They seek a monetary order for damage or compensation under the *Residential Tenancy Act* (the "*Act*"). Additionally, they seek reimbursement of the application filing fee. In the hearing, the landlords confirmed receipt of the information and evidence prepared by the tenants for this hearing.

There was a previous hearing between these parties regarding the tenant's application for a refund of the security deposit. As the Arbitrator on that matter, I issued a decision dated February 5, 2020 dismissing the tenant's application for a monetary order of the reimbursement of the deposits held by the landlords. I granted the tenant leave to reapply on that matter.

In the hearing, I advised each party that I was the Arbitrator and made the binding decision in the tenant's prior application. I reiterated that any concern of bias in my reaching a second decision in the same matter should be addressed in the hearing and gave either party the opportunity to do so. Neither party stated they took issue with the fact that I made the prior separate decision, and on this basis the hearing proceeded.

The tenants' Application here was filed initially as a Direct Request. The matter proceeded by way of a participatory hearing because the tenants' Direct Request application cannot be considered by that method when there is a cross-application by the landlords in place.

The matter proceeded to a hearing pursuant to section 74(2) of the *Act* on July 3, 2020. Both parties attended the conference call hearing. I explained the process and offered both parties the opportunity to ask questions. Both parties presented oral testimony and evidence during the hearing. Both parties acknowledged receipt of the other's evidence and confirmed they had the opportunity to review the material prior to the hearing.

Issue(s) to be Decided

For the landlords:

- Are the landlords entitled to a monetary order for recovery of rent/utilities pursuant to section 67 of the *Act*?

- Are the landlords entitled to retain the security deposit held, pursuant to section 38 of the *Act*?

- Are the landlords entitled to recover the filing fee for this Application pursuant to section 72 of the *Act*?

For the tenants:

- Are the tenants entitled to an Order granting a refund of the security deposit pursuant to section 38(1)(c) of the *Act*?

- Are the tenants entitled to recover the filing fee for this Application pursuant to section 72 of the *Act*?

Background and Evidence

The landlords submitted a copy of the Residential Tenancy Agreement that both parties signed on November 16, 2018. Neither party disputed the terms therein. The tenancy began on November 17, 2018, with a fixed term ending on November 30, 2019. The

rent paid was $2000.00 per month payable on the first of each month. The tenants paid a security deposit of $1000.00 and a pet damage deposit of $1000.00 on November 16, 2018.

On July 27, 2019 the tenants advised the landlords that they wished to end the tenancy effective August 31, 2019. This was due to their purchase of a home and they acknowledged that the tenancy was fixed with the end date of November 30, 2019.

The landlords' Application

The landlords presented that their chief task at the end of the tenancy was to secure future tenants in the unit as soon as possible. In their Application, they provided that the tenancy ended "3 months prior to end of fixed-term tenancy." They tried to have a discussion on the issue of the early end of tenancy with the tenants. This involved the tenants' assistance in securing future tenants in the unit as soon as possible.

The landlords provided a document they labelled as "tenants' Acknowledgement Early End of Tenancy Not Mutually Agreed to September 21, 2019." This document states: "I acknowledge that [tenants] moved out on August 31st/19 – breaking the lease which had a date of Nov 30/19 – which was not mutually agreed upon." The note bears a signature that matches that of one of the landlords on the tenancy agreement. This note also appears in the tenants' evidence, attached to an email dated September 1, 2019. The tenants state in that email that this is the landlords' "statement from the move out inspection yesterday".

The landlords presented that they proposed to settle the matter of the remainder of the fixed tenancy term with the tenant in a mutual agreement. Initially, the early end of tenancy left three months of rent outstanding in the amount of $6,000. By splitting this "50-50", this would leave $3,000 owing by the tenants. They provided evidence that they communicated this to the tenants by email on August 22, 2019.

A further email shows the tenants' response to this proposal on August 24: "We have acted within the terms laid out in the BC Tenancy Act and splitting any costs. . .is unwarranted." The landlords' August 25 response to this message states: "It's understandable you don't want to pay but it's important to consider it's your wanting to break your lease that's causing the situation. We need to think mutual and we need to think compromise."

After that, the unit sold in November 2019. They offered a “50-50 split” of the two months of rent lost, then equal to $2,000. In the hearing they stated that they wanted to come to some agreement with the tenants about the outstanding amount. They also stated they were hoping to not enter arbitration on this matter.

The landlords maintain that they had discussion with the tenants on a “mutually acceptable agreement” but the tenants “held firm to having no obligation.” They offered a “50-50 split” of lost rental income. They state the tenant did not agree on a split, so therefore they are now seeking the full two months’ rent for September and October 2019. This is the total amount of $4,000.00 they are seeking for reimbursement.

In response to the landlords’ application for compensation, the tenants stated the landlords told them that the onus was on the tenants to ensure new tenants entered into an agreement for the unit. This meant the tenants undertook advertising of the unit on the landlords’ behalf, and this continued through August 2019 before the final move-out date. Their position is that they did not feel a 50-50 on outstanding rent amounts was warranted because they did a lot of work finding tenants.

The tenants presented their initial notice of ending the tenancy to the landlords dated July 27, 2019. A following string of emails shows the landlords stating it “puts [them] in a very difficult situation financially” then the tenants offering to “assist in finding a new tenant by advertising the apartment right away.” (July 29). An email from the landlords on August 2, 2019 shows the landlords stating: “

> I would like to suggest that we both set out in earnest to find an acceptable replacement tenant who can take over the remainder of your lease and beyond. I feel confident that we will find someone sooner than November 30th. Once we have an acceptable replacement we can work out the financial details which will depend on the timing of the new tenant.

On that same date, the tenants responded by asking whether the landlords had posted an ad, its location, and whether they should also place an ad. By August 5th, the landlords communicated back to the tenants to ask if they placed “an additional ad” and if there were “any takers”. The tenants responded back: “It’s great that your original ad has had so much interest already” and asked if they needed to be present for showings to prospective tenants.

The tenants presented copies of documents showing their efforts in advertising the unit and prioritizing prospective tenants:

- Craigslist and Facebook housing group advertisements, dated August 5 and 6 stating: “Advertising for our landlord.”
- 8 separate documents showing a total of 32 prospective tenants
- a title search print for the unit, showing a mortgage registered on November 4, 2019 – this gives the name of the new registered owner
- 2 ads showing the unit as “UNAVAILABLE” on September 17, 2019 and October 14, 2019 by the new registered owner – the tenants state this is evidence that the apartment was listed for rent by the new and current owner”

Additionally, the tenants stated the landlords did not mitigate by re-renting the unit. On their Application, they stated: “Once we moved out the unit was put up for sale.” This means they were unfairly penalized for the landlords not taking on new tenants. They “did a lot of work” trying to find new tenants for the landlords. In summary, they stated they are “not willing to move past zero” and “50/50 is not fair”.

In the hearing the landlords responded to the tenants’ statement that the onus was placed on them by saying something more like “maybe you could chip in as well”. They also stated: “everybody was working on this”. In summary, they stated: “there was work on both sides, but the contract has been broken, and [the tenants] stayed at zero”.

The tenants’ Application

The tenants apply for a monetary order in the amount of $2,050. This is the security and pet damage deposits that “the landlord is holding without cause.” The tenancy agreement shows the amounts of $1,000 for each of the security and pet deposits. The additional $50 is shown on a copy of the initial cheque which the tenants gave to the landlords on November 16, 2018 – this is for a key deposit.

The tenants provided a copy of email messages to the landlords dated September 1, September 16, and October 10, 2019. These show the tenants specifying the total amount and giving their forwarding address. The tenants also provided a copy of the previous arbitration decision where I denied their application for a monetary order due to the evidence not establishing the email address used as being a verified communication channel to the landlords. My decision on that application was dated February 5, 2020.

After these emails, the tenants attempted to send a formal request for the return of the deposits via registered mail. They submit this was “rejected” by the landlords. They

submitted a copy of a record that shows the Canada Post transaction for their "forwarding address letter". They initially posted the letter on February 5, 2020, then the record shows the landlords were "not located at address provided". The item was returned to the tenants on February 12, 2020.

After the returned mail, the tenants "formally served" the request to the landlords via process server. An affidavit from the process server outlines this transaction and attaches a copy of the tenants' letter to the landlords dated February 10, 2020.

The landlords did not give an alternate version of events to any of the statements provided by the tenants on this history. They stated in the hearing that after service on February 10 they responded on February 15, 2020 by email, a copy of which they provided. In this email, they state:

- they understand they have 15 days to start an application for dispute resolution;
- they "remain unclear on why [the tenants] are expecting them to take a financial loss. . . because [the tenants] chose to break [their] contractual commitment"
- the damage deposits come to one month's rent – they "suggested before and . . .are suggesting again" that "this amount seems a fair compromise";
- they reiterate the unit was sold in November, "leaving two months with no rent" – the deposit (equal to one month's rent) is a "50-50 sharing of lost income"
- they state their hope that the tenants give this serious consideration, thereby alleviating the need for arbitration.

Analysis

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 sections 7 and 67 of the *Act*.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide enough evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

The *Act* section 7(2) states:

> 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.

I find the tenants' submission that the landlords did not minimize their loss by not re-renting the unit is verified by the evidence.

Primarily, this is the tenants' evidence that they received several potential tenant queries and applications and forwarded those to the landlords. There is evidence the tenants were making it clear to the landlords that they were available for showings and evidence that they were communicating with interested parties to schedule those showings. They also posted photos that they created on their own and asked the landlords if they wished for more to be added to the ads. The landlords did not reply to an abundance of messages from the tenants on the future tenant application process. The landlords' response to the tenants' query on status was on August 25, 2019 wherein they listed the challenges of incomplete applications, and "things that are seriously making this process a challenge." Minus any further evidence from the landlords providing more context, I find the month of August – immediately prior to the end of tenancy – left no prospects in place. The burden of accepting new tenants rested with the landlords, in line with a duty to minimize the loss. There is no reasonable explanation on why new tenants were not secured despite the work undertaken by the tenants.

Secondly, the evidence shows the new owner's ads with an increase in the rent to $2,500.00. I find these were put in place within a short timeframe after the tenancy ended. When considering the landlords' duty to minimize the damage or loss, I find this is proof that the landlords did not move on their own to advertise the unit's availability. I find it more likely than not that a sale was pending, and the landlords were certainly aware of that fact in the immediate period after the end of tenancy. The ad indicates "unavailable", with parties inquiring on future availability – this is not an effort at securing tenants within a narrow timeframe.

From this evidence I conclude a sale was imminent. The evidence of the landlord's efforts at coming to a "50-50 split" with the tenants on outstanding rent amounts does not outweigh the tenants' evidence which shows no moves by the landlords to take on new tenants post-haste after the end of tenancy. This is despite the landlords' plea that

"we both set out in earnest to find an acceptable replacement tenant." The evidence shows a sale was already lined up, with a buyer in place who was seeking out new tenants on their own in a short timeframe after the tenancy ended.

In summary, I find the landlords has not provided evidence that they met the obligation under section 7(2) to do whatever is reasonable to minimize the loss. Therefore, they have not met the burden of proof to be successful in their claim. I find they are not entitled to monetary compensation for the loss of rent that occurred after the end of tenancy. A key component of the duty to minimize their loss is not present. I dismiss the landlords' claim for $4,000.00.

To address the tenants' claim for a return of the security deposit, I turn to the *Act.* The relevant portion regarding the return of the security deposit is section 38:

> (1) . . .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. . .any security deposit. . .to the tenant. . .;
> (d) make an application for dispute resolution claiming against the security deposit. . .

Subsection 4 sets out that the landlord may retain an amount from the security deposit with either the tenant's written agreement, or by a monetary order of this office.

In this hearing, I find the tenants' address was within the landlords' knowledge after service by a process server on February 10, 2020. I find the landlords properly applied for dispute resolution within the 15 days set out in the *Act* on February 23, 2020. They thus complied with subsection (1) set out above.

The landlords do not have a valid monetary claim; therefore, they are not entitled to reimbursement against the security deposit. As such, I find they must return the security deposit amount of $2,000.00 to the tenants as per the *Act*.

The tenants also claim a $50.00 amount for a key deposit. I find this is a refundable fee as set out in the *Residential Tenancy Regulation* section 6. The tenants provided a copy of the original cheque they issued to the landlords on November 16, 2018. I so order the return of the fee to the tenants included in a monetary order.

As the tenants are successful in this application, I find they are entitled to recover the $100.00 filing fee paid for their Application.

Conclusion

I order the landlords to pay the tenants the amount of $2,150.00. I grant the tenants a monetary order for this amount. This monetary order may be filed in the Provincial Court (Small Claims) 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: August 4, 2020

Residential Tenancy Branch