Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 361584 BC LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD OPN FF – Landlord's application
MNSD OLC FF – Tenant's application

Introduction

This hearing was convened to hear matters pertaining to two Applications for Dispute Resolution. One filed by the Landlords and the other filed by the Tenant. The Landlord filed on July 20, 2016 seeking an Order of Possession based on the Tenant's notice to end tenancy; $425.00 to keep the security deposit; and to recover the cost of the filing fee. The Tenant filed her application on August 6, 2016 seeking the return of her $650.00 security deposit; to order the Landlord to comply with the *Act,* regulation, or tenancy agreement; and to recover the cost of the filing fee.

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 Landlords' application listed the corporate name of the Landlord and the owner of that corporation, who attended this hearing. As such, for the remainder of this Decision references to the Landlords importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

Each party confirmed receipt of the application, notice of hearing documents, and evidence served by the other party. Each party affirmed they served the other with copies of the same documents that they had served the Residential Tenancy Branch (RTB). No issues regarding service or receipt were raised. As such, I accepted the submissions from both parties as evidence for these proceedings.

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. Has the Landlord regained possession of the rental unit prior to the hearing?
2. Has the Landlord proven entitlement to compensation for her time to obtain another tenant?
3. Has the Tenant proven entitlement to the return of her security deposit?

Background and Evidence

I heard the undisputed evidence that the Tenant occupied the rental property effective November 1, 2014, based on a one year lease that required the tenant to vacate the rental unit at the end of the tenancy. Rent of $1,300.00 was payable on the first of each month. On or around November 1, 2014 the Tenant paid $650.00 was the security deposit. No condition inspection report form was completed by the Landlord at the beginning of this tenancy.

The Landlord testified that prior to the end of the first fixed term lease she informed the Tenant she could stay. They entered into a second fixed term lease which commenced on November 1, 2015 and was scheduled to end on October 31, 2016; at which time the Tenant would be required to vacate the rental unit. Rent was increased to $1,323.00 and was payable on the first of each month. The Landlord transferred the $650.00 security deposit to the second tenancy agreement.

I heard both parties state that the Tenant called the Landlord on May 3, 2016 to advise that she wanted to move out of the rental unit effective May 31, 2016, due to a change in her employment location. After a brief discussion the Landlord and Tenant agreed that the Landlord would work with the Tenant to get the unit re-rented.

The Landlord submitted that she had told the Tenant they would work out the fine details and that June or July would work better to re-rent the unit. I heard the Landlord state that she had told the Tenant she would have to charge the Tenant for her time to find another tenant. When the Landlord found such a tenant she told the Tenant she needed her notice to end tenancy in writing. She said she initially received an email notice that included the words that she had “agreed with no penalty”. She refused that notice and requested the Tenant re-send the email notice without the “no penalty” portion.

I heard the Landlord state that after she found the replacement tenant she advised the Tenant she would be charging her $25.00 per hour for her time to re-rent the unit. She

said the Tenant refused to agree to that amount and told the Landlord she would be checking with her lawyer.

The Landlord submitted she received the Tenants notice to end tenancy in July 2016. The Tenant vacated the unit by July 23, 2016 and provided her forwarding address to the Landlord on July 20, 2016.
The Tenant argued that she initially requested permission to sublet the rental unit when she called the Landlord on May 3, 2016. I heard the Tenant state that during the aforementioned telephone conversation they mutually agreed to terminate the tenancy, instead of doing a sublet, during which the Landlord asked for a small fee to find the new tenant. The Tenant argued that she asked the Landlord how much the fee would be, during the May 3, 2016 conversation, and the Landlord told her she did not know the fee amount at that time.

I heard that the parties arranged a move-out walk through to be conducted on July 23, 2016. The Landlord's spouse attended on behalf of the Landlord and no condition inspection report form was completed during that walk through. The Tenant left the keys to the rental unit inside on the counter during the July 23, 2016 walk through. The Tenant later mailed the mailbox keys to the rental unit address on August 7, 2016

The Landlord stated that she did not recall the Tenant asking to sublet the rental unit. She said she only recalled discussing the Landlord finding a new tenant. The Landlord confirmed that she told the Tenant she would charge a "small fee" and when the Tenant asked how much she replied "it depends on how long it takes". I then heard the Landlord state: "if someone breaks a lease I always charge a fee". The Landlord stated she sought $425.00 as liquidated damages to cover that fee.

The Tenant disputed the Landlord's claim and said she should not have to pay the Landlord "liquid damages" because she did not damage anything. She asserted the Landlord did not lose anything as the unit was re-rented August 1, 2016.

From the Landlord's application for Dispute Resolution in the Details of Dispute the Landlord wrote, in part, as follows:

> *Tenant broke her lease, gave less than one month notice. She was told she would be penalized monetarily depending on the time spent re-renting her suite…*
>
> [Reproduced as written]

The most recent tenancy agreement effective November 1, 2015, was submitted into evidence and provided for liquidated damages as follows:

4. *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 to the landlord the sum of $800 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.*

The parties were given the opportunity to settle these matters; however, the Landlord declined. I then ended the hearing and explained how my Decision would be issued in accordance with the *Act.* After the foregoing, the Landlord changed her mind. However, the hearing had already been concluded, I provided final instructions, and the hearing time had expired. Accordingly, I proceeded with issuing my Decision as follows.

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing; documentary evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

The Landlord withdrew her request for an order of Possession as the Tenant vacated July 23, 2016.

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. Upon review of the liquidated damages clause at section 5 of the tenancy agreement, I find that the clause turns on evidence of one of the following two breaches:

(1) *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*

(2) 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,

Residential Tenancy Policy Guideline 8 defines a material term as a term written into the tenancy agreement that both parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. I concur with this definition.

There was no evidence before me that the Tenant breached a material term of the tenancy agreement. Therefore, there was insufficient evidence to prove the Tenant breached a material term of their tenancy agreement that caused the Landlord to end the tenancy before the end of any fixed term.

In regards to the second manner in which the tenancy agreement could be considered breached, for the purpose of enforcing the liquidated damages clause, the tenancy agreement stipulates a tenant has to inform the landlord of their intention to breach their agreement and their intention to end the tenancy by vacating and vacate before the end of the fixed term.

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.

Section 52 of the *Act* provides that in order to be effective, a notice to end a tenancy must be in writing and must

> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,
> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and
> (e) when given by a landlord, be in the approved form.

The Landlord submitted adverse evidence that on May 3, 2016 the Tenant gave her verbal notice to end the tenancy effective May 31, 2016, to which the Landlord responded that she agreed to work with the Tenant to re-rent the unit. Then once the Landlord secured a new tenant the Landlord requested the Tenant provide her with written notice to end the tenancy effective two months later on July 31, 2016, a date to accommodate the Landlord's new tenant. The Landlord acknowledged that she accepted the Tenant's email notice to end tenancy on or around June 5, 2016, effective

July 31, 2016, despite an email notice not being a prescribed form for a notice to end tenancy, as required by section 52 of the *Act*.

Notwithstanding the foregoing, I accept the Landlord's submission that she was of the opinion that the email was a notice to end tenancy and a breach of the fixed term tenancy. That being said, I also accept the Tenant's submission she was of the opinion that during the May 3, 2016 telephone conversation the Landlord had mutually agreed to end the tenancy and agreed to assist in finding a new tenant. The evidence further suggests the Tenant agreed to continue with her obligations to the tenancy until a suitable new tenant had been secured by the Landlord, as she remained in possession of the unit and continued to pay rent for another two months after May 31, 2016, the effective date of her initial verbal notice.

I find there was insufficient evidence to prove the Tenant informed the Landlord of an intention to breach their agreement. I made this finding in part as there was undisputed evidence that the Tenant initiated communication with the Landlord to inform her of the Tenant's intent to move out; however, there was no evidence before me that would indicate the Tenant intended on breaching her obligations to the tenancy agreement. Rather, the evidence was the Tenant asked to sublet the unit and during a conversation the two parties mutually agreed the Landlord would find a suitable new tenant for a "small fee". I interpret the aforementioned to be the parties informing each other that they wanted to work with each other in order to uphold their obligations to the tenancy agreement, which is what the Tenant did until a new tenant was secured.

In addition, there was insufficient evidence before me that would suggest the Landlord informed the Tenant of their intention to enforce the liquidated damages clause. Rather, by her own submissions the Landlord intentions were that she would charge a "small fee" and that the Tenant would be "penalized monetarily". There was insufficient evidence before to prove the parties mutually agreed upon the amount of a "small fee" and the *Act* does not provide for punitive damages.

After consideration of the foregoing, I find the Landlord submitted insufficient evidence to prove the Tenant breached her obligation to the tenancy agreement. Rather, I accept that this tenancy ended by mutual agreement and no agreement was reached as to payment of a fee to the Landlord. Accordingly, I dismiss the application, without leave to reapply.

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 not succeeded with their application; therefore, I declined to award recovery of the filing fee.

As the Landlord has not been successful with her application I hereby find in favor of the Tenant's application and order the Landlord to return the **$650.00** security deposit plus $0.00 interest to the Tenant forthwith, pursuant to section 67 of the *Act.* The Tenant has succeeded with their application; therefore, I award recovery of the filing fee in the amount of **$100.00**, to be paid by the Landlord, pursuant to section 72(1) of the Act.

In the event the Landlord does not comply with the above Orders, the Tenant has been issued a Monetary Order for **$750.00** ($650.00 + $100.00). This Order must be served upon the Landlord and may be enforced through Small Claims Court.

Conclusion

The Landlord was not successful with their application and it was dismissed without leave to reapply. The Tenant was successful and was granted a monetary order in the amount of $750.00.

This decision is final, legally binding, and 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: January 13, 2017

Residential Tenancy Branch