Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MONICA APARTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Code MNRL-S

Introduction

The landlord seeks compensation for loss of rent, pursuant to section 67 of the *Residential Tenancy Act* ("Act"). The landlord declined to seek recovery of the application filing fees under section 72 of the Act.

It should be noted that the landlord, on the advice of staff at the Residential Tenancy Ranch, filed two applications for dispute resolution, one for each of two rental units which are the subject of this dispute. Having reviewed the submissions and evidence of the parties, and, having considered the facts and issues to be nearly identical in respect of each rental unit, the landlord's application will, for the purposes of this dispute, be joined. As such, this decision shall address the landlord's applications together.

An agent for the corporate landlord (hereafter simply "the landlord"), a witness for the landlord, and the tenant, attended the hearings on September 2 and 9, 2021. An additional witness for the landlord attended at the hearing on September 9. It is noted that Rule 6.11 of the *Rules of Procedure* was explained at the first hearing.

Issue

Is the landlord entitled to compensation?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issues of this dispute, and to explain the decision, is reproduced below.

The tenancies began on December 1, 2019 (rental unit 904, hereafter “904”) and on February 1, 2020 (rental unit 802, hereafter “802”). Each tenancy was a one-year fixed term tenancy. Though rental units were rented by the tenant, he occupied 904 and his in-laws resided in 802. Both tenancies ended on July 11, 2020 after the tenant gave notice to end the tenancies on July 8, 2020.

Monthly rent for each rental unit was $1,750.00. The tenant paid security deposits of $875.00 for each rental unit, for a total of $1,750.00. Pending the outcome of this dispute the landlord currently retains these deposits in trust.

Copies of the two written tenancy agreements were in evidence, as was a copy of the tenant’s letter dated July 8, 2020, in which he gives the landlord notice to end the tenancies effective July 11, 2020. Further, copies of condition inspection reports dated December 14, 2019 and July 12, 2021, were in evidence.

The landlord seeks compensation in the amount of $4,290.32 in respect of loss of rent for 904 and $6,666.66 for 802. It is the landlord’s position that, but for the tenant’s ending the tenancy before the fixed term expired, the landlord would not have suffered the above-noted losses totalling $10,956.98. In addition to these amounts, the landlord seeks a total of $50.00 for “late rent fee[s]”; this is based on the landlord’s submission that “outstanding rent” for August and for September incurred a twenty-five-dollar-per-month late fee.

The landlord argued that they attempted to re-rent both rental units but were not immediately successful in doing so. Rental unit 904 was not rented out until October 15, 2020 and rental unit 802 was not rented out until mid-November 2020. The landlord gave evidence that they took the same steps for both rental units.

The landlord testified that it is the landlord’s policy of the building to advertise on Craigslist. The landlord posts a “for rent” rental sign outside the multi-unit residential complex on the lawn. The assistant caretaker testified that it was a “fairly large” sign, it was red (which apparently contrasted nicely against the green grass), and it was visible to pedestrians approaching from both sides along the sidewalk.

In addition to this step, the landlord provided virtual tours of the available rental units on YouTube. The landlord followed this policy shortly after both rental units became available.

On this last point, the landlord's witness (the building's Assistant Caretaker) testified that they also offer live, virtual tours and video conference options for prospective tenants. Tours can also be pre-recorded.

When the tenancies ended in mid-July 2020, the COVID-19 pandemic was well underway. It was the landlord's policy – and this was a posted policy for everyone in the 40-rental unit building to see – that there were not to be any open viewings. (That is, no in-person viewings of rental units were made available. The caretaker noted that they were not comfortable with open viewings, given the state of the pandemic.)

Advertisements on Craigslist first went up on July 26, 2020. The ads did not go up until the tenant had left and the rental unit had been properly and thoroughly cleaned. After the ads went online, the caretaker testified, the landlord received immediate responses from some people. There were also other tenants in the building who were made aware of the rental units being available. The caretaker testified that the landlord received about four to five inquiries from prospective tenants a day. Both rental units were listed for rent at $1,700. However, the landlord instructed the caretaker (who appears to have been the primary individual responsible for accepting inquiries and brokering tenancies with prospective tenants) to be flexible in the rent amount.

The crux of the tenant's dispute regarding the landlord's claims is that "they didn't make [an] appropriate effort to rent out the rental units." He further submitted that the landlord did not make the "best" effort to rent the two rental units.

Regarding the sign posted outside and taking into consideration the travel restrictions that were then in place, the tenant argues that a sign outside is not indicative of a serious effort to find new tenants. He further argued that there elapsed a period of 16 days between when he first gave notice to end the tenancy and Craigslist advertisements being posted. Or, that there elapsed a period of 13 days between when the tenant vacated the rental units and a Craigslist ad being posted.

Moreover, the tenant submitted that "just using Craigslist is a pretty weak effort." Indeed, he suggested that is probably the "least reputable" site to use to post such advertisements. During the second hearing, the tenant explained that in order to increase one's chances of having their ad visible on Craigslist, one needs to repost (or refresh) the ad on a daily basis in order for that ad to appear at the top of the listings. The tenant testified that he was aware of the ad only being refreshed once during the applicable time period. He reiterated that this was "not a very strong effort to re-rent" the rental units and that the landlord only used "one means of re-renting."

And the tenant argued that the landlord's policy on restriction in-person visitation was incongruent with the current provincial health orders that were in place at the time. Moreover, the tenant suggested that the landlord's policy of refusing to show the rental units to prospective tenants is not a means to mitigate loss. He explained that most prospective tenants actually want to physically see a rental unit with their own eyes.

The tenant submitted that the landlord appears to have received many inquiries from prospective tenants, and there is in evidence no reason for the landlord's denying all of those inquiries. The tenant stated, "I find it very hard to believe they couldn't find a tenant in the time given." In summary, the tenant argued that he gave the landlord enough time to find new tenants and they simply did not take advantage of the time. In rebuttal, the landlord testified that the rental unit was not "immediately available for rent" because a condition inspection report needed to be completed the rental units required cleaning.

Additional cleaning, the caretaker testified, also included COVID-19 disinfecting and cleaning. The landlord "still has to go through preliminary cleaning" after a tenant vacated, the caretaker explained. And, she added, an advertisement did not go up immediately after the tenant vacated because the rental units need to look presentable.

In respect of the tenant's argument about the usefulness of Craigslist, the landlord testified that it is not the landlord's policy to use other methods, because Craigslist has been used successfully in the past. In fact, the landlord rarely has vacancies that last as long as these did.

As for having to accept every new inquiry from a prospective tenant, the landlord explained that the landlord is not obligated to accept every new inquiry. The landlord may accept only certain applications from prospective tenants, and that they "don't have to choose just anybody [. . .] they have to be suitable." He also added that if a tenant gives sufficient notice to end a tenancy early, the landlord will work with them in finding a replacement tenant. Yet, in this case, the tenant gave the landlord four days' notice.

In rebuttal, the tenant argued that the rental units were clean and empty, and that the landlord is using its own standard as to what constitutes a clean rental unit. In respect of the landlord's comment about working with tenants who given sufficient notice, the tenant said that paying for 5 weeks' worth of rent is akin to "working with them."

Both parties submitted a substantial amount of documentary evidence to support their respective positions.

Analysis

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.

Each of the above-noted criterion will be addressed in order, below.

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

A tenant may not end a fixed-term tenancy earlier than the effective end date of tenancy as agreed to on a tenancy agreement (see section 45(2) of the Act). In fact, the only legal means to end a fixed term tenancy early is through the application of section 45(3) of the Act (where a landlord fails to comply with a material term of the tenancy and has not fixed it within a reasonable period of time) or through frustration.

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract. However, while the tenant explained that they had to end the tenancies due to the pandemic, no argument was made in respect of whether the tenancies were frustrated.

Taking into consideration the evidence presented before me, and applying the law to the facts, I find that the tenant breached the Act and the tenancy agreements by ending the tenancies early. As such, the first criterion of the four-part test is satisfied.

2. Did landlord's loss result from tenant's non-compliance?

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

In this case, it is my finding that the landlord would not have suffered a loss of rent but for the tenant's breach of the Act and the tenancy agreement. Therefore, the second criterion of the test is proven.

3. Has landlord proven amount or value of loss?

Prima facie, there does not appear to be any dispute that the amount or value of the loss of rent is established at a total of $10,956.98.

4. Has landlord done whatever is reasonable to minimize the loss?

The answer to this question lies at the very heart of this dispute.

Before attempting to answer this question, it is worth examining the specific wording in subsection 7(2) the Act which addresses the mitigation question (emphasis added):

> 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.

In this dispute, the landlord argues that the efforts made to minimize any loss of rent included posting Craigslist ads and putting out a sign. No additional efforts were made.

However, the tenant argues that those efforts were neither an “appropriate effort” nor a “best effort” to rent out the two rental units. Furthermore, he argued that simply using one website – Craiglist – and then not renewing that ad on a daily basis, demonstrates “not a very strong effort” to re-rent the rental unit. It is worth noting that the landlord did not dispute the tenant’s argument or claim that the ad was not refreshed daily.

In helping to analyse the requirement to do whatever is reasonable to minimize a loss, we must turn to *Residential Tenancy Policy Guideline 5: Duty to Minimize Loss (May 2020),* which provides some clarification on the requirement under the Act:

> 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.

Moreover, the policy states that “[c]ompensation will not be awarded for damage or loss that could have been reasonably avoided.

There is a concept referred to in the policy guideline known as “partial mitigation,” which is described as follows (page 1):

> Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. [example omitted]. In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.

Finally. there is a specific section of the policy guideline that speaks to a claim for loss of rental income, which is as follows (on page 2):

> 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.

In this dispute, the landlord waited almost two weeks after the tenant vacated the rental units to place an online advertisement. And when they did, it was on one website, and the ad was not refreshed (or renewed or reposted) on a daily, or even, from the evidence before me, on a weekly basis. The only other step taken by the landlord to find new tenants was the placement of a lawn sign. Finally, it is not lost on me that the landlord's policy of not permitting in-person visits from prospective tenants is a significant error in an attempt to mitigate losses. Indeed, the tenant is correct in arguing that most prospective tenants would much prefer to see a rental unit before signing a tenancy agreement. While the provincial health orders that were in force at the time restricted landlord entry into a tenant-habited rental unit for purposes of a showing, they did not in any way prevent a landlord from entering a vacant rental unit.

There is, I note, no substantive or significantly persuasive evidence before me to find that the landlord received a certain number of applicants which they then turned down. Indeed, the landlord is correct in saying that they are not obliged to accept just any prospective tenant. What must be considered by me, however, is what steps the landlord took to re-rent the rental units as soon as possible.

Taking into very careful consideration all of 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 that they did whatever was reasonable to minimize their loss.

Using but one website for an advertisement, and then not renewing that ad, is less than reasonable. And, the placing of a lawn sign, while certainly reasonable, is, when taken with the use of simply Craigslist, not, I find, taking reasonable steps. Added to this was the almost two-week delay in even placing an advertisement online for the rental units. Certainly, the rental unit would need to be cleaned and disinfected, but it is not reasonable to accept that this would take two weeks.

Given the forgoing, it is my finding that the fourth criterion is not fully proven. However, I do find that the landlord took steps that are found to be partial mitigation. The landlord did post an ad, they did put out a sign, they kept the rents close to what they were, and they did conduct showings (which ultimately led to new tenants being found).

In respect of the landlord's claim for compensation, given that only partial steps were taken to mitigate their loss, the amount of the claim is reduced by 75% to $2,739.25.

Last, in respect of the $50.00 claim for late rent fees, the tenancy ended (in breach of the Act, of course) when the tenant vacated on July 11, 2020. As such, the rent was not "late" for August or September because there no longer existed a tenancy agreement under which rent was due and owing for those months. Accordingly, I dismiss this aspect of the landlord's claim.

Section 38(4)(b) of the Act permits a landlord to retain an amount from a security or pet damage deposit if "after the end of the tenancy, the director orders that the landlord may retain the amount."

As such, I order that the landlord may retain the entire amount of the security deposits of $1,750.00 in partial satisfaction of the above-noted award. The balance of the award is issued by way of a monetary order in the amount of $989.25. A copy of this monetary order is issued in conjunction with this decision, to the landlord. It is the landlord's responsibility to serve a copy of this order on the tenant.

Conclusion

The landlord's applications are granted, subject to the reduction in the amount of the award noted above.

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: September 10, 2021

Residential Tenancy Branch