



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes Landlord: MND, MNSD, MNDC, FF, O
Tenants: MNSD, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking a monetary order. The hearing was conducted via teleconference and was attended by the landlord, her translator and both tenants.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for damage to the rental unit; for losses resulting from a breach of the tenancy agreement; for all or part of the security deposit and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 38, 45, 67, and 72 of the *Residential Tenancy Act (Act)*.

It must also be decided if the tenants are entitled to a monetary order for return of double the amount of the security deposit and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

Both parties provided a copy of a tenancy agreement signed by both on June 21, 2013 for 1 year and 16 day fixed term tenancy beginning on July 15, 2013 for a monthly rent of \$1,950.00 due on the 1st of each month with a pet damage deposit of \$975.00 and a security deposit of \$975.00 paid.

The agreement included an addendum signed by the parties with 7 additional terms. The 7th term states:

"The Tenant cannot terminate this Tenancy Agreement prior to its expiry date without written consent of the Landlord. Even when consent is granted under very special circumstances, the security deposit is forfeited by the Tenant towards payment of the rental service fee to the Landlord/Agent in locating a replacement tenant. The Tenant

shall be responsible for any extra cost incurred and rental loss by the Landlord because of the early termination.”

The parties agree the tenants provided the landlord with a letter dated February 6, 2014 (submitted into evidence) indicating their intention to vacate the rental unit effective March 31, 2014. The parties also agree the tenants vacated the rental unit by March 13, 2014 and a move out condition inspection was completed that evening with the landlord and the tenants’ agent.

The landlord acknowledges that she received the tenants forwarding address by March 13, 2014. The parties agree that the landlord returned to the tenants an amount of \$925.00 by cheque dated April 1, 2014. The landlord has submitted an email dated April 10, 2014 stating she had enclosed the cheque. The tenants acknowledge receipt of this cheque on April 11, 2014.

The landlord seeks to retain the security deposit or \$975.00 as a result of the tenants ending the tenancy prior to the end of the fixed term as noted in Clause 7 of the tenancy agreement addendum. The landlord submits that the \$975 represents a “rental service fee” for these circumstances. The landlord has provided no evidence of any expense or costs incurred as a result of the tenants ending the tenancy prior to the end of the fixed term.

The tenants submit that the landlord cannot automatically withhold any amount from their security deposit as per Section 20 of the *Act*. The tenants also submit that the term in the addendum cannot be considered liquidated damages as there was no agreement that this was a genuine pre-estimate of the losses resulting from ending the tenancy earlier than the fixed term. The tenants also argue that the term states they would be held responsible for other costs that may be incurred.

The tenants also submit that term is unconscionable as it places the landlord in a better circumstance than had the tenancy continued to the end of the fixed term and is not compensation for any losses.

The landlord seeks \$50.00 to be retained from the pet damage deposit for repairs to a closet door. The landlord has submitted a photograph of a closet door and an in-house invoice in the amount of \$50.00. The landlord did not submit a Condition Inspection Report that records either the move in condition or the move out condition of the rental unit.

The tenants submit that because the landlord did not complete a move in inspection or a Condition Inspection Report recording the condition of the rental unit at the start of the tenancy the landlord cannot provide evidence to confirm that the damage occurred during the tenancy. The tenants submit the closet door was in this condition at the start of the tenancy.

The tenants also submit that while the landlord seeks to claim this amount from the pet damage deposit she has provided no evidence that the damage was caused by their pet cat.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 20(e) of the *Act* stipulates a landlord must not include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy.

Residential Tenancy Policy Guideline #4 defines a liquidated damages clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of a tenancy agreement. The amount agreed upon must be a genuine pre-estimate of the loss at the time the contract is entered into.

In the case before me, I find based on the evidence and testimony of both parties that the landlord has failed to establish that the “fee” charged and withheld from the tenants’ security deposit represents liquidated damages. I also find that there is no evidence that the landlord incurred any costs at all related to finding new tenants prior to the end of the fixed term of the tenancy.

Further, I agree with the tenants’ position that, pursuant to Section 20 of the *Act*, the landlord cannot include a term in the tenancy agreement that automatically can keep any portion of either deposit.

While I agree the tenants did violate the tenancy agreement by ending the tenancy prior to the end of the fixed term I find there is no evidence before me that the landlord has suffered a loss as a result of that violation.

For these reasons I dismiss the portion of the landlord’s claim seeking \$975.00 for ending the tenancy early.

In relation to the landlord’s claim for \$50.00 for repairs to a closet, I find the landlord has failed to provide any evidence of the condition of the rental unit and more specifically the closet at the start of the tenancy. As such, I find the landlord is unable to establish that any damage to the closet was caused during the tenancy or by the tenants. Therefore, I dismiss the portion of the landlord’s claim for damage to the rental unit.

Section 44(d) of the *Act* stipulates a tenancy ends when the tenant vacates or abandons the rental unit. From the evidence of both parties, I find that despite paying rent for the entire month of March 2014 the tenancy ended when the tenants returned possession of the rental unit to the landlord on March 13, 2014. I also accept, from the landlord's testimony, that she received the tenants' forwarding address on March 13, 2014.

Section 38(1) of the *Act* stipulates that a landlord must, within 15 days of the end of the tenancy and receipt of the tenant's forwarding address, either return the security deposit or file an Application for Dispute Resolution to claim against the security deposit. Section 38(6) stipulates that should the landlord fail to comply with Section 38(1) the landlord must pay the tenant double the security deposit.

Based on the above, I find that the landlord had until March 28, 2014 to either file her Application for Dispute Resolution to claim against the deposit or to return the security and pet damage deposits in full. I accept the landlord returned a portion of the deposits in the amount of \$925.00 to the tenants on or after April 10, 2014 and filed her Application for Dispute Resolution on April 22, 2014.

As such, I find the landlord has failed to comply with her obligations under Section 38(1) of the *Act* and the tenants are therefore entitled to double the amount of both deposits less the amounts already received.

Conclusion

Based on the above, I dismiss the landlord's Application for Dispute Resolution in its entirety.

I find the tenants are entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **\$3,025.00** comprised of \$3,900.00 double both deposits and the \$50.00 fee paid by the tenants for this application less \$925.00 already returned by the landlord.

This order must be served on the landlord. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be 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: July 30, 2014

Residential Tenancy Branch

