DECISION

Dispute Codes:

Tenant's application filed September 28, 2012: MNSD; FF

Landlords' application filed November 8, 2012: MNDC; MNR; FF

Introduction

This Hearing was scheduled to consider cross applications. The Tenant seeks a monetary award in the equivalent of double the amount of the security deposit and to recover the cost of the filing fee from the Landlords.

The Landlords seek a monetary award for unpaid rent and compensation for damage or loss under the Act, regulation or tenancy agreement and to recover the cost of the filing fee from the Tenant.

The parties gave affirmed testimony at the Hearing.

Preliminary Matters

The Tenant testified that she served the Landlords with the Notice of Hearing documents by registered mail, but was uncertain with respect to when she mailed the documents. The Tenant did not provide the registered mail receipt in evidence and did not have it with her at the Hearing. The Landlords acknowledged receiving the Notice of Hearing documents on September 29, 2012.

The Tenant stated that she did not serve the Landlords with copies of her documentary evidence and therefore these were not considered by me.

The Landlords testified that the served the Tenant with their Notice of Hearing documents and copies of their documentary evidence, by registered mail, sent November 9, 2012. The Landlords provided the registered mail tracking numbers. The Tenant acknowledged receipt of the documents.

Issues to be Decided

- Is the Tenant entitled to a monetary award in the equivalent of double the security deposit pursuant to the provisions of Section 38 of the Act?

- Are the Landlords entitled to a monetary award for unpaid rent for September, 2012, and the compensation for a $350.00 levy pursuant to the terms of the tenancy agreement; stains in the carpet; holes and stains on the walls; the costs of serving the Tenant; and for cleaning the rental unit at the end of the tenancy?

Background and Evidence

The Landlords provided a copy of the tenancy agreement in evidence. The rental unit is a suite in the Landlords' home. This tenancy began on April 11, 2011 and ended on August 1, 2012. The Tenant paid full rent for the month of August, 2012.

Monthly rent was $695.00, due on the first day of each month. The Tenant paid a security deposit in the amount of $350.00 at the beginning of the tenancy. There was no Condition Inspection Report completed that complies with the requirements of Section 20 of the regulations, at the beginning or the end of the tenancy.

The Tenant submitted that new occupants moved into the rental unit on August 25, 2012. The Landlords stated that the new occupants were slowly moving into the rental unit, but did not pay any pro-rated rent for August. The new occupants paid rent for September on September 1, 2012.

The Tenant stated that she provided her forwarding address in writing on August 1, 2012, when she gave her notice to end the tenancy. The Landlords provided a copy of the notice in evidence. The Landlord acknowledged that they received her forwarding address on August 1, 2012, and stated that the notice was insufficient because it was not given two months before the end of the tenancy.

The Landlords testified that they did not return the Tenant's security deposit because there were damages, the cost of which exceeded the amount of the security deposit. The Landlords provided a copy of a letter to the Tenant dated October 15, 2012, in evidence. The letter sets out the amounts that the Landlords have concluded the Tenant shall pay. The letter requests that the Tenant pay the Landlords an additional amount of $750.00 after deducting the security deposit from the damages listed, which is calculated as follows:

Numerous stains on carpet	$500.00
6 holes in living room wall	$100.00
Stain on the wall near the kitchen sink	$100.00
Vacuuming the carpet	$50.00
Numerous wax drippings on carpet	$100.00
Cleaning the oven	$100.00

Cleaning the shower	$100.00
Cleaning walls and window sills	$50.00
Subtotal	$1,100.00
Less security deposit	$350.00
TOTAL	$750.00

In their Application for Dispute Resolution, the Landlords seek a monetary award, calculated as follows:

Damages per letter of October 15, 2012	$750.00
September rent for insufficient notice to end the tenancy	$695.00
$350.00 levy per tenancy agreement	$350.00
Costs	$20.00
Recovery of filing fee	$50.00
TOTAL	$1,815.00

The Tenant stated that she left the rental unit reasonably clean at the end of the tenancy but it was not to the Landlords' high standards. She agreed that she had installed a shelf unit in the living room which left 6 holes, but stated that the holes only required touching up and that she believed $20.00 was fair compensation. The Tenant also agreed that she left 2 small stains on the carpet, but that they were from reasonable wear and tear. The Tenant disputed the Landlords' claim that it would cost $500.00 to clean the carpets and suggested that $50.00 was a more reasonable amount because of the small area of carpeting.

The Tenant stated that the Landlords suffered no loss of revenue for the month of September and therefore should not be entitled to compensation for insufficient notice to end the tenancy.

The Landlords replied that the $500.00 they seek for the carpets is not just for the cleaning but also because the stains will not come out and therefore the carpet will have to be replaced earlier than expected. The Landlords stated that the carpet was approximately 5 years old. The Landlords also stated that the rental unit was last painted in 2007, although the laundry room was more recently painted.

Analysis

Regarding the Tenant's Application:

The security deposit is held in a form of trust by the Landlords for the Tenant, to be applied in accordance with the provisions of the Act.

Section 38(1) of the Act provides that (unless a landlord has the tenant's **written consent** to retain a portion of the security deposit) at the end of the tenancy and after receipt of a tenant's forwarding address in writing, a landlord has **15 days** to either:

1. **repay the security deposit** in full, together with any accrued interest; **or**
2. **make an application** for dispute resolution claiming against the security deposit.

(emphasis added)

In other words, a landlord may not keep the security deposit without the Tenant's written permission or an Order of the Director allowing the Landlord to apply the security deposit towards damages or unpaid rent.

The Landlords testified that they received the Tenant's forwarding address in writing on August 1, 2012. I find that the tenancy ended on August 31, 2012, as the Tenant paid full rent for the month of August, 2012. Therefore, I find that the Landlords had until September 15, 2012 to either return the security deposit or file an application against it. The Landlords did not return the security deposit, nor have the Landlords filed for dispute resolution against the security deposit in their Application before me.

Section 38(6) of the Act provides that if a landlord does not comply with Section 38(1) of the Act, the landlord **must** pay the tenant double the amount of the security deposit. Therefore, I find that the Tenant is entitled to a monetary order for double the security deposit, pursuant to the provisions of Section 38(6) of the Act, in the amount of **$700.00**. No interest has accrued on the security deposit.

The Tenant has been successful in her application and I find that she is entitled to recover the cost of the **$50.00** filing fee from the Landlords. Therefore, the Tenant has established a total monetary award of **$750.00** against the Landlords.

Regarding the Landlords' Application:

It is important to note that the Landlords are relying largely on terms contained in the tenancy agreement with respect to their monetary claim. Section 4 of the Act provides that landlords and tenants may not avoid or contract out of the Act or the regulations and that any attempt to avoid or contract out of the Act or regulations is of no effect. In other words, any term in a tenancy agreement that is contrary to the provisions of the Act is of no force and effect. I find that the tenancy agreement provided in evidence contains many terms that are of no effect, because they are contrary to the provisions of the Act.

For example, the following are some of the terms that I find are unenforceable as they are contrary to the provisions of the Act:

1. Term #7 (in part): *"The Landlord shall return said deposit, less excessive damage repair and/or replacement costs paid by the Landlord, within 1 month following the final rental period."*

Term #7 is contrary to Section 38(1) of the Act. A Landlord may not keep a security deposit without the written consent of the Tenant, or an Order of the Director, otherwise the deposit must be returned within 15 days, in accordance with the provisions of Section 38(1) above.

2. Term #25: *"The Tenant shall give 2 months written notice of termination of this agreement."*

Term #25 is contrary to Section 45(1) of the Act. This is a month-to-month periodic tenancy and therefore the Tenant may end the tenancy by giving the Landlord notice that is not earlier than one month after the date the Landlord receives the notice and is the day before the day in the month that rent is payable.

3. Term #26: *"If the Tenant(s) choose to terminate this agreement in the first 12 months, the Landlord is entitled to charge reasonable decorating, cleaning and advertising costs, as permitted by the Tenancy Act in the province of British Columbia. These charges are to be paid upon serving written notice of termination of this agreement. These costs are to be calculated as follows: $350 if terminated within the first 6 months, or $50.00 multiplied by 12 minus the number of occupying months. For example, if the Tenant(s) choose to terminate this agreement after only 4 months, the Landlord is entitled to charge $350. If the Tenant(s) choose to terminate this agreement after only 8 months, the Landlord is entitled to charge $50 multiplied by 12 minus 8, for a total of $200."*

Term two of the tenancy agreement identifies the tenancy to be a month-to-month tenancy and therefore I find this clause to be a penalty clause. There is no provision in the Act allowing a Landlord to charge a "penalty" for termination of a month-to-month tenancy that is ended in accordance with the provisions of Section 45(1) of the Act. A landlord may require "liquidated damages" if the tenancy is a term lease, there is such a provision in the tenancy agreement, and the tenant ends the lease before the term is ended. Liquidated damages are an estimate of the costs that the landlord will incur in re-renting the rental unit due to the tenant's breach of the agreement. However in this case, this is a month-to-month tenancy and the Tenant may end the Tenancy on one month's notice as set out in Section 45(1) of the Act.

4. Term #27: *"The Landlord shall give a maximum of 3 warnings to the Tenant(s) if any terms of this agreement are in default. On the third and final warning, it will be made clear to the Tenant(s) that a subsequent default will result in immediate*

termination of privileges and eviction within 24 hours of said notice, and forfeiture of any remaining security and damage deposit."

Term #27 is contrary to the provisions of Sections 38 and 47 of the Act. A security deposit must be applied in accordance with the provisions of the Act. Pursuant to the provisions of Section 47 of the Act, a landlord's notice to end a tenancy for cause must be in the approved form (pursuant to the provisions of Section 52 of the Act) and ends a tenancy effective on a date that is not earlier than one month after the notice is received and is the day before the day in the month that rent is payable under the tenancy agreement.

This is not a complete list of all of the unenforceable terms contained in the tenancy agreement. The Landlords are encouraged to make themselves acquainted with the Residential Tenancy Act and regulations, and the standard tenancy agreement terms.

This is the Landlords' claim for unpaid rent and damage or loss under the Act and therefore the Landlords have the burden of proof to establish their claim on the civil standard.

Section 7(1) of the Act states that if a landlord or tenant does not comply with the Act, regulations or tenancy Agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results from the breach. Section 67 of the Act provides me with authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Section 7(2) of the Act requires the party claiming compensation to do whatever is reasonable to minimize the damage or loss.

To prove a loss and have the Tenant pay for the loss requires the Landlords to satisfy four different elements:

1. Proof that the **damage or loss exists**,
2. Proof that the damage or loss occurred **due to the actions or neglect of the Tenant in violation of the Act,**
3. Proof of the **actual amount required to compensate** for the claimed loss or to repair the damage, and
4. Proof that the Landlord followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

With respect to the Landlords' claim for unpaid rent in the amount of $695.00, I find that the Tenant did not give the Landlord sufficient notice to end the tenancy. However, the Landlords mitigated their loss and were able to re-rent the rental unit for September 1,

2012. Therefore, I find that they have suffered no loss of revenue and therefore have not met the requirements of part one of the test for damages. This portion of their application is dismissed.

I dismiss the Landlords' claim for a $350.00 penalty as it is based on term 26 of the tenancy agreement, which I have found to be unenforceable.

There is no provision in the Act for either party recovering the cost of preparing for a Hearing or serving the other party and therefore the Landlords' claim for $20.00 costs is dismissed.

With respect to the Landlords' remaining claims set out in their letter dated, October 15, 2012, I make the following findings:

1. $500.00 claim for stains on carpet: A Tenant is required to shampoo carpets at the end of a tenancy that exceeds one year. In this case, the Tenant did not shampoo the carpets. The Landlords did not provide proof of the cost of shampooing the carpet at the end of the tenancy and therefore I find that the Landlords have not satisfied part 3 of the test for damages. However, the Tenant submitted that she believed **$50.00** to be fair compensation for the cost of shampooing the carpets and therefore I allow this portion of the Landlords' claim in that amount.

   Sections 23 and 35 of the Act require landlords to complete a condition inspection report in accordance with the regulations at the beginning and at the end of the tenancy. Section 21 of the regulation states that a condition inspection report completed in accordance with the regulation is evidence of the state of repair and condition of the rental unit on the date of the inspection, unless there is preponderance of evidence to the contrary. In this case, the Tenant denied any damage to the carpet beyond normal wear and tear. The Landlords did not complete condition inspection reports and did not provide documentary evidence of the state of repair of the rental unit at the beginning of the tenancy. Therefore, I find that the Landlords have not met part 2 of the test for damages as set out above. In addition, the Landlords testified that the $500.00 charge for stains on the carpet was to cover the loss of depreciation and not the cost of shampooing the carpet. The Landlords testified that the carpets were 5 years old, which is approximately ½ of their useful life according to Residential Tenancy Branch Policy Guideline 40. The Landlords provided no evidence with respect to the cost of replacing the carpets and therefore I find that they have not met part 3 of the test for damages.

2. Landlords' claim for damage to living room wall and the stain on the kitchen wall: The Landlords stated that the living room wall was last painted 5 years ago. The Landlords provided no evidence of the cost of repairing the wall. Policy Guideline 40 provides a useful live for indoor paint of 4 years. I find that the paint in the living room and kitchen is at the end of its useful life, however the Tenant took responsibility for the holes in the living room wall and stated that $20.00 was reasonable compensation for the cost of putty. Therefore, I allow **$20.00** for this portion of the Landlords' claim.

3. Claim for general cleaning of the rental unit: Section 37 of the Act requires a tenant to leave a rental unit **reasonably** clean and undamaged except for reasonable wear and tear. A landlord may decide to perform a more thorough cleaning before new occupants move in, but there is no requirement for the vacating tenant to clean the rental unit beyond a reasonable state of cleanliness. I find that the Landlords did not provide sufficient evidence that the Tenant did not leave the rental unit reasonably clean (for example, a completed condition inspection report or photographs of the alleged dirty oven or shower; wax droppings on the carpet; dirty window sills and walls). Therefore, I find that the Landlords did not provide sufficient evidence to satisfy part 1 of the test above with respect to their claim for the cost of cleaning the rental unit.

The Landlords have been partially successful in their Application and I find that they are entitled to recover the **$50.00** filing fee from the Tenant. The Landlords have established a total monetary award of **$120.00** against the Tenant.

Set-off of Awards:
I hereby set off the Landlords' monetary award against the Tenant's monetary award and provide the Tenant with a Monetary Order in the amount of **$630.00** for service upon the Landlords.

Conclusion

I hereby provide the Tenant with a Monetary Order in the amount of **$630.00** for service upon the Landlords. This Order may be filed in the Provincial Court of British Columbia (Small Claims) 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: December 21, 2012.

Residential Tenancy Branch