Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding
K.N. INVESTMENTS LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **FFL, MNDCL-S (landlord); MNSDS-DR, FFT (tenant);**

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;

- Authorization to recover the filing fee for this application pursuant to section 72.

This hearing also dealt with an application by the tenants under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for the landlord to return the security deposit pursuant to section 38;

- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

NM attended as agent for the landlord ("the landlord"). The tenants attended. The parties were given a full opportunity to be heard, to present affirmed testimony, make submissions, and call witnesses. I explained the hearing process and provided the parties with an opportunity to ask questions. The parties did not raise any issues regarding the service of evidence.

I have only considered and referenced in the Decision relevant evidence submitted in compliance with the Rules of Procedure to which I was referred.

Issue(s) to be Decided

Is the landlord entitled to the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;

- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;

- Authorization to recover the filing fee for this application pursuant to section 72.

Are the tenants entitled to the following:

- An order for the landlord to return the security deposit pursuant to section 38;

- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

Background and Evidence

The parties agreed on the following. The tenancy began on December 1, 2016. The tenants began a 1-year fixed term tenancy on March 1, 2020 with an expected end date of February 28, 2020. Monthly rent was $2,732.00 payable on the first of the month. At the beginning of the tenancy, the tenants paid a security deposit of $1,300.00 which is retained by the landlord without the tenants' authorization.

The landlord testified that a condition inspection was conducted at the beginning of the tenancy; however, no report was submitted. The parties agreed there was a "walk through" at the end of the tenancy and no condition inspection report was prepared or submitted.

On May 31, 2020, the tenants provided written notice to the landlord that they were vacating the unit on June 29, 2020 as they could no longer afford the rent. A copy of the

notice was submitted as evidence and the landlord acknowledged receipt. The tenants paid the rent for June 2020.

The tenants submitted substantial testimony and supporting evidence as to their offers to assist the landlord in finding a suitable replacement tenant. This included having the unit ready for viewing during their final month in occupancy and the provision of pictures for advertising. The tenants testified they were aware they were breaking a fixed term tenancy and wanted to do everything they could to either find a replacement tenant themselves or assist the landlord in doing so.

However, the landlord rejected their offers. The landlord testified he hired a property agent on June 19, 2020 to advertise the unit and find a suitable replacement tenant. The landlord did not know when the agent began to advertise the unit or what means of advertising were used. The landlord submitted no details of the agent's efforts to advertise or locate suitable replacement tenants. The landlord testified he paid a commission to the agent of $1,400.00. A copy of the invoice was submitted for which he requested reimbursement.

The tenants stated that they monitored a popular rental website, the website where they first found the unit, after they moved out; they saw the unit advertised for the first time on July 15, 2020. They observed that the rent was higher than the rent they paid; the advertised rate was $2,800.00 monthly. They also noticed that the picture displayed was not of the unit. A copy of the advertisement was submitted as evidence.

The landlord acknowledged that the landlord raised the rent when the tenants vacated, and the advertised rent was $2,800.00. The landlord could not provide confirmation of whether July 15, 2020 was the first time the unit was advertised for rent.

The landlord testified the unit was occupied again on September 26, 2020 for the increased amount of rent.

The tenants provided their forwarding address to the landlord by letter dated May 31, 2020, a copy of which was submitted.

The landlord requested reimbursement of lost rent for July, August and September 2020. He also requested compensation for the agent's fees and the filing fee. The landlord requested authorization to apply the security deposit to the award.

The tenants claimed the landlord took inadequate steps to mitigate damages by either not advertising in a reasonably prompt manner or by requesting an increased rent which was not economic during or after the State of Emergency. They requested the return of their security deposit.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. Has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. If yes, did the loss or damage result from the non-compliance?
3. Has the applicant proven the amount or value of their damage or loss?
4. Has the applicant done whatever is reasonable to minimize the damage or loss?

The above-noted criteria are based on sections 7 and 67 of the Act, which state:

> 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.
> . . .
>
> 67 Without limiting the general authority in section 62 (3) [. . .] if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Each of the above four tests are considered.

1. Did respondent fail to comply with Act, regulations, or tenancy agreement?

Section 44(1) of the Act lists fourteen categories under which a tenancy may be ended, and references section 45 of the Act. Section 45 of the Act deals with a tenant's notice to end a tenancy, and reads, in its entirety, as follows (emphasis added):

> (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) 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.
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> (2) A tenant may end **a fixed term tenancy** by giving the landlord notice to end the tenancy effective on a date that
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> (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.
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> (3) If a landlord has failed to comply with a material term of the tenancy 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.
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> (4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

In this dispute, the tenancy was a fixed term tenancy, so section 45(2) applies. The tenant gave notice by way of email to the landlord on May 31, 2019 and stated they would be moving out at the end of June 2020. The notice complied with section 52.

In other words, the tenants ended the tenancy on a date that was earlier than the date specified in the tenancy agreement as the end of the tenancy.

Thus, I conclude that the tenant breached section 45(2)(b) of the Act by ending the tenancy early.

2. Did the loss or damage result from non-compliance?

Having found that the tenants breached the Act, I must next determine whether the landlord's loss resulted from that breach. This is known as cause-in-fact, and which focusses on the factual issue of the sufficiency of the connection between the respondent's wrongful act and the applicant's loss. It is this connection that justifies the imposition of responsibility on the negligent respondent.

The conventional test to determine cause-in-fact is the *but for* test: would the applicant's loss or damage have occurred *but for* the respondent's negligence or breach?

If the answer is "no," the respondent's breach of the Act is a cause-in-fact of the loss or damage.

If the answer is "yes," indicating that the loss or damage would have occurred whether the respondent was negligent, their negligence is not a cause-in-fact.

In this case, I find that but for the tenants' ending the tenancy as they did, that the landlord would not have suffered a loss of rent for July, August and September.

3. *Has applicant proven amount or value of damage or loss?*

The monthly rent was $2,732.00. The landlord testified the unit was vacant the months of July, August and September (until September 26) 2020 and he incurred a loss of rent for this period. The landlord also testified that the unit rented for $2,800.00 monthly, increased from the rent paid by the tenants.

I find that the landlord has proven the loss of rent for the period claimed, being $2,732.00. The landlord does not claim for the pro rated rent from September 26, 2020 to the end of September when the unit was occupied by the new occupants.

4. Has applicant done whatever is reasonable to minimize damage or loss?

The landlord testified that he retained the services of an agent on June 19, 2020, almost three weeks after the tenants provided notice they were vacating the unit at the end of June 2020.

The landlord did not provide testimony or evidence of the efforts made by the agent to locate a replacement tenant. The landlord could not state when the agent started to

advertise, how many inquiries were made, how many prospective occupants viewed the unit, or any similar details.

The tenants submitted testimony and evidence that the unit was advertised for the first time on July 15, 2020 which was not contradicted by the landlord. No evidence was submitted as to the agent's efforts. The landlord was unable to testify whether reasonable steps were made to find a new tenant.

The landlord stated that the rent was immediately increased to $2,800.00 monthly when the tenants vacated and the unit was rented for this amount on September 26, 2020. The landlord stated that no consideration was given to reducing the rent.

Policy Guideline 5 – Duty to Minimize Loss states in part as follows:

> **B. REASONABLE EFFORTS TO MINIMIZE LOSSES**
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> A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss.
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> Usually this duty starts when the person knows that damage or loss is occurring. The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided.
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> In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss. For example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:
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> • remove and dry the possessions as soon as possible;
> • promptly report the damage and leak to the landlord and request repairs to avoid further damage;
> • file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.
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> Compensation will not be awarded for damage or loss that could have been reasonably avoided.

The Policy Guideline also states:

> ***Loss of Rental Income***
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> When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:
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> 1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
> 2. re-rent the unit as soon as possible.
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> For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November. Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear.
>
> If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.

Considering the testimony and evidence, I find the landlord has not met the burden of proof that they took steps to re-rent the unit at a rent that was reasonable and to re-rent it as soon as possible. The landlord did not accept the tenants offers to help find replacement tenants and to have the unit available for viewing during the final month.

I find that the landlord submitted insufficient evidence that the landlord made reasonable efforts to minimize the damage or loss. I have concluded that the landlord failed to show that they took practical and common-sense steps to advertise in a timely and prudent manner. Given the circumstances, I find that increasing the rent at that time may not a reasonable step and the increased rent may have contributed to the delay in finding replacement occupants.

I therefore find the landlord has not met the burden of proof on a balance of probabilities that they made reasonable efforts reduce or mitigate damage or loss.

Landlord's claim: Conclusion

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving all four criteria in establishing that he is entitled to compensation in the amount claimed.

I therefore dismiss the landlord's claim without leave to reapply.

Security deposit

Section 38 of the *Act* requires the landlord to either return the tenants' security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenants' provision of a forwarding address in writing.

If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the deposit.

However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlords, which remains unpaid at the end of the tenancy (section 38(3)(b)).

On a balance of probabilities and for the reasons stated below, I make the following findings based on the testimony and evidence of both parties.

The tenancy ended on June 30, 2020. The tenants provided a written forwarding address by way of a letter, which was received by the landlord. I find that the landlord was deemed to have received the tenants' forwarding address on May 31, 2020, the date of the letter. The tenants did not give the landlords written permission to retain any amount from their security deposit. The landlord did not return the deposit to the tenants.

The landlord made an application for dispute resolution to claim against the deposit for damages on July 6, 2020, which is within 15 days of the end of tenancy date.

However, I find that the landlord extinguished their right to claim against the tenants'

security deposit for damages, as per sections 24 and 36 of the *Act*, for failure to complete move-in and move-out condition inspection reports for this tenancy.

Section 19 of the *Residential Tenancy Regulation* ("*Regulation*") requires that condition inspection reports must be in writing. Section 20 of the *Regulation* requires detailed, specific information to be included in the condition inspection reports.

No condition inspection report on moving in was submitted. The parties agreed that there was no condition inspection report on moving out. I find that the "walk through" that the landlord claimed was a condition inspection, does not meet the above requirements in sections 19 and 20 of the *Regulation*. Both parties agreed that no written condition inspection report on moving out was completed for this tenancy and none was provided for this hearing.

Residential Tenancy Policy Guideline 17 states the following, in part:

1. *Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:*
    - *if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*

In accordance with section 38(6)(b) of the *Act* and Residential Tenancy Policy Guideline 17, I find that the tenants are entitled to receive double the value of their security deposit of $1,350.00. There is no interest payable on the deposit during the period of this tenancy.

As the tenants were successful in this application, I find that they are entitled to recover the $100.00 filing fee from the landlords.

My award to the tenants is set out in the following table:

ITEM	AMOUNT
Security deposit	$1,350.00
Security deposit - doubled	$1,350.00
Reimbursement filing fee	$100.00
TOTAL AWARD TENANTS	**$2,800.00**

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Conclusion

I grant a Monetary Order to the tenants of **$2,800.00**. This Order must be served on the landlord. This Order may be filed and enforced in the courts of the Province of British Columbia.

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: October 27, 2020

Residential Tenancy Branch