DECISION

Dispute Codes Landlord: MNRL-S, MNDL-S, MNDCL-S, FFL
Tenants: MNSDS-DR

Introduction

This first hearing convened on November 15, 2022 and was adjourned due to service issues to March 27, 2023. This Decision should be read in conjunction with the November 15, 2022 Interim Decision. This hearing was a cross application hearing that dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for a Monetary Order for the return of the security deposit, pursuant to section 38.

This hearing also dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for damages, pursuant to section 67;
- a Monetary Order for damage or compensation under the Act, pursuant to section 67;
- a Monetary Order for unpaid rent, pursuant to section 67;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

Both parties attended the first hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. Due to service issues, testimony on the parties' substantive issues were not heard in the first hearing.

The tenants did not attend the second hearing, although I left the teleconference hearing connection open until 11:10 a.m. in order to enable the tenants to call into this teleconference hearing scheduled for 11:00 a.m. The landlord attended the second hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

Rule 7.1 of the Residential Tenancy Rules of Procedure states that the dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.

Rule 7.3 states that if a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply. Based on the above, in the absence of any evidence or submissions from the tenants, I order the tenants' application dismissed without liberty to reapply.

The landlord was advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. The landlord testified that he is not recording this dispute resolution hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000."

Preliminary Issue- Service

In the Interim Decision I ordered both parties to re-serve the other with their application for dispute resolution and evidence via e-mail, within seven days of receipt of this Interim Decision. Both parties agreed to accept service via e-mail, and confirmed their e-mail addresses for same.

The landlord testified that he re-served the above documents to the tenants via email on November 15, 2022 at the email address provided by the tenants in the first hearing. The landlord entered into evidence the serving email confirming the above testimony. I find that the tenant was deemed served with the landlord's application for dispute resolution and evidence on November 18, 2022, three days after it was emailed, in accordance with sections 88 and 90 of the *Act.*

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the landlord, not all details of the landlord's submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The landlord provided the following undisputed testimony. This tenancy began on June 15, 2021 and ended on March 1, 2022. This was originally a fixed term tenancy

agreement set to end on June 15, 2022. Monthly rent in the amount of $1,600.00 was payable on the first day of each month. A security deposit of $800.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The landlord testified that the tenants emailed him on February 18, 2022 informing him of their intent to move out at the end of the month. The above email was entered into evidence. The landlord testified that he started advertising the subject renal property for rent within a couple days of receiving the above email at the same rental rate of $1,600.00 per month. The landlord testified that he was able to rent the subject rental property starting March 15, 2022 and so lost $800 in rental income for March 2022 due to the tenant's breach of the fixed term tenancy agreement.

The landlord testified that the tenant signed a Form K. The Form K was not entered into evidence. The landlord testified that the tenant was issued fines totalling $600.00 that are still on the account; however, he has not paid those fines. The landlord testified that he is seeking $600.00 from the tenants. The landlord entered into evidence two letters from the strata to "Resident/Owner" regarding three fines totalling $600.00.

The landlord testified that the tenant damaged the walls at the subject rental property and that he had to putty the holes, repaint the walls and clean up cigarette buts that were left all over the deck by the tenants. The landlord testified that the above work took him and two friends approximately 20 hours to complete. The landlord testified that he did not pay his friends but supplied food and drinks while the work was completed, receipts for same were not provided. The landlord testified that he is seeking $200.00 for the above work and paint costs. The landlord entered into evidence photographs of heavily puttied walls and cigarette buts on the deck. No receipts for paint were entered into evidence. No documentary evidence showing the move in condition of the subject rental properyt were entered into evidence.

The landlord testified that a move in condition inspection report was not completed with the tenants but a move out condition inspection report was completed with the tenants on March 2, 2022. The move out condition inspection report was entered into evidence and is signed by both parties. The move out condition inspection report states that the tenants are responsible for the following damage at the residential property: patching on bathroom door and patching on walls. The move in condition inspection report states that the tenants do not agree with the contents of the move in condition inspection report. The tenants provided their forwarding address in the move out condition inspection report.

The landlord filed for dispute resolution on March 15, 2022.

Analysis

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

Policy Guideline 5 states that where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided. The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring.

Policy Guideline 3 states that 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.

Based on the landlord's undisputed testimony and the February 18, 2022 email entered into evidence, I find that the tenants breached their fixed term tenancy agreement by ending the tenancy before the end of the fixed term.

I accept the landlord's undisputed testimony that he started advertising the subject rental property for rent a couple of days after receiving the February 18, 2022 email and that he was able to re-rent it for March 15, 2022 at the same rental rate of $1,600.00 per month. I find that the above prompt action of the landlord constitutes mitigation of the damages caused by the tenants' breach of the tenancy agreement. I accept the

landlord's testimony that the tenants' breach of the fixed term tenancy agreement resulted in him suffering a loss of rental income totalling $800.00. Pursuant to section 7 of the *Act*, the tenants are required to compensate the landlord for that loss of rental income. I award the landlord $800.00.

Section 67 of the *Act* states:

> **67** Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, 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.

The tenancy agreement does not contain any terms pertaining to the payment of strata fines. I find that the breach of strata bylaws and any resulting fines does not, in this case, constitute a breach of the Tenancy Agreement, *Act* or regulations. As such, I find that I do not have authorization to award damages for the claimed strata fines. The Civil Resolution Tribunal is the appropriate forum for strata fine claims where the tenancy agreement does not specifically contain terms pertaining to such fees/fines. The landlord's claim for strata fines is dismissed for want of jurisdiction.

Section 37(2)(a) of the *Act* states that when tenants vacate a rental unit, the tenants must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due. To be successful in a monetary claim, the applicant must establish all four of the following points:

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

Failure to prove one of the above points means the claim fails.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that 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.

I find that the landlord has not proved the move in condition of the subject rental property as a move in condition inspection report was not completed and move in photographs or other documentary evidence establishing the condition of the subject rental property on move in were not provided. The move out condition inspection report notes damage to the walls, but the tenants did not agree with the move out condition inspection report. I find that the landlord has not proved, on a balance of probabilities, that the damage to the walls were caused by the tenants.

Based on the photographs of the deck, I find that the tenants left cigarette buts on the deck that the landlord was required to clean them up. I find that the landlord has not proved what portion of the $200.00 claim was for repairing the walls and what portion was for cleaning the cigarette butts; therefore, the landlord has not proved the value of his monetary claim for cleaning up the cigarette butts.

Residential Tenancy Policy Guideline 16 states that nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right. I find that the landlord has proved that the tenants did not clean the deck as required under section 37(2)(a) of the *Act* but has not proved the value of that loss. I award the landlord $50.00 in nominal damages for cleaning up the cigarette mess.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover the $100 filing fee from the tenants, pursuant to section 72 of the *Act.*

Section 38(1) of the *Act* states that 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,
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> the landlord must do one of the following:
>
> (c)repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d)make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security deposit pursuant to section 38(1)(a) and 38(1)(b) of the *Act.* I note that the extinguishment provisions found in section 24(2) do not apply in this case as the landlord's claims are not only for damage to the subject rental property but are also for loss of rental income. The landlord's right to claim against damages was extinguished for failure to complete a move in condition inspection report, but the landlord's right to claim for loss of rental income was not; therefore the landlord was still permitted to withhold the security deposit pending this hearing.

As the landlord was successful in this application, I find that the landlord is entitled to recover the $100.00 filing fee from the tenants, pursuant to section 72 of the *Act.*

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenants' entire security deposit in the amount of $800.00.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	**Amount**
Loss of rental income	$800.00
Nominal damages	$50.00
Filing Fee	$100.00
Less security deposit	-$800.00
TOTAL	**$150.00**

The landlord is 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: March 27, 2023

Residential Tenancy Branch