



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The landlords applied for:

- a monetary order for loss under the Act, the regulation or tenancy agreement, pursuant to section 67;
- an authorization to retain the tenant's security deposit, under section 38; and
- an authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing. Tenant's witness BW also attended. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issue – service of documents

The landlords affirmed they served both tenants the notice of hearing and evidence by e-mail in September 2020. A second package of evidence was emailed on December 02, 2020. The tenants confirmed receipt of both packages.

Residential tenancy Branch Rule of Procedure 3.15 states the applicant must serve his evidence not less than 14 days before the hearing. Per rule of Procedure 3.15, I do not accept the landlords' evidence served on December 02, 2020, one day before the hearing. Based on both parties testimony, I find the landlords served the tenants the notice of hearing and evidence package in September 2020 in accordance with section 71(2)(b) of the Act.

The tenants affirmed they served their response evidence in person to the landlords' agent BW on November 24, 2020. BW is a witness for the tenant. BW is not listed as the landlord's agent or contact for receiving documents in the landlord's application. The landlords and BW affirmed BW acted as a leasing agent when the tenancy started and BW is not authorized to receive documents for the landlords.

Based on the landlords' and witness BW testimony, I find the tenants did not serve their response evidence in accordance with sections 88 and 89 of the Act and I am excluding it from consideration.

Preliminary Issue – correction of tenant NV name

At the outset of the hearing tenant NV corrected the spelling of her first name. Pursuant to section 64(3)(a) of the Act, I have amended the landlords' application.

Issues to be Decided

Are the landlords entitled to:

1. retain the security deposit and receive a monetary award for compensation for losses caused by the tenants?
2. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and

important aspects of the landlords' claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlords' obligation to present the evidence to substantiate their application.

Both parties agreed they entered into a 12 month fixed-term tenancy from July 01, 2020 to June 30, 2021. Monthly rent of \$6,495.00 was due on the first day of the month. At the outset of the tenancy a security deposit of \$3,247.50 was collected and the landlords hold it in trust. The tenancy agreement was submitted into evidence.

Both parties agreed the tenants gave notice on July 14, 2020 to end tenancy and vacated the rental unit on July 31, 2020, prior to the end of the fixed term tenancy. This application was submitted on August 13, 2020.

The landlord is asking for loss of rental income for the month of August 2020 in the amount of \$6,495.00.

The landlords affirmed the rental unit was re-listed by their real estate agent immediately after the tenants gave notice on July 14, 2020. The landlord was able to re-rent the rental unit for the same rent amount effective September 01, 2020.

The tenants stated there was extreme noise in the rental unit due to a construction next door. The tenants could not work or answer phone calls due to the noise levels. The tenants would not have signed the rental agreement if they knew about the noise levels. The tenants asked the landlord to install a sound isolation board. As the landlords did not install the sound isolation board, on July 08, 2020 the tenants asked the landlord to end the tenancy. The rental unit was only listed on July 29, 2020 and it was re-rented two weeks after that.

The landlords affirmed the tenants were aware of the noise level when they signed the tenancy and the sound isolation board was installed.

Analysis

Section 7 of the Act states:

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.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

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.

Based on the both parties testimony and the tenancy agreement, I find the tenants were aware the tenancy was for a fixed term ending on June 30, 2021 and the tenants ended the tenancy 11 months early on July 31, 2020.

The tenant submitted that he had cause to break the fixed term tenancy early due to excessive noise. Section 45(3) of the Act states if a landlord fails 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 received the notice.

All documents referenced in the Act, including a notice that the landlord has failed to comply with a material term of the tenancy agreement, are to be given according to the way described in section 88 of the Act. The tenant has not demonstrated that he notified the landlord of a breach of a material term of the tenancy pursuant to sections 45(3) and

88 of the Act. Thus, I find the tenant has breached the fixed term tenancy agreement and section 45(2) of the Act, which states:

(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 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.

(emphasis added)

The landlord is claiming the tenant's failure to comply with the fixed term tenancy end date caused them a loss of rent for the month of August 2020.

Residential Tenancy Branch Policy Guideline 3 sets conditions for loss of rental income claims. It states:

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.

[...]

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.

Further to that, Policy Guideline 5 states:

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:

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.

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.

The parties offered conflicting testimony regarding when the notice to end tenancy was served and the rental unit was re-listed. At first both parties agreed the notice to end tenancy was served by the tenants on July 14, 2020. At a later point the tenants affirmed they notified the landlords on July 08, 2020. I find the landlords' testimony was more trustworthy, precise and clearer. I therefore accept the landlords' version that the notice to end tenancy was served on July 14, 2020 and the rental unit was re-listed immediately and was re-rented effective September 01, 2020.

The tenant provided less than 30 days notice of vacating the rental unit. The provision of 30 days notice is the minimum amount of notice required for a periodic tenancy, thus it is reasonable for the landlord to take 30 days to find a new tenancy to minimize their losses due to the tenant breaking the fixed term tenancy. In accordance with section 7 of the Act, I find the tenants are responsible for the loss of rental income from August 01 to 31, 2020 in the amount of \$6,495.00.

As explained in section D.2 of Policy Guideline #17, the Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord. Thus, I order the landlords to retain the tenants' deposit of \$3,247.50 in partial satisfaction of the monetary award granted.

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

In summary:

Loss of rental income from August 01 to 31, 2020	\$6,495.00
Filing fee	\$100.00
Total awarded:	\$6,595.00
Minus security deposit:	\$3,247.50 (subtract)
Total monetary award:	\$3,347.50

Conclusion

Pursuant to sections 38, 67 and 72 of the Act, I authorize the landlords to retain the \$3,247.50 security deposit and grant the landlords a monetary order in the amount of \$3,347.50.

The landlords are provided with this order in the above terms and the tenants must be served with this order as soon as possible. Should the tenants fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 *Residential Tenancy Act*.

Dated: December 07, 2020

Residential Tenancy Branch