Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR MNDC MNSD FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on February 25, 2021. The Landlord applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "*Act*").

The Landlords attended the hearing. However, the Tenants did not. The Landlords stated that they sent, by registered mail, their application, evidence, and Notice of Hearing to one of the Tenants, N.S., on November 14, 2020. Proof of mailing was provided into evidence. The Landlords stated that they sent it to the forwarding address they were provided by N.S. More specifically, the Landlords stated that N.S. sent them an email on April 29, 2020, which contained an address which was to serve as his forwarding address. The Landlords stated that they went online to track the registered mail package and noted that there was an error listed on the Canada Post website for the package they sent. The Landlords stated that they followed up with Canada Post, but it took them a while to finally close their investigation, and admit they lost it.

The Landlords stated that once they found out Canada Post lost the package, they sent an identical package to the same Tenant, N.S., at the same address on January 21, 2021. Proof of service was provided. Although service was substantially delayed, I note this was not the fault of either party. In any event, I note the second package was delivered, as per the proof of service provided, and the Tenant had at least a month to prepare for this hearing. In this case, I find the Tenant, N.S., is deemed served for the purposes of this hearing, 5 days after the package was sent, on January 26, 2021 (as per section 90 of the Act).

With respect to the second Tenant the Landlord named on their application, A.M., I find she should have been served with her own package, even if it was at the same forwarding address. The Landlord only put N.S.'s name on the package. I find A.M. has not been sufficiently served. However, I allow the hearing the proceed against N.S., as he was properly named, and served. I amend the style of cause and any orders to reflect N.S.'s name only, pursuant to section 64(3)(c) of the Act. N.S. will have to pursue A.M. outside of the RTB, at a Court of competent jurisdiction, should he wish to hold A.M liable for amounts they jointly owe as a result of this tenancy.

The Landlord was provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Are the Landlords entitled to a monetary order for unpaid rent and utilities or for damage or loss under the Act?
- Is the Landlord entitled to retain all or a portion of the Tenant's security and pet deposit in partial satisfaction of the monetary order requested?
- Is the Landlord entitled to recover the cost of the filing fee?

Background and Evidence

The Landlords stated that the Tenants signed a 1-year fixed term tenancy agreement on April 15, 2020. Monthly rent was set at $1,950.00 and was due on the first of the month. The Tenants paid a security deposit in the amount of $975.00 on April 15, 2020. The Tenants were set to move in effective May 1, 2020. However, on April 28, 2020, the Tenant, N.S., called the Landlords and stated that he and his partner, A.M., would not be moving in as agreed. The Landlords stated that they asked for the Tenants to put it in writing. On April 29, 2020, the Landlords stated they received an email from the Tenants stating they would be breaking the lease, and not moving in.

The Landlord stated that the Tenants never moved in, and as a result, they lost rent for May and June, but were able to re-rent the unit for July 2020. The Landlords stated that after getting the email from the Tenants, formalizing their intentions, they reposted the ad online in multiple places for the same rate of rent. The Landlords explained that there were several people who showed interest, and two people who viewed the property in

May, and early June. The Landlords stated that they were able to sign a lease with new Tenants in the middle of June, effective July 1, 2020, for the same rent.

The Landlords noted that it was challenging finding new Tenants in a timely manner, due to COVID pandemic, but they did the best they could to re-post, and show the unit as quickly as possible.

The Landlords pointed to a clause in their tenancy agreement, which states the following:

- **Lease agreement if broken - Liquidated Damages Clause**

The tenant has signed a one-year lease agreement. If lease is broken prior to completion of the agreement we the landlords require minimum 1 months' notice and liquidated damages of one additional month rent of $ 1950

The Landlords stated that they are seeking the liquidated damages amount of $1,950.00, plus one month's rental losses, for the month of May. In total, the Landlords are seeking $3,900.00 for these two items.

The Landlords stated that they were aware the Tenants split up, and this was part of the reason they didn't move into the unit. As a result, the Landlords explained that they returned half of the security deposit to one of the Tenants, A.M. The Landlords still holds $487.50 in deposits and are looking to retain this amount to offset the amounts owed.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlords to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the Tenants. Once that has been established, the Landlords must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

I note the following portion of the Act:

Start of rights and obligations under tenancy agreement

> ***16*** *The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.*

I find the Landlords and the Tenants entered into the tenancy agreement, when the fixed term lease was signed, the deposits were paid on April 15, 2020. The rights and obligations of both parties began at this time, regardless of whether or not the Tenants moved in.

Policy Guideline #30 states as follows:

> ***C. ENDING A FIXED TERM TENANCY***
>
> *During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties, or under section G below (Early Termination for Family Violence or Long-Term Care).*
>
> *A landlord may end the tenancy if the tenant fails to pay the rent when due by serving a Notice to End Tenancy for Unpaid Rent or Utilities (form RTB-30) on the tenant. Alternatively, a landlord may end the tenancy for cause by serving a One Month Notice to End Tenancy for Cause (form RTB-33) on the tenant.*
>
> *[…]*
>
> *A tenant may not use the one month notice provisions of the Legislation to end the tenancy prior to the end of the fixed term except for breach of a material term by the landlord or under section G below (Early Termination for Family Violence or Long-Term Care). Any other one month notice will take effect not sooner than the end of the fixed term.*

I find the Tenants were not in a position to legally end the tenancy, without liability, in the manner they did. Although the Landlord accepted the email at the end of April 2020 from the Tenants, regarding their intent to breach the lease, and not move in, I do not find this absolves the Tenants' liability for rental losses the Landlords incurred.

I note the Landlords are seeking May rent, totalling $1,950.00, given they were left without rent for the month. In fact, the Landlords did not collect rent for June either. However, they have not claimed compensation for that month. I will only consider their

request to recover May rent (plus the liquidated damages claim, which will be addressed further below).

I turn to *Policy Guideline #5 – Duty to Minimize Loss* which defines the Landlords' duty to mitigate their losses:

> ***B. REASONABLE EFFORTS TO MINIMIZE LOSSES***
>
> *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. 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.*
>
> *In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss.*

I have reviewed the totality of the testimony and evidence. I have considered the Landlords took steps to re-post the ad within a matter of days after finding out the Tenants were not going to move in. I accept that it is challenging to attract interest, and to show a rental unit during this pandemic, which is partly why it took 2 months to find new tenants. I note the Landlords posted the ad on multiple sites, fielded numerous inquiries, and showed it to multiple people. I find their efforts to mitigate were reasonable, given the circumstances. I award the Landlord the full amount they are seeking for May rent, $1,950.00.

Next, I turn to the Landlords claim to recover liquidated damages from the Tenants. Residential Tenancy Policy Guideline 4 provides for liquidated damages as follows:

> *A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.*
>
> *There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:*

- *A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- *If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- *If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

In this case, I find that the liquidated damages clause in the tenancy agreement is an enforceable term, as it is not extravagant compared to what rental losses could have been incurred following premature termination of the agreement. I find the amount of 1 month's worth of rent is not punitive, such that the clause is not enforceable. This term was agreed to up front. I award the full amount of this item, $1,950.00.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlords were substantially successful with the application, I order the Tenant to repay the $100.00 fee that the Landlord paid to make application for dispute resolution. Also, I authorize the Landlord to retain the security and pet deposit to offset the other money owed.

In summary, I find the Landlord is entitled to the following monetary order:

Item	**Amount**
May Rent	$1,950.00
Liquidated Damages	$1,950.00
PLUS: Filing Fee	$100.00
Subtotal:	$4,000.00
LESS: Security and Pet Deposit	$487.50
Total Amount	**$3,512.50**

Conclusion

The Landlords are granted a monetary order in the amount of **$3,512.50**, as specified above. This order must be served on the Tenant. If the Tenant fails to comply with this

order the Landlords may file the order in the Provincial Court (Small Claims) and be 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: February 26, 2021

Residential Tenancy Branch