



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR MNDC FF

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Landlord on August 11, 2015. The Landlord initially filed seeking an Order of Possession for unpaid rent and a Monetary Order of unpaid rent or utilities, money owed or compensation for damage or loss under the *Act*, Regulation, or tenancy agreement, and to recover the cost of the filing fee from the Tenant.

The Landlord stated that she amended her application to remove the request for an Order of Possession prior to serving the application and hearing documents to the Tenant.

The hearing was conducted via teleconference and was attended by the Landlord and the Tenant. Each person gave affirmed testimony. I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

The Landlord submitted two packages of evidence to the Residential Tenancy Branch (RTB). The first package consisted of 21 pages of documents and was received by the RTB on August 17, 2015. The second package included two pages, a cover sheet and copies of the Canada Post receipts as proof of service, which was received by the RTB on August 18, 2015. The Landlord affirmed that she served the Tenant with copies of the same documents that she had served the RTB, excluding the Canada Post receipts. The Tenant acknowledged receipt of the Landlord's documents, excluding the Canada Post receipts, and no issues regarding service or receipt were raised. As such, I accepted the Landlord's submissions as evidence for these proceedings.

The Tenant testified that she did not submit documentary evidence in response to the Landlord's application.

Both parties were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Had the Landlord entered into an agreement to return the Tenant's security deposit?
2. Has the Landlord proven entitlement to monetary compensation for damage or loss under the *Act*?

Background and Evidence

The Tenant entered into a fixed term tenancy agreement which began on June 1, 2015 which was not set to end until May 31, 2016. Rent of \$1,340.00 was payable on the first of each month and on May 11, 2015 the Tenant paid \$670.00 as the security deposit.

Both parties were represented at the move-in inspection and signed the condition inspection report form on June 1, 2015. Both parties were represented at the move-out inspection and signed the condition inspection report form on August 10, 2015,

On July 29, 2015 the Tenant served the Landlord with notice to end her tenancy, which was dated July 29, 2013. That notice listed an effective date of August 31, 2015. On July 30, 2015, the Tenant signed the Landlord's form titled "Improper Notice – Fixed Term Tenancy" which included the following:

Your signed Tenancy Agreement with [Landlord's name] states that the terms of your tenancy is for a fixed term ending on May 31, 2015. You are legally responsible for any loss of revenue incurred as a result of ending your tenancy prior to this date and the Landlord will pursue the recovery of any such loss.

[Reproduced as written]

On July 31, 2015 the Tenant signed the Landlord's form titled "Resident Notice to Vacate" which provided the Landlord with the Tenant's forwarding address. A copy was submitted into evidence.

The Landlord testified that when the Tenant failed to pay her August 1, 2015 rent they posted a 10 Day Notice to end tenancy to her door on August 2, 2015. The Tenant refused to pay the rent and vacated the rental unit as of August 10, 2015.

The Landlord stated they are seeking to recover the August 2015 unpaid rent of \$1,340.00 and the \$805.33 liquidated damages. The Landlord submitted a copy of the tenancy agreement which provides for liquidated damages at clause 5 as follows:

5. LIQUIDATED DAMAGES *If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay the landlord the sum of \$805.33 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.*

[Reproduced as written]

The Landlord testified that they began advertising the rental unit on the internet January 29, 2015 and once the Tenant vacated the unit they placed the rental unit on their company vacancy report. She submitted the rental unit was re-rented effective September 1, 2015.

The Tenant testified and confirmed that she had signed the above mentioned documents. She also confirmed receiving a copy of the Landlord's Marketing Liquidated Damages Breakdown as submitted in the Landlord's evidence.

The Tenant testified that when she took possession of the rental unit it had been painted bright colors. She stated that on July 31, 2015 the building manager requested permission to show the rental unit. She said she was present when the unit was shown to someone who told her he knew the building and that he was on the wait list to become a tenant. She said he agreed to take the unit and that he told her he was a painter and would like to get early possession so he could paint the unit before he moved in.

The Tenant submitted that she had told the building manager and this new tenant that she could move out of the unit early. She argued that after the showing they left and she assumed they would get back in touch with her to advise when the new tenant would be taking over. She stated she assumed that the new tenant would have to pay a prorated rent because he wanted the unit early which is why she did not pay the August 1, 2015 rent. She stated she was waiting to hear from the manager on what was decided. She argued that August 1, 2015 was a holiday long weekend and when she saw the 10 Day Notice on August 2, 2015 she moved out in accordance with the Notice.

The Tenant testified that she was of the opinion that the 10 Day Notice provided her the option to do one of two things, pay the rent and stay, or do not pay the rent and move out. She said she interpreted the notice to mean that she was not required to pay the rent if she moved out. She also argued that once she moved out she would not have access to the unit so she would not be required to pay rent when she did not have access.

The Tenant submitted that she was in the building on August 31, 2015 and saw the new tenant moving into her unit. She said she had returned looking for her remote control so

he let her into the rental unit to search the closets for it. She stated that when she entered she could see that the entire unit had been repainted.

The Tenant argued that, although she thought there was an amount owed for liquidated damages initially, the Landlord had not suffered a loss in trying to re-rent the unit. She asserted the new tenant who rented the unit was on the Landlord's waiting list and because he decided to take the unit when she saw it on July 31, 2015, there was no other effort to advertise or re-rent the unit so she should not be required to pay the liquidated damages.

The Tenant disputed the Landlord's claim for unpaid rent and liquidated damages arguing that the Landlord agreed, during the move out inspection, that she was no longer required to pay those items. The Tenant pointed to page 2 of the condition inspection report submitted into evidence by the Landlord which she stated supports that agreement. The Tenant noted that the Landlord crossed out the amounts for unpaid rent and liquidated damages and the Landlord wrote \$670.00 for the Balance Due Tenant, in the section titled Security Deposit Statement. The Tenant asserted the Landlord told her she would be getting her \$670.00 security deposit returned.

The Tenant stated that she feels the Landlord's application is frivolous and vexatious. She submitted that if the Decision was in favour of the Landlord that consideration should be given to double her security deposit as it was not returned within the required timeframe. She argued the Landlord told her that her deposit would be returned and it was that statement she relied upon.

The Landlord confirmed she had crossed out the two amounts on the move out inspection form in the Security Deposit Statement. She submitted that the Tenant had been very much in her face saying she was not going to pay those fees and was insistent that those items be removed from the form. She said she never said the Tenant was not responsible for the amounts due. She argued that she began by telling the Tenant August rent was due. The Landlord confirmed that the new tenant was allowed to move in on August 31, 2015; however, he was not given access until 1:00 p.m. that day.

The Tenant stated that she believes the new tenant was given access earlier in order to paint the unit. She said she recalled the new tenant moving in during the morning and not after 1:00 p.m.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Section 7 of the Act provides as follows in respect to claims for monetary losses and for damages made herein:

- 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.
- 7(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.

Section 67 of the Residential Tenancy Act states:

Without limiting the general authority in section 62(3) [*director's authority*], 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.

Section 45 (2) of the Act stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

The undisputed evidence was the Tenant initiated ending this tenancy on July 29, 2015, when she served the Landlord notice to end the tenancy effective August 31, 2015, which was prior to the end of the fixed term. Based on the foregoing, I find the Tenant ended her fixed term tenancy in breach of section 45(2) of the Act.

Section 26 of the Act stipulates that a tenant must pay rent in accordance with the tenancy agreement.

In this case the tenancy agreement stipulated the Tenant was required to pay rent on the first of each month. I do not accept the Tenant's submission that August 1, 2015 fell on a holiday weekend which delayed the due date rent was payable as there was no provision in the tenancy agreement which allowed the Tenant to delay paying her rent in the event of a holiday. Rather, I find the burden was on the Tenant to ensure her rent was paid to the Landlord in full no later than August 1, 2015.

Section 44(1)(d) of the Act stipulates, in part, that a tenancy ends on the date the tenant vacates or abandons the rental unit or the effective date of a Notice to end tenancy, whichever is the earliest date.

The fact that the Landlord served the Tenant a 10 Day Notice for unpaid rent on August 2, 2015 did not release the Tenant from her obligation to pay her rent in accordance with the tenancy agreement. I do not accept the Tenant's argument that she was not required to pay the outstanding rent if she vacated the unit in accordance with the Notice as the Tenant was still obligated to pay rent in accordance with the tenancy agreement.

I find the Tenant ended the tenancy effective August 10, 2015 when she vacated the unit and returned possession to the Landlord, pursuant to section 44(1)(d) of the *Act* and in breach of section 45(2) of the *Act*.

I further find that the Tenant's contractual obligation to tenancy agreement continued to remain in full force and effect regarding the payment of rent, until the Landlord began collecting rent on a subsequent tenancy agreement.

Notwithstanding the Tenant's submissions that she did not have possession of the unit after August 10, 2015 and she saw the new tenant moving in on August 31, 2015, I find the Landlord has provided sufficient evidence to prove their claim for unpaid rent and/or loss of rent for the entire month of August, 2015 in the amount of **\$1,340.00**, pursuant to section 67 of the *Act*.

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.

The irrefutable evidence was the Tenant was fully aware of her obligation to pay the liquidated damages clause at the time she gave her notice to end the tenancy in breach of the tenancy agreement. I do not accept the Tenant's submission that the Landlord incurred no costs in re-renting the unit simply because they rented the unit to a person who was on their waiting list. Rather, I conclude that managing a wait list involves costs to pay staff to administer such a list and still involves showing the specific unit; conducting credit checks; having meetings with the prospective tenant; and time to explain and sign the required paperwork such as the tenancy agreement.

In addition, the fact the Landlord may or may not have entered into an agreement to allow the new tenant access to re-paint the rental unit after the Tenant returned possession to the Landlord, or allowed access to any other contractor to conduct repairs to the unit prior to the new tenant occupying the unit, has no relevance to the matters before me. A Landlord is free to conduct maintenance or repairs to rental units in their possession whenever they see fit to do so.

Accordingly, I find the Landlord provided sufficient evidence to prove their claim for liquidated damages and I grant them monetary compensation in the amount of **\$805.33**, pursuant to section 67 of the *Act*.

Section 72(1) of the *Act* stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) [*starting proceedings*] or 79 (3) (b) [*application for review of director's decision*] by one party to a dispute resolution proceeding to another party or to the director.

The Landlord has succeeded with their application; therefore, I award recovery of the **\$50.00** filing fee, pursuant to section 72(1) of the Act.

Monetary Order – I find that this application meets the criteria under section 72(2)(b) of the Act to be offset against the Tenant's security deposit plus interest as follows:

Section 20(2) of the Regulation provides that In addition to the information referred to in subsection (1), a condition inspection report completed under section 35 of the Act [*condition inspection: end of tenancy*] must contain the following items in a manner that makes them clearly distinguishable from other information in the report:

- (a) a statement itemizing any damage to the rental unit or residential property for which the tenant is responsible;
- (b) if agreed upon by the landlord and tenant,
 - (i) the amount to be deducted from the tenant's security deposit or pet damage deposit,
 - (ii) the tenant's signature indicating agreement with the deduction, and
 - (iii) the date on which the tenant signed.

It should be noted that the condition inspection form pertains to amounts the parties agreed to have deducted from the security deposit. That form does not preclude the Landlord from making an application to recover losses incurred that were not mutually agreed to be deducted from the security deposit.

Upon review of the move out condition inspection report, I accept the Tenant's submissions that the Security Deposit Statement section, which she signed in agreement too, indicated there was a balance due to the Tenant of \$670.00. I further accept that the Tenant acted based upon this statement as she expected a full refund of her security deposit. Accordingly, I find the Landlord extinguished their right to make a claim against the security deposit and were required to return the deposit to the Tenant within 15 days after the later of: 1) the date the tenancy ended and 2) the date the Landlord received the Tenant's forwarding address in writing, pursuant to section 38(1) of the Act.

This tenancy ended August 10, 2015 and the Landlord received the Tenant's forwarding address on July 31, 2015. Therefore, the Landlord was required to return the \$670.00 security deposit to the Tenant no later than August 25, 2015.

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the Act and the Landlord is now subject to Section 38(6) of the Act which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit. Therefore, the monetary award is calculated as follows:

Landlord's monetary award (\$1340.00 + \$805.33 + \$50.00)	\$2,195.33
LESS: Double Security Deposit (2 x 670.00) +	
Accrued interest of \$0.00	<u>-1,340.00</u>
Offset amount due to the Landlord	<u>\$ 855.33</u>

As per the above, I hereby order the Tenant to pay the offset amount of \$855.33 to the Landlord forthwith.

In the event the Tenant does not comply with the above order, The Landlord has been issued a Monetary Order in the amount of **\$855.33** which may be enforced through Small Claims Court after service upon the Tenant.

Conclusion

The Landlord was primarily successful with their application and was awarded monetary compensation in the amount of \$2,195.33 which was offset against double the Tenant's security deposit; leaving a balance owed to the Landlord of \$855.33.

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 12, 2016

Residential Tenancy Branch

