Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Decision Codes: FFT, MNDCT, MNSD

Introduction

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

a. A monetary order in the sum of $1830
b. An order for the return of the security deposit
c. An order to recover the cost of the filing fee.

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/Notice of Hearing was served on the landlord by mailing, by registered mail to where the landlord carries on business as the landlord acknowledged the documents were delivered on July 24, 2018:

Issues to be Decided

The issues to be decided are as follows:

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

Background and Evidence:

The tenancy began on June 6, 2017. A copy of the fixed term tenancy agreement indicates the fixed term was to end on December 31, 2017 and it was to become month to month after that. The rent was $1500 per month plus $25 for parking for a total of $1525. The tenants paid a security deposit of $750 at the start of the tenancy. The tenancy agreement also contained a liquidated damage clause that provided that if the tenants terminated the agreement before the end of the fixed term the sum of $750 would be due and owing as liquidated damages.

On August 18, 2018 the tenants e-mailed the landlord advising this landlord that the rental unit would be vacated on or before August 31, 2017 and requesting permission to sublet the rental property. The landlord denied this request stating the landlord does not permit sublets.

The tenants paid rent for the period of September 1, 2017 to September 15, 2017. The tenancy ended on September 7, 2018. The landlord re-rented the rental unit in August with possession to take place on September 15, 2018.

On September 15, 2017 the landlord filed a application for a monetary order and to keep the security deposit. The application was initially set for hearing on April 5, 2018 but it was adjourned to June 27, 2018. During the hearing the tenant(s) made a number of arguments including that the landlord was not entitled to the liquidated damages as claimed as the landlord did not have to show the rental unit as the Tenants showed unit to prospective tenants. The tenant gave evidence that there were a number of prospective tenants who were prepared to take the unit starting September 1, 2017 but the landlord rejected them.

The arbitrator in a previous arbitration decision dated June 28, 2018 determined the landlord was entitled to liquidated damages of $750 plus the $100 filing fee. The landlord ordered that the landlord shall retain the security deposit of 750 and issued a monetary order in the sum of $100. The decision includes the following statements:

> "On the basis of the undisputed evidence I find that there is a liquidated damages clause in the tenancy agreement that was signed by the female Tenant, which requires the Tenant to pay $750.00 to the Landlord if the tenancy is ended by the Tenant prior to December 31, 2017. 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.
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> The amount of liquidated damages agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into. I find that $750.00 is a reasonable estimate given the potential expense of advertising a rental unit; the time a landlord would potentially spend showing the rental unit and screening potential tenants; and the wear and tear that moving causes to residential property.
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> ….
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> Section 34(1) of the *Act* stipulates that unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit. Section 34(2) of the Act stipulates that 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).

On the basis of the undisputed evidence I find that the Landlord breached section 34(2) of the Act when it denied the Tenant's request to sublet the rental unit. I find that the Landlord's decision to deny the request was based on company policy, rather than a reasonable consideration of the circumstances of the request.

In the event a tenant believes that a landlord is unreasonably withholding consent to assign or sublet a rental unit, the tenant has the right to seek authority to sublet from the Residential Tenancy Branch. The Tenant has not done so.

I find, however, that the Landlord's breach of section 34(1) of the *Act* does not negate the liquidation damages clause of the tenancy agreement. I therefore find that the Tenant cannot use the Landlord's failure to permit a sublet as a defense to the claim for liquidated damages."

Analysis

With respect to each of the tenants' claims I find as follow:

a. The tenant submits they are entitled to the return of the security deposit of $750 due to the refusal of the landlord to allow sublet as required by law. In making this submission the tenant relies on the statements of the previous arbitrator set out above.

I do not accept this submission of the tenants. I determined the previous arbitrator was correct in the result but I do not agree with the reasoning when she determined the landlord breached section 34(2) of the Act. Section 34 of the Act provides:

Section 34 of the Act provides as follows:

> "Assignment and subletting
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> 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.

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The fixed term was to end on December 31, 2017. The tenants requested that they be permitted to sublet the rental unit by e-mail on August 18, 2017. At that stage there was less than 6 months remaining on the fixed term. While the decision is correct when it

states that a landlord cannot refuse all requests to sublet on the basis of company policy, it is incorrect in this situation as there was less than 6 months left on the fixed term. I determined in a situation where there is less than 6 months left of the fixed term section 34(2) does not require the landlord to consider a tenants' request to sublet. The previous decision determined the landlord was entitled to $750 for liquidated damages and ordered that the landlord can retain the security deposit. I determined there is no basis for awarding the tenants the security deposit and this claim is dismissed.

b. The tenants seek the sum of $750 for reimbursement of the rent that they paid for the period September 1, 2017 to September 15, 2017. The law provides that where a party breaches the Act the other party must act reasonably to mitigate or lessen the loss. I determined the tenant breached the fixed term tenancy when they advised the landlord they were ending the tenancy on August 31, 2018. However, in my view the landlord failure to provide sufficient evidence to prove that they acted reasonably to lessen their loss be finding another tenant to move in on September 1, 2018. The landlord failed to provide evidence as to their efforts to advertise the rental unit and whether there were prospective tenants ready to take possession on September 1, 2018. The tenants gave evidence that in their efforts to have the premises re-rented there was a number of prospective tenants willing to move in on September 1, 2018. In the absence of sufficient evidence of the landlord to prove they acted reasonably to lessen the loss I determined the tenants are entitled to receive compensation. However, the tenants did not fully vacate the rental unit until September 7, 2018 and did not return the keys until that date. I determined the tenants are entitled to recover the rent paid for the period September 8, 2017 to September 15, 2018 or the sum of $375.
c. I dismissed the Tenants' claim of $45 for reimbursement of a portion of the parking cost. The Tenants failed to provide sufficient evidence to prove the dates and time they were deprived on the specific parking spot and that the landlord failed to act reasonably to rectify this problem.
d. I dismissed the claim to recover $60 for the cost of insurance the tenants were required to obtain as part of the tenancy agreement. The tenants failed to prove this term contravenes the Act.
e. I dismissed the claim set out in the Application for Dispute Resolution that the landlord took legal action against him in the previous proceeding while he did not sign the tenancy agreement. He identified himself as a tenant in these proceedings. There is no basis for a monetary award as he failed to prove he has suffered a loss.
f. I dismissed the claim of the Tenants that the landlord has harmed the credit of the Tenants by bringing a claim that was heard by the previous arbitrator. The landlord has a legal right to file such a claim. The Tenants failed to prove a loss.

Monetary Order and Cost of Filing fee

I ordered the landlord(s) to pay to the tenant the sum of $375 plus the sum of $100 in respect of the filing fee for a total of $475.

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: October 23, 2018

Residential Tenancy Branch