Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **LL: MNDCL-S FFL**
TT: MNSDS-DR FFT

Introduction

This hearing dealt with two applications for dispute resolution pursuant to the *Residential Tenancy Act* (the "Act"). The Tenant made one application ("Tenant's Application") for:

- an order to seek the Landlord to return the Tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee of the Tenant's Application from the Landlord pursuant to section 72.

The Landlord made one application ("Landlord's Application") for:

- an order for compensation for monetary loss or other money owed by the Tenant pursuant to section 67(1);
- authorization to keep the Tenant's security and/or pet damage deposit pursuant to section 38; and
- authorization to recover the filing fee of the Landlord's Application from the Tenant pursuant to section 72.

The Landlord and Tenant attended this 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* ("RoP"). The parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The Landlord stated she served the Notice of Dispute Resolution Proceeding and her evidence ("Landlord's NDRP Package") on the Tenant by registered mail on December

16, 2021. The Landlord provided the Canada Post tracking number for service of the Landlord's NDRP Package to corroborate her testimony. I find the Landlord's NDRP Package was served on the Tenant in accordance with the provisions of sections 88 and 89 of the Act.

Preliminary Matter – Service of Amendment on Tenant

The Landlord filed an amendment ("Amendment") to the Landlord's Application with the Residential Tenancy Branch on July 7, 2022 to increase the monetary claim in the Application from $900.00 to $1,800.00. The Landlord stated she served the Amendment on the Tenant by registered mail on July 5, 2022. The Landlord provided the Canada Post tracking number for service of the Amendment to corroborate her testimony.

Rules 4.6 of the RoP states:

> **4.6 Serving an Amendment to an Application for Dispute Resolution**
>
> As soon as possible, copies of the Amendment to an Application for Dispute Resolution form and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by section 89 of the Residential Tenancy Act or section 82 of the Manufactured Home Park Tenancy Act and these Rules of Procedure.
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> The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution form and supporting evidence as required by the Act and these Rules of Procedure.
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> In any event, a copy of the amended application and supporting evidence should be served on the respondents as soon as possible and must be received by the respondent(s) *not less than 14 days before the hearing*. See also Rule 3 [Serving the application and submitting and exchanging evidence]
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> [emphasis in italics added]

Rule 4.6 required the Landlord to serve the Amendment on the Tenant not less than 14 days before the hearing. The Landlord served the Amendment on the Tenant on July 5, 2022, being less than 14 days before this hearing. As the Landlord did not comply with the requirements of Rule 4.6, I find service of the Amendment was late. As such, the

Amendment is ineffective. The Landlord sought to increase her claim at the hearing. The Landlord had more than 8 months within which to make and serve an amendment on the Tenant to increase the amount of the Landlord's claim from $800.00 to $1,800.00. I find that to allow an amendment of the Landlord's Application at the hearing would be prejudicial to the Tenant and cannot be justified when the Landlord had more than 8 months to prepare and serve the Tenant with an amendment prior to the hearing. As such, I find the Landlord's claim for compensation is limited to the amount claimed in the Landlord's Application, being $900.00.

Preliminary Matter – Service of Tenant's Notice of Dispute Resolution Proceeding

The Tenant stated she served the Notice of Dispute Resolution Proceeding ("Tenant's NDRP") on the Landlord by email on December 21, 2021. The Tenant conceded the Landlord did not give her written consent to service of documents by email. The Tenant acknowledged she did not obtain an Order for Substituted Service to allow her to serve the Landlord with the Tenant's NDRP by email. The Landlord stated she only refers to her email infrequently.

Rules 3.1 of the RoP states:

> **3.1 Documents that must be served with the Notice of Dispute Resolution Proceeding Package**
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> The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:
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> a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;
> b) the Respondent Instructions for Dispute Resolution;
> c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and
> d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

See Rule 10 for documents that must be served with the Notice of Dispute Resolution Proceeding Package for an Expedited Hearing and the timeframe for doing so.

Pursuant to Rule 3.1, an applicant must serve each respondent with, among other things, a copy of the Notice of Dispute Resolution Proceeding within 3 days of it being provided to the applicant by the Residential Tenancy Branch. Sections 88 and 89 of the Act state:

88 All documents, other than those referred to in section 89 *[special rules for certain documents]*, that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

(a) by leaving a copy with the person;

(b) if the person is a landlord, by leaving a copy with an agent of the landlord;

(c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

(d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;

(e) by leaving a copy at the person's residence with an adult who apparently resides with the person;

(f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

(g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;

(h) by transmitting a copy to a fax number provided as an address for service by the person to be served;

(i) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;

(j) by any other means of service provided for in the regulations.

89(1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

(a) by leaving a copy with the person;

(b) if the person is a landlord, by leaving a copy with an agent of the landlord;

(c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

(d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;

(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;

(f) by any other means of service provided for in the regulations.

(2) An application by a landlord under section 55 *[order of possession for the landlord]*, 56 *[application for order ending tenancy early]* or 56.1 *[order of possession: tenancy frustrated]* must be given to the tenant in one of the following ways:

(a) by leaving a copy with the tenant;

(b) by sending a copy by registered mail to the address at which the tenant resides;

(c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;

(d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;

(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;

(f) by any other means of service provided for in the regulations.

(3) A notice under section 87.5 *[notice of administrative penalty]* must be given in a manner referred to in subsection (1).

Section 43 of the *Residential Tenancy Regulations* ("Regulations") states:

> 43(1) For the purposes of section 88 (j) *[how to give or serve documents generally]* of the Act, the documents described in section 88 of the Act may be given to or served on a person by emailing a copy to an email address *provided as* an address for service by the person.
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> (2) *For the purposes of section 89 (1) (f)* [special rules for certain documents] *of the Act, the documents described in section 89 (1) of the Act may be given to a person by emailing a copy to an email address provided as an address for service by the person.*
>
> (3) For the purposes of section 89 (2) (f) of the Act, the documents described in section 89 (2) of the Act may be given to a tenant by emailing a copy to an email address provided as an address for service by the tenant.
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> [emphasis in italics added]

The Tenant did not send the Tenant's NDRP by a method specified pursuant to section 89 of the Act. The Landlord stated she did not provide her email address to the Tenant as an address for service of documents required by sections 88 and 89 of the Act. The Tenant did not submit into evidence a copy of a signed consent from the Landlord that allowed the Tenant to give or serve the Landlord by emailing a copy of the documents described in either section 88 or section 89(2) of the Act by email. As such, the Tenant could not rely on section 43(2) of the Regulations to serve the Tenant's NDRP on the Landlord by email. I find the service by the Tenant of the Tenant's NDRP on the Landlord by email to be ineffective. Based on the foregoing, I find the Tenant's NDRP was not served on the Landlord and I dismiss the Tenant's Application in its entirety without leave to reapply.

Issues to be Decided

Is the Landlord entitled to:

- an order for compensation for monetary loss or other money owed by the Tenant?
- authorization to keep the Tenant's security and/or pet damage?
- recover the filing fee of the Landlord's Application from the Tenant?

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 Landlord's Application and my findings are set out below.

The Landlord submitted into evidence a copy of the tenancy agreement dated October 9, 2021 ("Agreement") between the Landlord and Tenant. The parties agreed the tenancy commenced on October 15, 2021, with a fixed term ending April 1, 2022, with rent of $1,800.00 payable on the 1st day of each month. The Tenant was to pay a security deposit of $900.00 by October 15, 2021. The Landlord acknowledged she received the security deposit and that she was holding it in trust for the Tenant. The parties agreed the Tenant vacated the rental unit on November 25, 2021.

The Landlord stated the Agreement contained a liquidated damages provision as follows:

> If the Tenant gives notice to vacate the Rental Unit before the end of any fixed term, the Landlord and the Tenant agree and recognize that the Landlord will incur out of pocket costs that it would not have incurred had the Tenant not given notice of an early end of the Agreement. In such circumstances, the Landlord and Tenant agree that the Tenant will pay to the Landlord the sum of $1800 as liquidated damages, and not as a penalty, as compensation for the Landlord's out of pocket costs, and without prejudice to the Landlord's right to claim damages for any other reason such as lost rent.

The Landlord stated the Tenant breached the Agreement by ending the tenancy prior to the end of the fixed term on April 1, 2022. The Landlord sought to recover $1,800.00 pursuant to the liquidated damages provision of the Agreement.

The Tenant stated she provided her forwarding address to the Landlord by email on November 22, 2021. The Tenant stated the Landlord was not entitled to $1,800.00 pursuant to the liquidated damages provision of the Agreement because the Landlord had not done enough to mitigate her damages.

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.
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> 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 her claim, on a balance of probabilities, is on the Landlord.

1. Return of Security Deposit to Tenant

Sections 38(1) and 38.1 of the Act provide:

> 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,
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> 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.
>
> 38.1(1) A tenant, by making an application under Part 5 *[Resolving Disputes]* for dispute resolution, may request an order for the return of an amount that is double the portion of the security deposit or pet damage deposit or both to which all of the following apply:

(a) the landlord has not applied to the director within the time set out in section 38 (1) claiming against that portion;
(b) there is no order referred to in section 38 (3) or (4) (b) applicable to that portion;
(c) there is no agreement under section 38 (4) (a) applicable to that portion.

(2) In the circumstances described in subsection (1), the director, without any further dispute resolution process, may grant an order for the return of the amount referred to in subsection (1) and interest on that amount in accordance with section 38 (1) (c).

Notwithstanding I have dismissed the Tenant's Application in which the Tenant sought the return of the security deposit, I must nevertheless consider whether I am required to grant an order for the return of an amount that is double the portion of the deposit pursuant to section 38.1(1) of the Act.

The Tenant submitted an email into evidence in which she informed the Landlord of her forwarding address on November 22, 2022. Service of a tenant's forwarding address by email is not recognized as a method of service of documents under either section 88 of the Act or section 43(1) of the Regulations. As such, the service of the Tenant's forwarding address was ineffective. Based on the foregoing, the Landlord was not required to comply with either section 38(1)(c) or section 38(1)(d) of the Act. I find the Tenant is not entitled to an order for the return of an amount that is double the portion of the deposit pursuant to section 38.1(1) of the Act.

2. Landlord's 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.
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> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
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> - 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.
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> [emphasis in italics added]

The Landlord submitted into evidence a copy of the Agreement which stated the tenancy had a fixed term ending April 1, 2022. The parties agreed the Tenant vacated the rental unit on November 25, 2021. The Agreement contained a liquidated damages provision that required the Tenant to pay the Landlord $1,800.00 if the Tenant vacated the rental unit prior to April 1, 2022. It was the position of the Tenant that the Landlord was not entitled to $1,800.00 as the Landlord failed to mitigate her damages. As noted in PG 4, 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. I find that, pursuant to PG 4, one-month's rent is a genuine pre-estimate of the loss to the Landlord of the Tenant ending the tenancy before the end of the fixed term. As such I find the liquidated damage clause to be valid.

As the Landlord's Application only claims $900.00 for compensation for the Tenant vacating the rental unit early, I find the Landlord is entitled to her claim in the amount of $900.00. Pursuant to section 67 of the Act, I order the Tenants pay $900.00 to the Landlord pursuant to the terms of the Agreement. Pursuant to section 72(2) of the Act, the Landlord may retain the security deposit of $900.00 in satisfaction of the monetary order.

As the Landlord has been successful in the claims made in the Landlord's Application, pursuant to section 72 of the Act, I award the Landlord $100.00 for the filing fee of the Landlord's Application.

Conclusion

I order the Tenant pay the Landlord $100.00 as follows:

Purpose	Amount
Compensation payable to Landlord	$900.00
Filing Fee of Landlord's Application	$100.00
Less: Tenant's Security Deposit	-$900.00
Total:	$100.00

The Landlord must serve the Monetary Order on the Tenant as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in 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: August 13, 2022

Residential Tenancy Branch