



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Decision Codes: FF, MNR, MND, MNSD & MNDC

Introduction

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

- a. A monetary order in the sum of \$2700 for loss of rent and cleaning and painting
- b. An order to keep 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. A monetary order in the sum of \$3450
- b. An order to recover the cost of the filing fee.

The landlord's application was initially set for June 5, 2018. However, it was adjourned to today's date so that it could be heard at the same time as the Tenant's application as many of the issues were the same.

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.

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

Issues 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 a monetary order and if so how much?
- e. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence:

The parties submitted many documents. The relevant evidence is as follows. The tenant works in the entertainment industry, travels frequently and is in need of short term accommodation. .

On September 9, 2018 she was offered a job in a production in North Vancouver. She saw the rental unit advertised on an Airbnb site and contacted the landlord. After viewing the rental unit the tenant agreed to rent it on a short term basis.

The parties entered into a fixed term written tenancy agreement that provided that the tenancy would start on September 17, 2017 and end on December 2, 2017. The rent was \$2300 per month. The Tenant paid a security deposit of \$1150 on September 16, 2017. The tenant moved into the rental unit on September 17, 2017.

On October 3, 2017 she was informed that by the production that her services were no longer needed. She decided to return to Toronto. On that date she texted the landlord stating that she would be vacating the rental unit on October 20, 2017.

The tenant decided to return to Ontario on an earlier date. On October 6, 2017 the Tenant told the landlord she would be leaving "in a few days." On October 10, 2017 she texted the landlord stating that she would be leaving the next day. On October 11, 2018 she texted the landlord she was in the process of leaving. The parties agreed the tenant could leave the keys in the rental unit. The landlord was not working the next day. However, she testified she picked up the keys on October 15, 2018. I determined the tenancy ended on October 15, 2018 when the landlord regained possession and it was clear the tenant had abandoned the rental unit and was not returning.

A Condition Inspection Report was not done at the start and at the end of the tenancy. On October 23, 2018 the landlord e-mailed the Tenant (who was now living in Ontario) a letter with the appropriate form proposing to do a Condition Inspection on October 25, 2018.

There are a number of e-mails between the parties relating to the tenant's demand for the return of the security deposit and the landlord's efforts to re-rent the property.

The landlord testified that she attempted to re-rent the property as follows:

- The property was advertised on Craigslist on October 4, 2018.
- She had 13 e-mails from prospective renters and had 8 showings.
- The landlord's witness testified that some of the showings involved showing a comparable rental unit.
- The landlord produced a copy of the Craigslist advertisement for October 19, 2017 and November 5, 2017.
- There was a sign outside the building indicating the unit was up for rent.

The landlord failed to provide documentary evidence to corroborate this evidence although she said she had some documents in her possession.

The tenant testified the landlord failed to provide sufficient evidence of mitigation despite receiving notice on October 3, 2018 that the rental unit would be available to re-rent on October 20, 2018. The tenant testified she checked Craigslist on a regular basis. She acknowledged the landlord advertised the rental unit in a Craigslist advertisement on October 19, 2018 and November 5, 2017. She provided evidence that the advertisement was taken down for a period at the end of October.

The rental unit was painted on October 25, 2017. The landlord testified the rental unit was eventually rented with the new tenant taking possession on December 15, 2017.

Landlord's Application - Analysis

The tenant spent a considerable time arguing that the landlord's right to keep the security deposit has been extinguished and should have been returned to the tenant.

Section 38 of the Residential Tenancy Act provides as follows:

Return of security deposit and pet damage deposit

38 (1) Except as provided in subsection (3) or (4) (a), 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,

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.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) [landlord failure to meet start of tenancy condition report requirements] or 36 (2) [landlord failure to meet end of tenancy condition report requirements].

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

(7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

(8) For the purposes of subsection (1) (c), the landlord must repay a deposit

(a) in the same way as a document may be served under section 88 (c), (d) or (f) [service of documents],

(b) by giving the deposit personally to the tenant, or

(c) by using any form of electronic

(i) payment to the tenant, or

(ii) transfer of funds to the tenant.

The Application for Dispute Resolution filed by the Tenant seeks the return of the security deposit but does not claim the doubling at the security deposit. At the hearing the Tenant stated she was seeking the doubling of the security deposit and was not intending to waive her right for the doubling of the security deposit.

Policy Guideline #17 includes the following:

- “9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
- to obtain the tenant’s consent to deduct from the deposit any monies owing for other than damage to the rental unit;
 - **to file a claim against the deposit for any monies owing for other than damage to the rental unit; (my emphasis)**
 - to deduct from the deposit an arbitrator’s order outstanding at the end of the tenancy; and
 - **to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.” (my emphasis)**

The tenant submits the landlord’s right to retain the security deposit has been extinguished because the landlord failed to conduct a Condition Inspection at the start and end of the tenancy and failed to provide her with at least two opportunities to do so. She subsequently found a pre tenancy Condition Inspection Report but alleges the landlord fraudulently altered it when the landlord conducted the post tenancy inspection.

I do not accept the submission of the Tenant. Even if the tenant’s testimony is accepted the Policy Guideline provides that the landlord has the right “**to file a claim against the deposit for any monies owing for other than damage to the rental unit;**” The landlord’s claim is for \$2300 for loss of rent and \$400 for compensation for damage allegedly caused by the Tenant. The security deposit held by the landlord is \$1150. I determined the tenancy ended on October 11, 2017. The landlord filed the claim on October 24, 2017 which is within 15 days of the end of the tenancy. The landlord is legally entitled to withhold the security deposit until her claim for loss of rent has been adjudicated even if her right to claim against the security deposit for damages to the rental unit has been extinguished.

The Residential Tenancy Act provides the tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. The tenant must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant and is liable to compensate the landlord for failure to do so. In some instances the landlord's standards may be higher than what is required by the Act. The tenant is required to maintain the standards set out in the Act. The tenant is not required to make repairs for

reasonable wear and tear. The applicant has the burden of proof to establish the claim on the evidence presented at the hearing.

After carefully considering all of the evidence I determined the landlord failed to provide sufficient evidence to establish her claim of \$400 for cleaning and painting. The landlord produced an invoice. However, the individual who did the work did not attend the hearing or present sufficient evidence to prove the work was necessary. Further the landlord failed to present photographs or other evidence to support this claim. The Inspection report completed by the landlord was not done in the presence of the Tenant and was completed after the tenant returned to the Ontario. The tenant disputes this evidence. The tenant only lived in the rental unit for a short period of time from September 17, 2017 to October 11, 2017. As a result I dismissed the landlord's claim for cleaning and painting.

The landlord claimed the sum of \$2300 for loss of rent for November 2017. A tenant is normally responsible to pay the rent for the unexpired portion of the fixed term. However, this obligation is subject to the landlord's obligation to mitigate or act reasonably to lessen the loss.

Section 7(2) of the Residential Tenancy Act provides as follows:

Liability for not complying with this Act or a tenancy agreement

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.

Policy Guideline #5 includes the following:

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved (my emphasis). The landlord or tenant entitled to contract for repairs as a result of a breach by the other party, may choose to pay a service charge that exceeds what one would reasonably be required to pay for the service in the circumstances. In that case, the arbitrator may award a reduced claim based on the reasonable cost of the service. **If partial mitigation occurs, the arbitrator may apportion the claim to cover the period during which mitigation occurred (my emphasis).** The landlord who does not advertise for a new tenant within a reasonable time **after the tenant vacates a rental unit or site prior to the expiry of a fixed term lease may not be entitled to claim loss of rent for the first month of vacancy;** however, claims for loss of rent for subsequent months may be successful once efforts to find a new tenant are made.

The Act provides that the landlord must do whatever is reasonable to minimize the damage or loss. The Policy Guideline provides that if a landlord does not advertise for a new tenant within a reasonable time after the tenant vacates may not be entitled to claim loss of rent for the first month. The Act permits an arbitrator to award a reduced claim that is adjusted to what might have been saved.

After carefully considering all of the evidence I determined the landlord has established a claim for half of the rent for November for the following reasons. I determined the obligation to act reasonably to mitigate its loss started when the tenant vacated the rental unit on October 11, 2018. I determined that it was not reasonable to expect the landlord could re-rent the rental unit for November 1, 2017. However I determined that it was reasonable to rent the rental unit for November 15, 2018 had the landlord acted reasonably. I made this determination based on the following:

- The Policy Guidelines provide that the obligation to advertise starts within a reasonable time after the tenant has vacated the rental unit.
- I determined the tenant vacated the rental unit on October 11, 2017 and the landlord regained possession on October 15, 2017.
- I determined the landlord failed to prove that the tenant was responsible for the alleged damage and is not responsible for any delays incurred by the landlord before painting.
- The landlord failed to present sufficient evidence to prove that she received 13 e-mail inquiries and 8 showings. The landlord could have kept a log or presented the e-mail enquiries.
- The landlord provided documentary evidence of the rental unit being listed on Craigslist on October 19, 2017 and on November 5, 2017. The tenant testified the advertisement was pulled for some reason for a period of time at the end of October. I determined the landlord failed to prove they acted reasonable in attempting to re-rent the rental unit and the loss was reduced.

I determined that it was not reasonable to expect the landlord could find a new tenant to take over the rental unit for November 1, 2018. However, in the circumstances, I determined that had the landlord properly mitigated their loss it is reasonable to expect that a new tenant could take possession on November 15, 2017. The landlord has established a claim for half of the rent for November or the sum of \$1150.

The Tenant filed submissions on the day before the hearing. The tenant failed to prove that the tenancy contract was entered into under duress or that there was an oral contract the tenancy could be ended on short notice. I do not accept the submission that the landlord cannot retain the security deposit for loss of rent because the landlord was negligent.

Monetary Order and cost of the filing fee:

In summary I determined the landlord has established a monetary claim against the tenant(s) in the sum \$1150 plus the \$100 filing fee for a total of \$1250.

Security Deposit

Section 72(2) of the Act provides as follows:

Director's orders: fees and monetary orders

72 (2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other, including an amount under subsection (1), the amount may be deducted

...

(b) in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit due to the tenant.

I determined the security deposit plus interest totals the sum of \$1150. I determined the landlord is entitled to retain this sum. I ordered the landlord may retain this sum thus reducing the amount outstanding under this monetary order to the sum of \$100.

Tenant's Application:

With regard to each of the Tenant's claims I find as follows:

- a. I dismissed the Tenant's claim of \$315 for the cost of printing, scanning and mailing evidence. These claims relate to the cost of preparing and prosecuting litigation. An arbitrator does not have the jurisdiction to award these costs. The only award an arbitrator is permitted to make is the cost of the filing fee.
- b. I dismissed the Tenant's claim of \$500 for the landlord failure to minimize the loss of rent. This is not a claim. This is a defense that the landlord's claim which the Tenant was partially successful and the landlord's monetary award was reduced as a result.
- c. I dismissed the Tenant's claim of \$400 for the failure of the landlord to provide time stamped evidence as the Tenant failed to prove a loss.
- d. I dismissed the claim of the Tenant for \$500 alleging the landlord forged the Condition Inspection Report. The Tenant failed to prove a loss.
- e. I dismissed the Tenant's claim of \$500 because the landlord failed to invite her to participate in any Condition Inspection. This can be used as a defense to a claim the landlord might make alleging damage to the rental unit but it does not give the tenant a right to make a monetary claim.
- f. I dismissed the Tenant's claim for the return of the security deposit as it has already been dealt with as party of the landlord's claim.

- g. I dismissed the Tenant's claim of \$500 for mental distress caused by the Property Manager. The landlord has a legal right to make a claim against the security deposit and there is no basis for the Tenant to make such a claim.
- h. I dismissed the Tenant's claim of \$200 for the cost of cleaning as the Tenant failed to provide sufficient evidence to prove this claim.
- i. I dismissed the Tenant's claim of \$100 for the cost of the filing fee as the tenant has been unsuccessful with her application.

Conclusion

In summary I determined the landlord has established a monetary order against the tenant(s) in the sum of \$1250. I ordered the landlord may retain the security deposit/pet deposit in the sum of \$1150. In addition I ordered that the Tenant pay to the Landlord the sum of \$100. I dismissed the Tenant's claim without leave to re-apply.

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.

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: July 23, 2018

Residential Tenancy Branch