Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' pet damage and security deposits (the deposits) in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72.

The tenant SS (the tenant) appeared. The tenant SS confirmed that she had authority to act on behalf of both tenants. The landlord DF (the landlord) appeared. The landlord DF confirmed that he had authority to act on behalf of both landlords. Both parties were given a full opportunity to be heard. Neither party elected to call witnesses.

The landlord testified that the landlords served the tenants with the dispute resolution package on 21 November 2014 by registered mail. The landlords provided me with a Canada Post customer receipt that showed the same. The tenant did not dispute service. On the basis of this evidence, I am satisfied that the tenants were deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

Issue(s) to be Decided

Are the landlords entitled to a monetary award for losses arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenants' pet damage and security deposits in partial satisfaction of the monetary award requested? Are the landlords entitled to recover the filing fee for this application from the tenants?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlords' claim and my findings around it are set out below.

This tenancy began 1 March 2014. The parties entered into a written tenancy agreement dated 9 February 2014. Monthly rent of $1,300.00 was payable on the first. The landlord testified that he continues to hold $850.00 of the tenants' deposits, which were collected at the beginning of this tenancy. The landlord testified that he received a notice dated 29 September 2014 from the tenants to end the tenancy. The landlord testified that the tenancy ended 31 October 2014, when the tenants vacated the unit.

The tenancy agreement includes the following relevant clauses:

- *5. LIQUIDATED DAMAGES. If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of $1,050.00 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.*
- *Addendum to Residential Lease Agreement. This agreement is a one year lease from March 1st 2014. March 1st 2015 for [rental unit address]. Should you request to terminate the lease prior to March 1st 2015 the tenant(s) agree to a loss of their deposit.*

[as written]

The landlord testified that condition move-in and condition move-out reports were completed in respect of this tenancy. The tenant did not contest this testimony.

On 28 October 2014, the landlord presented the tenant with the following note:

> *I [landlord] are reimbursing [tenants] the sum of $200.00 for their deposit. They will be forfeiting the sum of $850 of their deposit due to lease break non refundable.*
>
> [as written]

The 28 October 2014 note was signed by both the tenant and the landlord. The landlord submitted that by signing this note the tenant was agreeing to the retention of the balance of the deposits. The landlord testified that he would not have given the $200.00 to the tenant if she did not acknowledge its receipt. The landlord testified that the $200.00 was the return of the tenant's portion of the pet damage deposit.

On 5 November 2014, the tenants sent their forwarding addresses in writing to the landlords. The tenants sent this letter by regular mail.

The landlord testified that it was important to the landlords that they secure a one-year lease with prospective tenants. The landlord testified that he did not incur any costs of rental. The landlord testified that he placed an advertisement on a free internet site. The landlord testified that the landlords advertised the rental unit for $1,200.00 and that it was never advertised at $1,300.00. The landlord testified that approximately ten interested parties viewed the rental unit. The landlord testified that the landlords believed that in order to avoid a rental loss for November, it was necessary to lower the rent to $1,200.00. The landlord testified that it was important to the landlords to rerent the rental unit quickly as there were mortgage payments that need to be paid in respect of the rental unit.

The landlord testified that the landlords secured a new tenant for the rental unit for mid-November. The landlord testified that the landlords were not seeking the rental loss for early November from the tenants and that this was an oversight. The landlord testified that the landlords incurred a strata fine for the tenants' move out. The landlord testified that the landlords were not seeking recovery of this cost.

The tenant testified that the tenants had to leave the tenancy early because of real estate showings that were proving disruptive. The tenant admitted that the tenants did not put this concern in writing. The tenant submitted that the liquidated damages amounted to a penalty.

The landlord seeks a total monetary order in the amount of $1,250.00:

Item	**Amount**
Liquidated Damages	$850.00
Rental Loss (4mo x $100.00)	400.00
Total Monetary Order Sought	**$1,250.00**

The landlords filed their application 21 November 2014.

Analysis

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant abandons the rental unit.

I find that the landlord and tenant entered into a fixed term tenancy for the period 1 March 2014 to 1 March 2015.

Subsection 45(2) of the Act sets out how a tenant may end a fixed-term tenancy:

> A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
>
> (a) is not earlier than one month after the date the landlord receives the notice,
>
> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

This means that a tenant cannot give notice to end the tenancy before the end of the fixed term. In this case, the tenants vacated the rental unit before the completion of the fixed term.

Subsection 45(3) of the Act allows a tenant to end a tenancy for breach of a material term:

45 (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

The tenants never provided any written complaint to the landlords regarding the real estate showing. Accordingly, the tenants were not entitled to leave to the tenancy early on the basis of a breach of a material term.

By failing to give proper notice, the tenants have breached the Act and as a result the landlords experienced a loss. I then must consider whether the landlords have sufficiently mitigated their damages. The landlord testified that he placed an advertisement on a free internet site. The landlord testified that he never attempted to rerent the rental unit at the full rental price. The landlord testified that he did so as he did not believe that the unit would be rerented in time for November at that price. In fact, the rental unit was not rented for the beginning of November. I find that the landlords mitigated their losses by advertising the rental unit for rent notwithstanding the fact that they never advertised the rental unit at the full rental price. The rent for the four months remaining on the fixed-term tenancy was $1,300.00 per month. The landlords were able to rerent the rental unit for $1,200.00 per month. I find that the landlords have proven their entitlement to $400.00, the monthly rental loss for the remainder of the fixed-term tenancy.

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 liquidated damages clause is intended to compensate the landlords for losses resulting from the costs of re-renting the rental unit after a tenant breach. The cost of re-renting a rental unit to new tenants is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why landlords enter into fixed-term tenancy agreements is to attempt to limit the number of times the landlord must incur the costs of re-renting.

I find it more likely than not that, when a tenant breaches a fixed-term tenancy agreement resulting in an early end to the tenancy, the landlord incurs the costs of re-renting earlier than they would have without the breach. This exposes the landlord to extra costs of rerental. For that reason, I find there is a loss to the landlord associated with the breach. The next question is whether the amount specified, $1,050.00, is a genuine pre-estimate of that loss.

The liquidated damages clause that the landlords have elected to use sets out that it is for compensation for the costs associated with rerental. The landlord testified that the landlords advertised on a free internet site and did not incur any costs as a result of the re-rental. The landlord testified that the landlords experienced stress as a result of the early termination of the tenancy. The landlord testified that this was financial stress in relation to the mortgage payments in relation to the rental unit. I find that the landlords' intangible stress is not a cost of rerental. I find that the costs of rerental were nil and could be predetermined as such. I find that the liquidated damages amount is a penalty. As such, the liquidated damages clause is not enforceable.

The landlords and tenants purportedly entered into an addendum that would allow the landlords to retain the tenants' deposits in the event they terminated the tenancy early. This is in addition to the liquidated damages clause set out at clause 5 of the tenancy agreement. This clause

appears to be an attempt to reinforce the liquidated damages clause. I note that the landlords did not attempt to claim both for the liquidated damages amount and the retention of the deposits.

There are many circumstances in the Act under which a tenant's right to the return of his or her security deposit is extinguished or the landlord may retain amounts from the security deposit:

- subsection 24(1): tenant's failure to participate in condition move in inspection;
- subsection 36(1): tenant's failure to participate in condition move out inspection;
- subsection 38(3): amounts ordered paid from the tenant to landlord by the Residential Tenancy Branch that are outstanding at the end of the tenancy;
- paragraph 38(4)(a): the tenant agrees in writing that the landlord can retain an amount to satisfy a liability or obligation of the tenant;
- paragraph 38(4)(b): at the end of the tenancy the Residential Tenancy Branch orders an amount can be retained;
- section 39: the tenant fails to provide a forwarding address in writing to the landlord within one year of the end of the tenancy; and
- subsection 72(2): by order of the Residential Tenancy Branch.

None of these provisions apply so as to authorize the landlords' retention of the security deposit for the breach of the tenancy agreement.

Paragraph 20(e) of the Act sets out that a landlord may not "require, or 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 agreement." *Residential Tenancy Policy Guideline*, "17. Security Deposit and Set off" clarifies that this includes the end of the tenancy:

1. The tenancy agreement may not provide that the landlord automatically keeps all or part of the security deposit at the end of the tenancy.

I find that the addendum provision is an attempt to automatically retain the deposits at the end of the tenancy and as such is contrary to paragraph 20(e) of the Act.

Section 5 of the Act sets out that the Act cannot be avoided and any attempt to contract out of the Act is of no force and effect. I find that the addendum is an attempt to contract out of Act (in particular paragraph 20(e)) and as such that clause is of no force and effect. The landlord is not entitled to retain the security deposit as a result of the tenants' early termination of the tenancy agreement.

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the security deposit. However, pursuant to paragraph 38(4)(a) of the Act, this provision does not apply if, at the end of the tenancy, the landlord has obtained the tenant's

written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy.

I find that the tenancy ended 31 October 2014 pursuant to the tenants' notice to end tenancy. I find that the tenants provided their forwarding addresses in writing to the landlords by mail on 5 November 2014. In accordance with the deeming provisions in section 90 of the Act, the forwarding addresses were deemed received by the landlords on 10 November 2014, the fifth day after the letter's mailing. The landlords filed their claim 21 November 2014. Accordingly, the landlords filed their claim within the fifteen days as permitted under subsection 38(1).

The landlord submits that by signing the note on 28 October 2014, the tenant agreed that the landlords could retain the balance of the deposits. If the landlord's position is correct, then it could be argued that that the landlords were permitted to retain the deposits pursuant to paragraph 38(4)(a). There is no issue of extinguishment pursuant to subsection 38(5).

I find that the language of the 28 October 2014 note is not such that it amounts to an authorization by the tenants to retain the deposits. Rather, the note is phrased as a statement by the landlord. It is written from the landlord's perspective. I accept the tenant's testimony that she was signing the note as acknowledgement of receipt of $200.00 from the landlord. I find that the tenant's signature on the note is not authorization to retain the deposits pursuant to paragraph 38(4) (a).

The landlords have proven their entitlement to $400.00. As the landlords have experienced success in this application, I am exercising my discretion pursuant to section 72 of the Act to order that the landlords are entitled to recover their filing fee from the tenants in the amount of $50.00.

Residential Tenancy Policy Guideline, "17. Security Deposit and Set off" provides guidance in this situation:

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 Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

There is no evidence before me that indicates that the tenants' right to the security deposit has been extinguished. As there is a balance in the amount of $400.00, I order that the balance of the tenants' security deposit shall be returned to the tenants forthwith.

Conclusion

I issue a monetary order in the tenants' favour in the amount of $400.00 under the following terms:

Item	**Amount**
Total Deposits Collected	$1,050.00
Less Portion of Deposits Returned	-200.00
Offset Rental Loss (4mo x $100.00)	-400.00
Recovery of Filing Fee for this Application	-50.00
Total Monetary Order	**$400.00**

The tenants are provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court 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 subsection 9.1(1) of the Act.

Dated: June 03, 2015

Residential Tenancy Branch