Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT, FFT**

Introduction

This hearing was convened as a result of the Tenant's application for dispute resolution ("Application") under the *Residential Tenancy Act* ("Act"). The Tenant applied for:

- a Monetary Order for compensation for $696.77 pursuant to section 67; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

The Landlord and Tenant attended the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure*. The parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The Tenant testified she served the Notice of Dispute Resolution Proceeding and some of her evidence ("NDRP Package") on the Landlord by registered mail on November 3, 2021. The Tenant provided the Canada Post tracking number for service of the NDRP Package on the Landlord to corroborate her testimony. I find the NDRP Package was served on the Landlord pursuant to the provisions of sections 88 and 89 of the Act.

The Tenant stated she served additional evidence on the Landlord by regular mail on December 16, 2021. The Landlord acknowledged receiving the Tenant's additional evidence. I find the Tenant's additional evidence was served on the Landlord in accordance with the provisions of section 88 of the Act.

The Landlord stated he did not serve any evidence on the Tenant for this hearing.

Issues to be Decided

It the Tenant entitled to:

- a Monetary Order for compensation from the Landlord?
- authorization to recover the filing fee for the Application from the Landlord?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Application and my findings are set out below.

The parties agreed the tenancy commenced on January 1, 2021, for a fixed term ending July 1, 2021, with rent of $1,800.00 payable on the 1st day of each month. The Tenant was to pay a security deposit of $850.00 and a pet damage deposit of $250.00 by January 1, 2021. The Landlord acknowledged receiving the deposits and stated the deposits were returned to the Tenant after the tenancy ended. The parties agreed the Tenant vacated the rental unit on August 19, 2021.

The Tenant stated she initially called the Landlord in May 2021 to advise she would be vacating the rental unit in August 2021. The Tenant stated she followed-up on the phone call by sending a notice to the Landlord on May 23, 2021 by email. The Tenant stated she “left it vague” on the date that she would actually be moving out of the rental unit in that email. Although the Tenant did not submit the email into evidence, the Landlord admitted he received it. The Tenant stated that, in the phone conversation with the Landlord, she told the Landlord she would be out of the rental unit by the end of August 2021 and it would be ready to rent for September 1, 2021 but that she would probably be out of the rental unit on August 23, 2021.

The Tenant submitted into evidence a screenshot of a string of texts between her and the Landlord from July 23, 2021 as follows:

> [Name of Landlord]
> [Phone number of Landlord]
> Friday, July 3, 2021
>
> Hey just for info are you planning still to be moving on the 20th?
> 3:49 p.m.
>
> Yes
> 3:50 p.m.
>
> Actually, my movers are for the 19th
> 3:51 p.m.
>
> OK great thanks! This one girl was hoping to get in by around the 20th
> 3:31 p.m.
>
> That would be awesome! I can be completely out on the 19th. Would love to save the rent.
> 3:52 p.m.
>
> Yes I told her she would have to prorate it
> 3:52 p.m.
>
> Absolutely! Fingers
> [Screen shot of text does not show the time stamp]

The Tenant stated that, at the move-out condition inspection performed by the parties on August 19, 2021, the Landlord told her that he did not have a new tenant. The Tenant submitted into evidence a screenshot of a string of texts between her to the Landlord dated August 21, 2021. In that text the Tenant asked the Landlord about whether she would get the damage deposit back and how much it would be. The Landlord replied to this text message and stated that, as the Tenant did not damage the rental unit, “there was nothing to worry about”. The Tenant then responded with “Plus 11 days since you’ve rented it out and they’ve moved in. Otherwise I could have kept the place and parking until month end. Sorry, I mean 10 days”. There was no further

reply from the Landlord. The Tenant stated she observed someone had moved into the rental two days after she moved out.

The Landlord acknowledged the new tenant moved in on the August 21, 2021. The Landlord testified he did not agree to reimburse the Tenant for any portion of the rent she paid for August 2021.

Analysis

Rule 6.6 Residential Tenancy Branch Rules of Procedure ("RoP") states:

> **6.6 The standard of proof and onus of proof**
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> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Based on Rule 6.6, the onus to prove his case, on a balance of probabilities, is on the Tenant who has made the claim for compensation.

Sections 7 and 67 of the Act state:

> 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.
>
> (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.
>
> 67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, 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.

Residential Tenancy Policy Guideline 4 ("PG 4") deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages. PG 4 states in part:

> 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, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.
>
> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
>
> - A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
> - If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
> - If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.
>
> If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally, clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

There were communications between the Tenant and the Landlord starting in May 2021 in which the Tenant advised the Landlord she would be vacating the rental unit. On July 23, 2021, the Landlord sent a text message to the Tenant asking whether she was moving on August 20, 2021 to which the Tenant replied that she had arranged for movers for August 19, 2021. In response, to the text, the Landlord stated that "one girl

was hoping to get in by around the 20th to which the Tenant replied that she would be completely out of the rental unit August 19, 2021. The Landlord responded by advising the rent would have to be prorated. The Tenant stated that, at the time of the condition inspection performed by the parties on August 19, 2021, the Landlord told her that he did not have a new tenant.

The Tenant submitted into evidence a text she sent to the Landlord on August 21, 2021. In that text the Tenant asked the Landlord about whether she would get the damage deposit back and how much it would be. The Landlord replied to this text message and stated that, as the Tenant did not damage the rental unit, "there was nothing to worry about". The Tenant then responded with "Plus 11 days since you've rented it out and they've moved in. Otherwise, I could have kept the place and parking until month end". There was no further reply from the Landlord. The Tenant stated she observed someone had moved into the rental two days after she moved out. The Landlord admitted a new tenant moved in on August 21, 2021. However, the Landlord denied agreeing to reimburse the Tenant any portion of the August rent.

Subsection 26 and 45(1) of the Act state:

> 26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.
>
> 45(1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Pursuant to subsection 26(1) of the Act, and the terms of the tenancy agreement, the Tenant was required to pay the rent in full on the 1st day of August 2021, being the month her notice to vacate stated she would be vacating the rental unit. Notwithstanding the Tenant vacated the rental unit on August 19, 2021 and a new tenant moved into the rental unit several days later, there is no provision in the Act that requires the Landlord to reimburse the Tenant for any unused days for which the Tenant paid rent but did not occupy the rental unit. As such, in order to make a claim for compensation for the unused portion of the rent paid for August 2021, the Tenant must demonstrate, on a balance of probabilities, that the Landlord agreed to reimburse the Tenant for any rent he received from the new tenant during August 2021.

Based on the testimony the parties provided at the hearing, I was inclined to find in favour of the Landlord. However, after careful review of the texts between the parties on July 23, 2021, I find that the Landlord was being disingenuous when he gave his testimony. Firstly, the Landlord asked the Tenant if she was still moving out on the 20th. The Tenant replied that the movers were set for the August 20, 2021. The Landlord then replied “Ok great thanks! This one girl was hoping to get in by around the 20th”. The clear inference from this statement was the Landlord wanted obtain possession of the rental unit early so that he could rent the unit to a prospective tenant. Secondly, the Tenant stated “That would be awesome! I can be completely out on the 19th. Would love to save the rent”. If the Landlord did not intend to return any portion of the August rent to the Tenant, then I would have expected the Landlord to have responded to the Tenant’s reference to “saving the rent” by clearly responding that he was not returning any of portion of the rent the Tenant paid for August. Instead, the Landlord responds, “Yes I told her she would have to prorate it”. This response indicated the Landlord understood the Tenant was seeking reimbursement for the rent she paid for August for the period the new tenant occupied the rental unit. No reasonable landlord would expect a tenant to give up possession of a rental unit prior to the time and date the Tenant was required to vacate required by law unless the landlord was reimbursing the Tenant for the unused portion of the rent already paid by the Tenant.

Section 37(1) of the Act states:

> 37(1) Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.

As a result of the Landlord's July 23, 2021 texts, the Tenant accommodated the Landlord by giving up her right to remain in possession of the rental unit on August 19, 2021 instead of 1:00 pm on August 31, 2021. Furthermore, the Landlord stated in the July 23, 2021 texts that the new tenant would have to prorate the of rent. Based on the testimony and evidence of the parties, I find the new tenant moved into the rental unit on August 21, 2021. As such the new tenant occupied the rental unit for 11 days in August 2021. If the Landlord is not required to reimburse the Tenant for the 11 days of rent, he would unjustly profit by keeping the Tenant's rent, as well as collecting rent from the new tenant, for the period from August 21 to August 31, 2021.

Based on the foregoing, I find the Tenant has satisfied the burden of proving, on a balance of probabilities, that she is entitled to be compensated for 11 days of rent she paid for August 2021 during which the new tenant occupied the rental unit. The daily rent for the rental unit was $58.06, being $1,800.00 divided by 31 days. The total rent for the 11-day period the new tenant occupied the rental unit was $638.66, being $58.06 multiplied by 11. Pursuant to section 67 of the Act, I order the Landlord pay the Tenant $638.66.

As the Tenant has been successful in the Application, pursuant to section 72(1) of the Act I order the Landlord pay $100.00 to reimburse the Tenant for the filing fee of the Application.

Conclusion

Pursuant to section 67 of the Act, I order the Landlord pay the Tenant $738.66 representing the following:

Description	**Amount**
Compensation Awarded to Tenant	$638.66
Filing Fee of Application	$100.00
Total	**$738.66**

It is the Tenant's obligation to serve this Order on the Landlord. If the Landlord does not comply with the Monetary Order, it may be filed with the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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 6, 2022

Residential Tenancy Branch