Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes Landlord: MND, MNSD, MNDC, FF
Tenant: MNSD

Introduction

This hearing was convened by way of conference call to deal with applications filed by the landlords and by the tenant. The landlords have applied for a monetary order for damage to the unit, site or property; for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement; for an order permitting the landlord to retain all or part of the security deposit or pet damage deposit; and to recover the filing fee from the tenant for the cost of this application. The tenant has applied for return of all or part of the security deposit or pet damage deposit, and claims double the amount of the security deposit.

The landlord company was represented by an agent, and the tenant also attended the conference call hearing. Both parties provided affirmed testimony and were given the opportunity to cross examine each other on their evidence.

The landlord's agent provided an evidence package which was not received within the time provided in the Residential Tenancy Branch Rules of Procedure, and the tenant opposed the consideration of that evidence. That evidence is not considered in this Decision, however all other evidence and the testimony of the parties has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Are the landlords entitled to a monetary order for damage to the unit, site or property?
Are the landlords entitled to a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement?
Are the landlords entitled to retain all or part of the security deposit or pet damage deposit?
Is the tenant entitled to the return of all or part of the security deposit or pet damage deposit, or double the amount of the security deposit?

Background and Evidence

The parties agree that this fixed-term tenancy began on October 1, 2010 and ended on December 21, 2010 although the fixed term was to expire on February 28, 2011. Rent in the amount of $750.00 per month was payable in advance on the 1st day of each month and there are no rental arrears. On September 22, 2010 the landlord collected a security deposit from the tenant in the amount of $375.00 as well as a $50.00 non-refundable move-in fee charged by the strata.

The landlord's agent testified that the tenant had given notice to move from the rental unit in December, 2010 and the parties had arranged for a move-out condition inspection to take place on December 21, 2010 at 3:30 p.m. About 2 days prior to the arranged inspection, the landlord's agent had to leave town for a family emergency, and she called the tenant to advise that she could not attend at that time. She stated that the tenant had already arranged with the new tenants that the move would take place on December 21, 2010, and the new tenant was moving into the unit from another unit within the same complex. The new tenant was going to have the carpets cleaned, and consequently, the move-out condition inspection was not again arranged. She stated that she had intended to conduct the move-out with the tenant and the move-in with the new tenant both on the same day upon her return, but the two tenants conducted the move-out on their own on December 21, 2010 without the landlord present.

The landlord's agent further testified that she and the tenant had exchanged emails, wherein the tenant had asked what to do to ensure he would receive his security deposit back, and the landlord replied with some useful information for the tenant.

The landlord's agent also stated that the tenancy agreement, a copy of which was provided by the tenant in advance of the hearing, contains a liquidated damages clause, which states as follows:

- "If the tenant gives notice to end a fixed-term tenancy before the end of the term, the Landlord may, at the Landlord's sole option, accept the notice and treat the pre-determined and agreed upon sum of $<placement fee + ads> $840.00 shall be paid as a penalty, to cover the administrative costs of re-renting the said premises. The Landlord and Tenant acknowledge and agree that the payment of the said amount is not a limitation of liability and shall not preclude the landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damages to the premises and damages as a result of loss of rental income due to the Tenant's breach of the terms of this Agreement."

The landlord's agent further testified that the unit was re-rented immediately, however once the tenant had given notice, she placed advertisements on the Castanet website as well as the Associated Property Management website. The new tenant, however, actually learned about the unit becoming available directly from the landlord's agent. She stated that the new tenant resided in the building and found the neighbours near his unit noisy and wanted to rent this unit. The landlord's agent and the new tenant conducted a move-in condition inspection report on January 1, 2011 well after the tenant moved in.

The landlord's agent further testified that she did not receive the tenant's forwarding address in writing until she was served with the Tenant's Application for Dispute Resolution on February 1, 2011.

The landlord's agent stated that she returned from the family emergency on December 31, 2010, and that the parties had agreed to a move-out earlier than December 31, 2010. The landlord claims the security deposit for the tenant's breach of the tenancy agreement. No evidence was lead with respect to damages to the unit, site or property.

The tenant testified that he gave the landlord notice and then reasons for moving early in an email dated December 9, 2010, a copy of which he provided in advance of the hearing. A week prior to that, the landlord told him that his moving out would work well for the new tenant. She told him that the new tenant would be shampooing the carpet, so he didn't need to worry about that.

The tenant also testified that the landlord did not give him another opportunity to complete the move-out condition inspection report. He stated that he understood that the liquidated damages clause would not be enforced because there were no costs involved to re-rent the unit because it was already re-rented.

The tenant acknowledged the landlord's evidence that he provided his forwarding address in writing on February 1, 2011 when he served the landlord with the Tenant's Application for Dispute Resolution, and the landlord's application was filed on February 11, 2011

Analysis

Section 23(1) on the *Residential Tenancy Act* requires that the landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit, on or after the day the tenant ceases to occupy the rental unit, or on another mutually agreed day.

Section 23(3) and section 35 both state that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. The *Act* places the obligation on the landlord to complete the condition inspection report in accordance with the regulations and states that both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations. Part 3 of the Regulations goes into significant detail about the specific obligations regarding how and when the Start-of-Tenancy and End-of-Tenancy Condition Inspections and Reports must be conducted. In regards to the landlord's allegation that the tenants did not cooperate, the *Act* does anticipate such situations. In particular, section 17 of the Regulation details exactly how the inspection must be arranged as follows:

> (1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.
>
> (2) If the tenant is not available at a time offered under subsection (1),
>
> > (a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and
> >
> > (b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.
>
> (3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

In this case, the landlord was not available for the first opportunity provided, but did not offer a second opportunity to the tenant.

Section 23(6) of the *Act* states that the landlord must make the inspection and complete and sign the report without the tenant if

> (a) the landlord has complied with subsection (3), and
>
> (b) the tenant does not participate on either occasion.

Both sections 25 and 35 which deal with the Start of Tenancy and the End of Tenancy Condition Inspection Report requirements as outlined above.

I find that the landlord has failed to provide a second opportunity to conduct the inspection. The *Act* also states that if the landlord fails to complete the reports as

required under the legislation, the landlord's right to claim against the security deposit for damages is extinguished. The landlord has not proven a claim for damages, and therefore, the application for a monetary order for damages to the unit, site or property must be dismissed.

With respect to the landlord's claim for liquidated damages, I refer to Residential Tenancy Policy Guideline 4 which states that:

- "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 this case, the clause is definitely a penalty, and it states in clear terms that it is a penalty, and I therefore find that it is unenforceable.

Having found that the landlord's application for damages has not been proven, and that the landlord's application for liquidated damages is unenforceable, the landlord's claim to retain the security deposit cannot succeed.

With respect to the tenant's application, it is clear in the evidence that the tenant did not provide his forwarding address in writing to the landlord until February 1, 2011, and the landlord applied for dispute resolution on February 11, 2011. Therefore, as stated in the *Residential Tenancy Act*, the landlord has complied with the 15 day rule, and the tenant is not entitled to double recovery of the security deposit paid.

Having found that the landlord's application cannot succeed, I find that the tenant is entitled to recovery of the security deposit in the amount of $375.00.

Conclusion

For the reasons set out above, the landlord's application is hereby dismissed in its entirety without leave to reapply.

I hereby grant a monetary order in favour of the tenant in the amount of $375.00. This Order may be filed in the Provincial Court of British Columbia, Small Claims division 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: April 08, 2011.

Residential Tenancy Branch