Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Tia Investments Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing was scheduled to address a claim by the tenants for the return of double their security deposit. At the hearing, which was attended by both parties, the parties asked to address both the tenants' claim and the landlord's claim against the security deposit, which was scheduled to be heard the following day. The tenants claimed that they had not been served with a copy of the landlord's actual application, but only with the notice of hearing. At this hearing, the tenants stated that they were aware of the substance of the landlord's claim and as the landlord had submitted into evidence for the tenants' hearing the same evidence on which he intended to rely for his own application, the tenants stated that they were prepared to proceed to address the landlord's claim.

Both of the claims were addressed at this hearing and I have made a final and binding decision on each claim and cancelled the hearing scheduled for Tuesday, May 14.

Although the landlord had originally made a claim for the cost of duct cleaning, he withdrew that claim at the hearing.

The tenants had originally named the landlord's agent, J.Z., as well as 3 corporate entities as respondents in their application. At the hearing, the parties agreed that J.Z. and the corporate respondent Tia Investments Ltd. were the proper respondents. The style of cause in this decision reflects that agreement.

Issues to be Decided

Are the tenants entitled to a monetary order as claimed?
Is the landlord entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on July 15, 2011 and that the tenants surrendered possession of the rental unit on January 31, 2013. They further agreed that the tenancy agreement provides that the tenancy was to run for a fixed term of 2 years, expiring on June 30, 2013. They further agreed that the tenants paid a $1,000.00 security deposit at the outset of the tenancy and that the landlord received the tenants' forwarding address in writing on February 13, 2013. Both parties filed their applications for dispute resolution on February 18, 2013.

The tenants ended their tenancy 5 months before the end of the fixed term. The landlord seeks to recover $1,120.00 as the cost of re-renting the rental unit. J.Z. testified that he acts as a property manager for the owner and provided a copy of an invoice showing that he billed the owner of the property $1,020.00 for his services. J.Z. testified that he charges one half month's rent for the cost of re-renting, which is standard practice in the industry. J.Z. relied on the following term of the tenancy agreement:

> Leasebreach – If the tenant vacates prior to expiration of Lease the tenant will be responsible for any costs incurred by the Landlord to re rent the premise. This will include but not limited to loss of rent up to the expiration of the lease, fees paid to management agencies, credit checks and advertising. The Landlord has a duty to mitigate loss by acting in a prompt manner to re rent the premise. [reproduced as written]

The tenants advanced a number of arguments. First, they stated that because the unit re-rented within a few days of the time the first advertisement appeared, the actual costs to re-rent could not have been high. J.Z. replied that he charges all landlords one half of one month's rent regardless of how much effort is required to re-rent.

Because the landlord produced the invoice but not a proof of payment, the tenants questioned whether the landlord was actually out of pocket the monies claimed and stated that they were aware that the owner was a personal friend of the agent. J.Z. testified that the invoice had been paid and that regardless of his friendship with the owner, he charges her fees as he would any other client.

The tenants argued that the landlord had not met all of his obligations under the tenancy agreement and therefore the tenants should not be held responsible for any breach as the landlord had breached prior to the tenants.

The tenants claimed that the landlord had told them via email that he would return the security deposit within 15 days. The email submitted into evidence states "... when you vacate we will do a move out report for the owner to authorize the return of the deposit. Just let me know when you do move if early then we can start that process. It will never be longer than 15 days from the time you vacate."

The male tenant testified that when they met to conduct the final walk-through of the rental unit, J.Z. told him that the female tenant had agreed to pay $485.00 for advertising costs. The female tenant testified that she had had some discussion with J.Z. about advertising costs, but she did not agree to pay those costs. J.Z. denied having said that $485.00 would be payable and testified that he emphasized that the tenants were responsible for the cost of re-renting.

The male tenant argued that the landlord had extinguished his right to claim against the security deposit because of what took place on January 29. The tenant testified that he arrived at the rental unit on that date to conduct the final inspection of the unit and discovered that the landlord had been in the unit without his permission. The landlord advised him at that time that he had already conducted the walk-through and that the unit was in good condition. The landlord then broached the subject of the fees and the tenant refused to sign the condition inspection report. The tenant argued that the landlord should have given him 2 opportunities to perform a "proper" walk-through and stated that the landlord had not given him a copy of the condition inspection report. The landlord did not disagree with the tenant's version of events and testified that because the tenant refused to sign the condition inspection report, the report was useless.

Analysis

Section 38 of the Act requires landlords to either return a security deposit in full or file a claim against it within 15 days of the end of the tenancy and the date the forwarding address is received. Failure to act within that timeframe renders the landlord liable for double the deposit. As the parties agreed that the forwarding address was received on February 13 and as the landlord filed his application on February 18, I find that the landlord acted within the statutorily prescribed timeframe and I find that the tenants are not entitled to the return of double their security deposit.

Turning to the question of whether the landlord has extinguished the right to claim against the deposit, I find that the parties had scheduled a time to meet to inspect the rental unit and that both parties were there at the agreed upon time. Although the agent did not have the right to enter the unit without permission from the tenants as they had not yet surrendered possession of the unit at that point, this does not render the appointment void. The parties should have gone through the unit to inspect it together,

but as the agent made it clear that the unit was in satisfactory condition and as he stated that he had no intention of filing a claim for damage to the unit, the act of going through the unit was in my view, rendered unnecessary. The letter of the law requires that parties inspect a unit together, but I find that in rendering an inspection unnecessary by pronouncing the unit in satisfactory condition, the agent satisfied the spirit of the law. The agent did not need to provide additional opportunities to inspect the unit because the parties had already agreed that they would meet on January 29.

While the landlord had an obligation to provide the tenants with a copy of the condition inspection report, I find that as the report did not reflect any problems with the rental unit and as the tenant refused to sign the report, the failure to provide a copy of the report had no impact on the tenants' ability to defend themselves against the landlords' claim and therefore the spirit of the law was not infringed.

The tenancy agreement explicitly stated that the tenants would be responsible to pay the landlord's costs to re-rent the unit if they ended the tenancy prior to the expiry of the fixed term. The only time in which parties are not bound by the terms of their agreement is when the terms contradict the Act, are unconscionable (meaning that they are grossly unfair or oppressive to one party) or are uncertain. This term does not contradict the Act, I find that it is not unconscionable and I find it to be sufficiently certain that it is an enforceable term.

I do not accept the tenants' argument that they should not be bound by the terms of the tenancy agreement because the landlord breached the agreement first. When a party to a contract breaches a term of the agreement, it does not render the entire contract null and void; rather, it gives rise to a claim for damages by the aggrieved party. The tenants had the option of pursuing arbitration to force the landlord to comply with the terms of the agreement and apparently chose not to do so. This does not disentitle the landlord for seeking damages for the tenants' breach.

The tenants argued that the actual costs to re-rent could not have been as high as was claimed by the landlord and suggested that the landlord should have provided proof that the invoice submitted by the agent was paid. The agent freely acknowledged that while the rate charged seemed high as the unit was immediately re-rented and testified that the invoice was paid. I accept that charging one half of a month's rent is the industry standard and I have no reason to doubt the agent's credibility and I find that the invoice was paid and that the landlord is out of pocket for the $1,020.00 which was invoiced.

I find that the email (quoted in the first paragraph of page 3 of this decision) which was sent by the landlord to the tenants did not indicate that the landlord would return the security deposit. Rather, it explicitly stated that the owner had to authorize the return of

the deposit. I find that the landlord is not estopped from claiming against the deposit. I further am not persuaded that the landlord at some point reduced the amount payable from half of one month's rent to $485.00.

I find that the landlord is entitled to recover the amount paid to re-rent the rental unit. In his application for dispute resolution, the landlord claimed $1,120.00 as the cost of re-renting, but the invoice entered into evidence identifies $1,020.00 as the amount payable. It is clear that the amounts listed on the invoice, $1,000.00 for rental services and $120.00 for GST, were added incorrectly, but what is not clear is whether the landlord paid the $1,120.00 that the total should have been or the $1,020.00 which was invoiced.

I find that because the evidence on which the landlord relies shows that $1,020.00 was payable, that the landlord must be limited to recovering that amount. I award the landlord $1,020.00. As the landlord been successful in his claim, I find that he is entitled to recover the filing fee paid to bring this application and I award him $50.00 for a total award of $1,070.00. I order the landlord to retain the $1,000.00 security deposit in partial satisfaction of the claim and I grant the landlord a monetary order under section 67 for $70.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

I dismiss the tenants' claim in its entirety.

Conclusion

The tenants' claim is dismissed. The landlord will retain the security deposit and is granted a monetary order against the tenants for $70.00.

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: May 15, 2013

Residential Tenancy Branch