



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, MNR, MDSD & FF

The Application for Dispute Resolution filed by the landlord makes the following claims:

- a. A monetary order in the sum of \$725 damages and liquidated damages
- b. An order to retain the security deposit
- c. An order to recover the cost of the filing fee

The Application for Dispute Resolution filed by the Tenant makes the following claims:

- a. An order that the landlord comply with the Act, regulations and/or tenancy agreement.
- b. An order to recover the cost of the filing fee.

The tenant subsequently filed an Amendment to her claim that sought a monetary order in the sum of \$801. The monetary order worksheet claims \$625 for the liquidated damages, \$78.50 for the carpet cleaning claim in the landlord's claim and the \$100 filing fee. However while the claim is unclear it would appear she is seeking reimbursement of these sums on the basis the landlord has wrongfully withheld money for these items.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the Application for Dispute Resolution/Notice of Hearing filed by each party was sufficiently served on the other.

Issue(s) to be Decided:

The issues to be decided are as follows:

- a. Whether the landlord is entitled to A Monetary Order and if so how much?
- b. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- c. Whether the landlord is entitled to recover the cost of the filing fee?
- d. Whether the tenant is entitled to an order that the landlord comply with the Act, regulations and/or tenancy agreement?
- e. Whether the tenant is entitled to a monetary order and if so how much?
- f. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence:

The parties entered into a fixed term written tenancy agreement that provided that the tenancy would start on November 15, 2017 and end on June 30, 2018. The rent is \$1015 per month payable in advance on the first day of each month. The tenant paid a security deposit of \$507.50 at the start of the tenancy.

The tenant determined that she wished to vacate the rental unit. On December 12, 2017 she e-mailed the landlord requesting whether she could assign the lease. The landlord responded saying that she could assign it provided she first came in and paid the liquidated damage sum of \$625. The tenant disputed this position on the basis that an assignment of the lease does not involve a termination of that lease. Therefore the landlord does not have a right to the liquidated damages.

The dispute continued. On December 22, 2017 the tenant gave the landlord 30 days written notice that she was ending the tenancy on January 31, 2018, the rental unit was available for showing on December 28, 2018 and that the rental unit would be empty by January 15, 2018.

The landlord told the tenant by e-mail that she was not to advertise and that any new tenant would have to be checked and approved by the landlord.

The landlord testified they advertised the rental unit on 7 or 8 sites. Four prospective tenants were sent to the landlord by the Tenant but two did not show. They had a number of showings. Eventually a new tenant was found who agreed to rent the rental unit as of January 15, 2018. The landlord proposed to the new tenant that the fixed term end on June 30, 2018 to be consistent with the tenants. The new tenant requested and the landlord agreed to a longer fixed term.

The tenant vacated the rental unit on January 15, 2018. The new tenant moved in. The landlord acknowledged they have not suffered a loss of rent for January.

The landlord testified he agreed and has returned the ½ of rent for January 2018. The tenant disputes this. She presented an e-mail from the landlord where the landlord states there is a cheque available in the sum of \$211.85 after the landlord has deducted the claim for liquidated damages in the sum of \$625, carpet cleaning and the cost of the landlord's fling fee. The tenant testified that \$211.85 was sent by e-transfer to her. The landlord disputed this saying it was not the practice of the landlord to send money by e-transfer. Further, he submitted the exchange of e-mails was an attempt to settle the matter and does not reflect any withholding or payment of money. This oral testimony is in conflict with the e-mail produced by the tenant and a document from their broker to the tenant proposing to return \$390 and warning that there may be other deductions. The landlord failed to produce evidence that indicates the ½ rent for January was paid to the Tenant. The Tenant failed to produce evidence that the e-transfer of the lesser sum was made. In the circumstances I determined it was not possible to determine whether the landlord returned the full ½ month rent, a lesser sum or not at all. .

The Law:

Section 34 of the Residential Tenancy Act provides as follows:

Assignment and subletting

34 (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.

(2) If a fixed term tenancy agreement has 6 months or more remaining in the term, the landlord must not unreasonably withhold the consent required under subsection (1).

(3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

Policy Guideline #19 provides as follows:

B. ASSIGNMENT

Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.

When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment. It is possible that the original tenant may be liable to the landlord under the original agreement. For example:

- ☐ the assignment to the new tenant was made without the landlord's consent; or
- ☐ the assignment agreement doesn't expressly address the assignment of the original tenant's obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.

Residential Tenancy Act

Under s. 34 of the *Residential Tenancy Act*, a tenant must not assign a tenancy agreement unless the landlord consents in writing. A landlord must not unreasonably withhold consent if the tenancy agreement has six months or more remaining in the fixed term. (By implication a landlord *has* the discretion to withhold consent, without regard to reasonableness, in the case of a fixed term tenancy agreement with less than six months remaining). The Act does not specifically refer to month-to-month (periodic) tenancies.

An arbitrator may find that a landlord has acted reasonably for withholding consent to assign a periodic tenancy, unless the tenant can demonstrate a compelling reason why the landlord should agree to the assignment. The circumstances of each case would have to be examined.

In either a fixed-term or a periodic tenancy, failure to obtain the landlord's written consent prior to the assignment could result in the landlord serving a One Month Notice to End Tenancy (form RTB-33).

Failure of a landlord to accept a reasonable assignment may interfere with the landlord's ability to claim for loss of rental income as it may be found that the landlord failed to mitigate that loss.

An assignment may take place in various circumstances, such as a tenant leaving town, but still having a period of time left on a fixed-term tenancy

agreement. The original tenant may wish to assign the tenancy agreement to a new tenant who takes over the tenancy agreement for the remainder of the term.

Analysis:

The tenancy agreement contained the following liquidated damage clause:

5. LIQUIDATED DAMAGES. If the tenant breaches a material term of this Agreement that caused 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 the 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 **\$625** 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.”

I do not accept the position taken by the landlord that the tenant is responsible for and must pay the liquidated damage sum if there is an assignment. In my view the tenancy agreement has not come to an end and is ongoing where there is an assignment. Thus there is no basis the payment of liquidated damages.

I agree with the landlord that they have discretion as to whether to consent to the assignment provided the consent is not unreasonably withheld. In my view the landlord would be acting reasonably to require the normal application procedure for a prospective tenant that might receive the benefit of an assignment including the right to check references.

However, I determined that for an assignment to take place proposed tenant must be presented to the landlord. The landlord would then have the opportunity to do the normal checks. If the landlord rejected the proposed tenant then at that stage a tenant could apply for arbitration seeking order to determine whether the consent was unreasonably withheld. In this case a proposed tenant was never presented to the landlord as a prospective assignee. The tenancy ended when the tenant gave written notice that she was ending the tenancy at the end of January 2018. The tenancy was never assigned.

Landlord's Claim:

With respect to each of the landlord's claims I find as follows:

- a. I determined the landlord is entitled to the sum of \$625 pursuant to the liquidated damage clause. The tenancy came to an end after the tenant gave the landlord written notice that she was ending the tenancy at the end of January. This triggered the landlord's right to liquidated damages. I accept the evidence presented that the amount claimed was a reasonable pre-estimation of the loss. The landlord presented evidence the amount is consistent in all of the contracts and is a genuine pre-estimation of the additional cost required to re-rent the rental unit. I do not accept the submission of the Tenant that this amounted to an assignment or that the landlord unreasonably withheld his consent to the assignment. The tenant did not have a prospective assignee of the lease and the landlord was never given the opportunity as to consent to such an assignment.
- b. I dismissed the landlord's claim of \$78.50 for the cost of carpet cleaning. The tenancy was short. The landlord failed to prove condition of the carpets needed carpet cleaning or that it was caused by the tenant.
- c. I dismissed the landlord's claim of \$76.19 for the cost of replacing a blind as I determined there is insufficient evidence to prove the tenant caused the damage.

In summary I determined the landlord has established a claim against the tenant in the sum of \$625 plus \$100 for the cost of the filing fee for a total of \$725.

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Tenant's Application:

I determined the tenant is entitled to an order that the landlord comply with the Act, regulations and/or tenancy agreement. I order that the landlord refrain from requiring a tenant to pay liquidated damages prior to the end of the tenancy where the tenancy may be assigned and refrain from claiming the liquidated damages if the tenancy agreement has been assigned. As the tenant has been successful with this aspect of her claim I determined the tenant is entitled to recover the \$100 filing fee.

I dismissed the tenant's claim for a monetary order. It is not possible for me to determine whether the landlord has returned all or part of the last ½ of the rent for January. Neither party presented sufficient evidence to prove their testimony. The landlord failed to present evidence of the payment. The tenant testified she received a E-transfer of the lesser sum but failed to include the a copy of the lesser sum. The tenant is entitled to re-apply for a monetary order if the landlord has continues to wrongfully withh0ld her money. The tenant is not entitled to claim to recover the cost of liquidated damages and the filing fee in the landlord's application as I have determined the landlord is entitled to those claims.

In summary, I determined the tenant was entitled to an order that the landlord comply with the Act, regulations and/or tenancy agreement and that the tenant was entitled to recover the sum of \$100 for the cost of the filing fee.

Conclusion:

I determined the landlord has established a claim in the sum of \$725. I determined the Tenant has established a claim in the sum of \$100. After deducting one claim against that of the other I ordered that the Tenant pay to the Landlord the sum of \$625.

Security Deposit:

I determined the security deposit plus interest totals the sum of \$507.50. I ordered the landlord may retain this sum thus reducing the amount outstanding under this monetary order to the sum of \$117.50.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

The tenant retains the right to claim for any monies wrongfully withheld by the landlord if the money is not been returned.

This decision is final and binding on the parties.

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 17, 2018

Residential Tenancy Branch