Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **MNRL-S, FFL / MNSD, FFT / MNDCT, FFT**

Introduction

This hearing dealt with three applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's application for:

- authorization to retain all or a portion of the security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $14,600 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the two of the tenants' applications for:

- monetary order for $7,300 representing two times the amount of the security deposit, pursuant to sections 38 and 62 of the Act;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $7,300 pursuant to section 67; and
- authorization to recover both filing fees for these application from the landlord pursuant to section 72.

Preliminary Issue – Service

JY testified, and the tenants confirmed, that the landlord served the tenants with the landlord's notice of dispute resolution package and supporting documentary evidence.

JY testified that the landlord received the notice of dispute resolution package and supporting documentary evidence for the tenants' application relating to the return of double the security deposit (the "**Application 610**"), but not for the notice of dispute resolution package and supporting documentary evidence for the tenants' application relating to compensation for the landlord's breach of the Act (the "**Application 172**").

JY testified that she contacted the tenants roughly one month prior to the hearing, notified them that she did not receive the Application 172 materials, and asked that they re-send them to her via email. Tenant YZ testified that he replied that he had already sent them by registered mail, and that the tenants had met their statutory duties.

LF testified that JY later conceded to her that the landlords had mailed them to her, but she stated that the landlord must have lost them. She testified that JY did not make any further requests for the documents, so LF assumed that JY no longer required them.

I entered the tracking number the landlords provided for the Application 172 materials into the Canada Post tracking website. It indicated that the package was “out for delivery” and that the item was delayed. The last update on the package was from August 2, 2022, which stated: “Item redirected to recipient's new address.”

YZ argued that because the tenants sent the Application 172 materials to the landlord by registered mail, the tenants had discharged their obligations under the Act regarding service.

Section 89 of the Act permits a party to serve the other via registered mail. Section 90 of the Act deems that service has occurred five days after the registered mail is sent. However, per Residential Tenancy Branch (the “**RTB**”) Policy Guideline 12, this is a rebuttable presumption.

Based on the Canada Post tracking information, I find that the tenants sent the Application 172 materials to the landlord by registered mail, but the landlord never received them. As such, I do not find that the landlord has been served with the required materials.

In the circumstances, I did not find an adjournment of the hearing appropriate, as the materials of the landlord’s application and Application 610 were served properly. I also did not find it appropriate to order that the Application 172 proceed today but exclude the evidentiary material, as this would deny the tenants an opportunity for the application to be adjudicated on its merits due to an error of Canada Post (YZ’s refusal to re-send the materials not withstanding).

Accordingly, I dismiss Application 172 with leave to reapply.

The balance of this decision will address the landlord’s application and Application 610.

Preliminary Issue – Amount of Landlord's Application and Partial Withdrawal

Prior to the hearing, the landlord submitted a revised monetary order worksheet, which reduced the amount of the landlord's application from $14,600.00 to $10,789.50, which reflected the fact that the landlord re-rented the rental unit after having made the application.

However, the landlord included a claim for $3,162.33, representing a portion of June 2022's rent. At the outset of the hearing, YZ asked that this portion be dismissed as the issue of June's rent had already been addressed at a prior hearing (the "**December Hearing**", file number of cover of this decision).

In the December Hearing, the landlord sought a monetary order of $7,300 for unpaid June 2022 rent. The presiding arbitrator found that the tenancy ended on June 17, 2022, and ordered that the tenants pay the landlord $4,136.67, representing unpaid rent calculated on a pro-rated basis for June 2022. The presiding arbitrator ordered that the landlord could retain the security deposit ($3,650) in partial satisfaction of this order.

As such, I find that a decision on the landlord's entitlement to June 2022 rent has already been rendered by the RTB. I advised JY of this, and she asked to withdraw this portion of the application. In the hearing, I permitted this. However, upon reflection, I do not think that this is appropriate, as it allows the possibility of the landlord re-apply for the same relief. Rather, I think it appropriate to dismiss this portion of the landlord's application without leave to reapply, as the issue of the landlord's entitlement to June 2022 rent is *res judicata* (a matter already decided).

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $7,626.17; and
2) recover the filing fee.

Are the tenants entitled to:

1) a monetary order of $7,300 representing the return of double the security deposit; and
2) recover the filing fee?

Evidence and Analysis

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written, fixed term tenancy agreement starting March 1, 2022 and ending February 28, 2023. The tenants vacated the rental unit on June 17, 2022. Monthly rent was $7,300 and was payable on the first of each month. The tenants paid the landlord a security deposit of $3,650. As mentioned above, an RTB arbitrator ordered that the landlord could keep the security deposit in partial satisfaction of a monetary order.

1. End of Tenancy

The parties agree that the tenants vacated the rental unit on June 17, 2022. The arbitrator presiding over the December Hearing found that the tenancy ended on this date.

At the hearing, the tenants argued that the reason they ended the tenancy was that the landlord had failed who make a number of repairs to the residential property which they claimed violated the tenancy agreement and resulted in their physical and mental injury.

In an e-mail sent to the landlord dated April 27, 2022, FL outlined 14 issues the tenants had since the tenancy started. She wrote:

> And here is my proposed solutions moving forward:
>
> 1. Fix the fireplace, master bedroom shower head, and bathtub.
> 2. Deal with the pond in the backyard as it is too unsanitary.
> 3. Professional clean of the carpet on the staircase.
> 4. Eliminate pest problem in the kitchen, as we found the source.
> 5. Fix the leak in the guest bathroom shower.
> 6. Formal apology regarding yesterday's incidence
>
> We demand prompt attention prior to THIS FRIDAY. Otherwise we will stop paying for the rent and reserve all the rights to demand for compensation of already incurred physical and mental injuries. In the meantime, file formal complaint regarding the negligence an unprofessional behavior of your assistant.

On May 16, 2022, after receiving the landlord's reply, FL wrote a further e-mail to the landlord stating:

> Fail to repair an misrepresentation or breach of the material terms of the tenancy agreement. As the tenant, I am entitled to give one month notice to end our tenancy agreement that started on March 1, 2022 and will end in March 28, 2023 for renting [the rental unit].
>
> Hereby, I notify you guys that our tenancy agreement (defined as above) will end on June 20, 2022.

Section 45 of the Act allows a tenant to end a fixed term tenancy by giving one month's notice prior to the end date of that agreement, or in the event that the landlord has failed to comply with the material term of the tenancy agreement and has not corrected the situation, within a reasonable time after the tenant gives written notice of the failure.

RTB Policy Guideline 8 Expands upon this. It states:

> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
>
> • that there is a problem;
> • that they believe the problem is a breach of a material term of the tenancy agreement;
> • that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> • that if the problem is not fixed by the deadline, the party will end the tenancy.

Neither of the LF's emails satisfy these criteria. The April 27 email does not allege that the problem amounts to a breach of a material term. While the letter does propose a deadline for the electric breach to be rectified, I do not find the deadline to be reasonable, given the amount of work requested, and that the deadline is two days after the e-mail was sent.

Additionally, the letter does not state that if the problem is not fixed by the deadline, the tenant will end the tenancy. Rather, it only alerts the landlord to the tenants' intention to make a monetary claim for damages resulting from these alleged breaches.

The May 16 email alleges that the tenants consider the problems to be a material breach of the tenancy agreement. However, it does not propose a reasonable time to rectify the alleged breach. Instead, the tenants unilaterally terminate the tenancy. This is not something they are permitted to do under the Act. They must first notify the landlord, in writing, that they consider the alleged material breaches to be grounds for ending the tenancy and provide a reasonable deadline for rectification.

As the tenants did not do this, I find that the tenants breached the tenancy agreement by moving out prior to the end of the fixed term.

2. Landlord's Loss Caused by Tenants' Breach

    a. Loss of Income

The landlord posted the rental unit for re-rent after the tenancy ended and was able to secure new tenants starting July 6, 2022. However, the monthly rent these tenants agreed to pay is $6,950. They paid a pro-rated rent for July, in the amount of $5,829.

The landlord argues that the tenancy agreement between the tenants and the landlord guaranteed the landlord an income of $7,300 per month from March 1, 2022 to February 28, 2023. By renting the rental unit out for less than this, the landlord argues that it suffered a loss of $350 per month for August 2022 to February 2023 ($7,300 – $6,950 = $350; $350 x 7 months = $2,450) as well as a loss of $1,471 for July 2022 ($7,300 – $5,829 = $1,471).

RTB 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:
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> - 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 "**Four-Part Test**")

As stated above, I find that the tenants breached the Act by vacating the rental unit prior to the end of the fixed term. I accept the landlord's argument that as a result of this breach it was unable to generate $7,300 per month in rent for the entirety of the term of the tenancy agreement. Based on the copy of the new tenancy agreement entered into evidence, I find that the landlord re-rented the rental unit less than a month after the tenancy ended for $6,950 per month.

As such, I find that the landlord has lost the ability to generate the $3,921 in rent otherwise would have been able to have the tenants not breached the tenancy agreement. I find that the landlords acted reasonably to secure a new tenant as soon as possible once the tenants vacated the rental unit.

I do not find it unreasonable for them to have accepted slightly less monthly rent in order to secure a new tenant quicker. Had the landlord held out for an additional month in order to secure a new tenant who would pay $7,300 per month, any gains the landlord might have made would have been offset by the fact that they were unable to collect rent for July 2022.

I order the tenants to pay the landlord $3,921.

b. Leasing Commission

The landlord seeks to recover the cost of the leasing commission for re-renting the rental unit. JY testified that she, on behalf of her employer, the landlord, charged the owners of the rental unit (who are not the landlords, per the tenancy agreement) $3,648.75. The landlord did not submit a copy of this invoice into evidence.

I do not find that the landlord is entitled to recover this amount from the tenant. The landlord did not incur any expense when re-renting the rental unit. Rather, the owners of the rental unit incurred that expense. They are not a party to the tenancy agreement and therefore do not have standing before the RTB.

Additionally, in the event that I am incorrect, and the owners do have standing, I do not find that they have discharged their evidentiary burden to prove it is more likely than not

that they paid the landlord this amount. I do not have a copy of invoice, receipt, contract, or piece of correspondence, which shows that this transaction ever occurred.

Accordingly, I dismiss this portion of the landlord 's application without leave to reapply.

3. Tenants' Claim

The tenants argue that they are entitled to an amount equal to double the security deposit. They cited two reasons for this entitlement.

a. No Valid Claim

First, they argued that the landlord had "no legal reason" to keep the security deposit, as there was no damage to the rental unit. I am not persuaded by this argument.

A security deposit may be applied to more than just damage to the rental unit. Section 1 of the Act defines "security deposit" as an amount "held as security for any liability or obligation of the tenant respecting the residential property". As such, the security deposit secures, among other things, a claim for damages caused by a tenant's breach of the Act. The landlord has made such a claim.

Section 38 of the Act states that a tenant is entitled to an amount equal to double the security deposit if the landlord does not make an application against the security deposit within 15 days of either the tenancy ending or a landlord receiving the tenant's forwarding address (whichever is later).

The tenancy ended on June 17, 2022. The tenants provided their forwarding address, in writing, to the landlord on July 4. The landlord made its application claiming against the security deposit on July 4. As such, the landlord has complied with its obligations under the Act and the tenants are not entitled to an amount equal to double the security deposit on this basis.

b. Landlord's Right to Retain Security Deposit is Extinguished

The tenants argued that the landlord did not agree to attend a move out condition inspection at either of the times they provided. They testified that they suggested that the inspection occur on either June 17 or June 20, 2022, and that the landlord did not agree to either of these dates.

The landlord conducted a move out inspection on June 23 which the tenants did not attend because they were on a “family trip”.

I must first note that it is the landlord’s obligation to give two opportunities for a move out inspection (per section 23(3) of the Act), and not the tenant’s. The landlord never gave the tenants these two opportunities. As such, per section 24(4) of the Act, the landlord’s right to claim against the security deposit for *damage to residential property* is extinguished. The landlord’s right to claim against the security deposit for unpaid rent or for loss suffered as a result of a breach of the tenancy agreement is not extinguished.

The landlord’s application does not relate to damage to the residential property. Rather it relates to compensation for unpaid rent and for monetary loss caused by the tenants’ breach of the Act. As such, the landlord was entitled to make its application and the extinguishment of its right to claim against the security deposit for damage to the residential property does not entitle the tenants to an amount equal to double the security deposit.

For these reasons, I dismiss the tenants’ Application 610 without leave to reapply.

4. Filing Fees

As the landlord was partially successful in its application and the tenants were unsuccessful in their applications, I order the tenants reimburse the landlord its filing fee. I decline to order that the landlord reimburse the tenants’ their filing fee.

Conclusion

I dismiss the tenants’ Application 610 without leave to reapply.

I dismiss the tenants’ Application 172 with leave to reapply.

I grant the landlord’s application, in part.

Pursuant to sections 67 and 72 of the Act, I order that the tenants pay the landlord $4,021, representing the $3,921 in compensation for the tenants breaching the fixed-term tenancy agreement plus the $100 filing fee.

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: April 17, 2023

Residential Tenancy Branch