



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Decision Codes: FFL, MNDL-S

Introduction

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

- a. A monetary order in the sum of \$700 for unpaid rent and loss of rent.
- b. An order to keep 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. The parties acknowledged they had received the documents of the other party.

I find that the Application for Dispute Resolution and Notice of Dispute Resolution Hearing was served on the Tenant by mailing, by registered mail to where the Tenant resides on May 24, 2019.

The Evidence:

The evidence presented by both parties was not satisfactory. The landlord produced a signed tenancy agreement only. She failed to produce e-mails and text messages between her and the Tenant leading up to the signing of the tenancy agreement and end of the tenancy, evidence of her evidence to mitigate her loss and the cost of re-renting.

The tenant produce a letter dated July 31, 2018, 3 text messages and a one page record of telephone calls. However, the letter refers to and quotes other text messages that were not produced. The oral evidence referred to other text messages.

The tenant sent the evidence to the landlord by registered mail at the end of July 2019. It is unclear when the evidence was sent as she did not produce the registered mail receipt. The landlord testified she did not receive it until the day before the hearing. Rule 3.15 of the Rules of Procedure provides as follows:

3.15 Respondent's evidence provided in single package

...

The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch **as soon as possible**. Except for evidence related to an expedited hearing (see Rule 10), and subject to Rule 3.17, the respondent's evidence must be **received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing**.

See also Rules 3.7 and 3.10.

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?

Background and Evidence:

On July 28, 2018 the parties entered into a written tenancy agreement that provided that the tenancy would start on September 1, 2019 expire on August 31, 2019 and become month to month after that. The rent was \$3500 payable in advance on the first day of each month. The tenancy agreement indicated that the tenant paid a security deposit of \$1750 and a pet damage deposit of \$1750 on July 26, 2019. The tenant provided the landlord with post dated cheques for the rent and the two deposits.

The tenant requested that a new tenancy agreement be entered in which included both her and her friend VH as tenants. The landlord refused. There were allegations that the landlord was racist and questions asked by the landlord were inappropriate.

The tenant testified she became uncomfortable with the situation. On July 30, 2019 she orally advised the landlord that she was cancelling the lease and was not prepared to

rent the rental unit. The landlord said she did not agree to the cancellation and that the tenant "could not break the lease."

The tenant testified she went to the rental property to talk to the landlord (who lives in a basement suite) but the landlord would not talk to her.

There was an exchange of text messages. At one stage the agent for the landlord texted the tenant stating "...owner doesn't like to make any change of the lease. If you changed your mind, they agree to cancel the lease and return \$1750 pet deposit." This text was not provided but was referred to in a letter dated July 31, 2018.

The tenant testified she wrote a letter dated July 31, 2018 confirming the cancellation and the history between the parties. The letter also provided an address where the landlord was to return the rent (presumably the post dated cheques). The letter outlines the provision of the Residential Tenancy Act relating to the return of the security deposit and states the landlord is breaching this provision. It also reminds the landlord of her obligation to mitigate the loss by finding a new tenant given the extreme nature of the Vancouver rental market and that the landlord had a month to find a new tenant.

The agent for landlord testified she never received this letter and that the first time she saw this letter was the day before the hearing when she picked up the registered mail package sent by the tenant. .

The tenant testified she attempted to contact the agent for the landlord but the landlord refused to return her phone calls.

The landlord failed to produce documents as to her efforts to re-rent the rental unit. The landlord takes the position that the tenant failed to give the tenant written notice that she was cancelling the tenancy agreement. She could not remember exactly when she started to advertise and when a new tenant was found. She testified a new tenant was found and that tenant moved into the rental unit of October 1, 2018.

There was no further contact between the landlord and tenant for the next 8 months. The tenant testified she delayed as she was dealing with personal issues including the passing of her mother.

In May 2019 the Tenant wrote the landlord a letter providing her forwarding address in writing and demanding the return of the security deposit and pet damage deposit. Neither party produced a copy of that letter. The landlord filed an Application for Dispute Resolution on May 17, 2019 which was within 15 days of receiving this letter.

Landlord's Application - Analysis

Policy Guideline #16 includes the following:

"C. COMPENSATION

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss."

The landlord testified she is making the following claims:

- The sum of \$3500 for the cost of re-renting the rental unit
- The sum of \$3500 for loss of rent for September 2018.
- The sum of \$100 for the cost of the filing fee.

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

- a. I dismissed the landlord's claims of \$3500 for the cost of re-renting the rental unit as the landlord failed to provide any evidence to prove this claim. It is not sufficient to speculate that the landlord might incur additional costs.
- b. The landlord claimed the sum of \$3500 for loss of rent for September 2018. The landlord testified the tenant failed to give the landlord written notice that she was ending the tenancy agreement. As a result the landlord did not know whether the tenant intended to move in on September 1, 2019. The Application for Dispute Resolution states as follows "The rental house was abandoned more than one month. It took landlord and landlord's representative quite a long time and lot of work to find a substitute tenant."

A party has the duty to mitigate their loss. Section 7(2) of the Act

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.

After carefully considering the disputed evidence between the parties I determined the tenant failed to prove that the landlord received the letter dated July 31, 2018 for the following reasons:

- The tenant and her friend testified that they signed the letter and put it in the mailbox on or about July 31, 2018. The landlord testified she never received that letter. The Act permits a party to serve by mailing by regular mail. However, this creates a rebuttable presumption.
- Policy Guideline #12 includes the following:

Proof of service by methods other than personal service or Registered Mail should include:

- the date and time of service,
- details of the method used to serve, including:
 - the name of the adult served,
 - if posted, the address where the documents were attached,
 - the fax number to which the document was faxed and proof that the fax transmission was completed,
 - the address of the mailbox or mail slot used,
 - who effected service

**A photograph of a posted or deposited document in its posted or deposited location may reinforce the veracity of service.
(my emphasis)**

- I do not accept the submission of the Tenant that I can infer from the text messages and surrounding conduct of the parties that the landlord received this letter. The text messages do not refer to the letter.
- There were other methods the tenant could have used to ensure she could prove service such as personal service, service by registered mail etc.

- The conduct of the parties indicates the landlord did not receive it. The landlord did not file an Application for Dispute Resolution in August 2018 because she had not received the tenant's forwarding address. However, she filed an Application within a short period of time after receiving the tenant's Notice sent in May 2019. The Tenant provided the landlord with a Notice which included her forwarding address and demanding the return of the deposit(s) May 2019. If the tenant was confident that the landlord had received the July 31, 2019 letter there would be no need to provide her forwarding address a second time and she could have immediately filed a claim for double the security deposit(s) at any time after 15 days from when the landlord received the July 31, 2018 letter. There would be no need to serve a second letter.
- In summary I determined the tenant failed to prove the letter dated July 31, 2018 was received by the landlord.

However, I determined the landlord failed to prove they mitigated their loss and as a result I dismissed the landlord's claim for loss of rent for September for the following reasons:

- The law provides there is an obligation to negotiate in good faith. I determined that it was clear to the landlord and the agent for the landlord the tenants were cancelling the agreement and were not intending to move in. This is evidenced by the text messages and the face to face oral communications between the parties. In late July the tenants attended the office of the agent for the landlord seeking the return of the cheques and advising they had cancelled the agreement.
- The landlord misunderstood the rights and obligations of the parties. The landlord thought the tenants could not cancel the lease if the landlord did not agree. The tenant has a legal right to cancel the agreement at any time. However, if a tenant cancels the tenancy agreement, the landlord has a right to bring a monetary claims against the tenant for losses suffered which the landlord can prove.
- The landlord had a full month to try to minimize their loss and find a new tenant. The landlord failed to provide evidence to prove what efforts were made and when those efforts were made. The agent for the landlord testified she acts as an agent for landlords for many properties and she could not recall. The landlord failed to prove documents that would prove these efforts. The tenant testified it was a hot rental unit market and the landlord could have easily re-rented the rental unit. The

landlord failed to provide evidence to dispute this. Even if one takes the position that the landlord was not legally required to start looking for new tenants until September, the evidence to support the claim for loss of rent for September is insufficient.

- In summary I dismissed the landlord's claim for loss of rent for September as the landlord failed to produce sufficient evidence to prove the landlord fulfilled her obligation to mitigate her loss.

- c. I dismissed the landlord's claim to recover the cost of the filing fee as the landlord has not been successful with this application.

I dismissed the landlord's application without leave to re-apply.

Security Deposit/Pet Damage Deposit:

Policy Guideline #17 includes the following:

C. RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH DISPUTE RESOLUTION

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit; or
- a tenant's application for the return of the deposit.

unless the tenant's right to the return of the deposit has been extinguished under the Act¹⁴. **The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return. (My emphasis)**

The landlord's application for a monetary order, an order to retain the security deposit/pet damage deposit and an order to recover the cost of the filing fee was dismissed. Policy Guideline #17 provides that an arbitrator will order the return of the deposit(s) to the tenant in this situation.

Conclusion:

As a result I order that the landlord pay to the Tenant the sum of \$3000. I dismissed the request of the tenant for the doubling of the deposit(s) as the landlord filed a claim within 15 days of receiving the tenant's forwarding address in writing.

The testimony of the tenant alleged a Human Rights complaint and discrimination. The agent for the landlord denies this. I determined it was not necessary to deal with these allegations as it was not relevant to a determination of the claims brought by the landlord.

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

Should the Applicant 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: August 09, 2019

Residential Tenancy Branch