Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S and FFL

Introduction

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

- authorization to retain all of the tenants' security deposit and pet damage deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to sections 37 and 67;
- authorization to recover his filing fee for this application from the tenants pursuant to section 72;

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord testified that the tenants were served the notice of dispute resolution package (including documentary evidence) via registered mail on October 13, 2018. He provided a Canada Post tracking number which is included on the cover page of this decision.

The tenants confirmed receipt of the notice of dispute resolution package via registered mail, but were not sure on which date it was received. I find that the tenants were deemed served with this package on October 18, 2018, five days after the landlord mailed it, in accordance with sections 89 and 90 of the Act.

Preliminary Issue – Additional Evidence

On December 12, 2018, after having served the notice of dispute resolution package on the tenants, the landlord uploaded additional documentary evidence to the Residential Tenancy Branch website. He testified that he did not know he had to provide the tenants with copies of these documents, and that he did not do so.

Rule of Procedure 3.14 states:

> 3.14 Evidence not submitted at the time of Application for Dispute Resolution
> Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.
>
> In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

I find that the landlord never served tenants with the additional evidence.

Rule 3.17 grants me the discretion to accept or reject documents submitted into evidence in a manner other than that specified in Rule 3.14. In this case, I do not accept the documents uploaded December 12, 2018 into evidence, as the tenants have not had an opportunity to review them, and it would therefore be prejudicial to the tenants to allow the landlord to rely on the documents. Parties are expected to comply with the all Rules of Procedure.

Issues to be Decided

Is the landlord entitled to:

1) a monetary award for compensation for damage under the Act or tenancy agreement;
2) retain the security deposit and pet damage deposit in partial satisfaction of a monetary award; and
3) be reimbursed by the tenants for his filing fees?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' evidence and my findings are set out below.

The parties agree that:

- The parties entered into a fixed-term tenancy agreement on March 15, 2016 that converted to a month to month tenancy on March 15, 2017. The tenants moved out on October 4, 2018. Monthly rent started at $3,000.00 but was raised to

$3,250.00 by the end of the tenancy. The tenants provided a security deposit of $1,500.00 on February 25, 2016. The landlord retains this deposit. Pets were not permitted under the tenancy agreement.

- The rental property was a single detached home with a basement suite. The parties agree that the landlord granted authorization to the tenants to sublet the basement suite.

The tenants testified that:

- They attempted to sublet the basement suite immediately after taking possession of the residential property and were trying to have it rented out by April 1, 2016. They claim they only received a single offer, and that the prospective subtenants had a dog.
- On March 28 or 29, 2016 they phoned the landlord, and asked if they could rent the basement suite out to subtenants with a dog.
- On that phone call the landlord agreed on the conditions that:
    - The tenants provide a pet damage deposit of $1,500.00;
    - The tenants assume responsibility for all damage caused by the dog; and
    - The tenants sign an addendum to the tenancy agreement.
- On this basis, the tenants accepted the subtenants' offer, and the subtenants moved into the basement suite.
- On March 31, 2016, the landlord attended the rental property to have the tenants sign an addendum to the tenancy agreement. This addendum was entered into evidence by the landlord and was dated effective March 31, 2016 (the "**Addendum**"). The Addendum had the following terms:
    - The tenants are required to provide a pet damage deposit of $1,500.00;
    - The tenants are responsible for all damages and clean-up costs of the sub-tenant's pet (dog); and
    - The tenants are required to replace all carpet in the basement with brand new carpet upon the completion or termination of the tenancy agreement (the "**Replacement Clause**").
- Both tenants and the landlord signed the Addendum.
- They felt pressured into signing the Addendum because they had already agreed to rent the basement suite to the subtenant on the basis of the phone call with the landlord, which made no mention of the requirement to replace the carpet.

The landlord has a different version of events. He testified that:

- He did not know that the subtenants moving into the basement suite had a dog in advance of their moving in.

- He only found out about the dog when he attended the rental property with a plumber to conduct some repairs sometime during the second week of the tenancy (i.e. the last week of March 2016). The subtenants had already moved in by this point.
- When he learned of this, he spoke with the tenants about it, and the prohibition against pets in the lease. He alleges they asked him for a solution on how he might allow the subtenants to stay in the basement suite with the dog.
- At that time, he stated the subtenants could have a dog if the tenants agreed to the following terms:
    - The tenants are required to provide a pet damage deposit of $1,500.00;
    - The tenants are responsible for all damages and clean-up costs of the subtenants' pet (dog); and
    - The tenants are required to replace all carpet in the basement with brand new carpet upon the completion or termination of the tenancy agreement.
- The tenants agreed to these terms.
- Subsequent to this conversation, on March 31, 2016, he and the tenants signed the Addendum, which memorialized the oral agreement described above.

Both parties agree that, subsequent to the signing of the Addendum, the tenants provided the landlord with a pet damage deposit in the amount of $1,500.00, which the landlord still holds.

On October 4, 2018, the tenants moved out of the rental property. The subtenants had already vacated at this point. The parties conducted a move-out inspection, wherein the landlord identified three issues (which were recorded on the inspection report dated October 4, 2018, and signed by the tenant):

1) Scratches to the inside of the oven;
2) A burn on the downstairs countertop; and
3) The basement carpets had not been replaced, per the Addendum.

At the hearing, the landlord valued the damage to the oven and countertop at $50.00 for each instance ($100.00 total). The tenants agreed with this valuation.

On the inspection report, the tenants wrote that they disputed the need to replace the basement carpet, as it had no damage, and had been recently professionally cleaned (and had been cleaned throughout the tenancy).

The inspection report is silent as to whether the basement carpet was damaged.

The tenants provided their forwarding address to the landlord on the inspection report.

The landlord alleges that the basement carpet smelled very bad, and that it had fleas.

The tenants allege that there were no fleas, and denied that the basement carpet smelled bad, or that if it did smell, it was the carpet cleaning solution, and not the result of any damage to the carpet.

The landlord made this application for dispute resolution on October 10, 2018.

At the hearing, the tenants argued that they should not be responsible for replacing the basement carpet, as it was not damaged, and because they were pressured into signing the Addendum. They also allege that the Replacement Clause is a violation of section 20(e) of the Act, as it is a term which allows the landlord to automatically keep all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

I note that the tenants have not provided any documentary evidence in relation to feeling pressured into signing the Addendum (for example, subsequent communications with the landlord or subtenants on the topic), or as to the condition of the carpet (for example, carpet cleaning receipts, a video of the move-out inspection, or a move out inspection report of the subtenants). Indeed, they have not submitted any documents whatsoever into evidence, instead relying on the copies of the inspection report and Addendum uploaded by the landlord. Neither party called any witnesses.

The landlord argues that he is entitled to rely on the Addendum and the Replacement Clause for the replacement of the carpet. He submits that the reason no damage to the carpet was recorded on the inspection report was because he relied on the Replacement Clause.

The landlord testified that he obtained an estimate that the replacement of the basement carpet would be $2,850.00. The tenants did not contest this amount.

The landlord further testified that, rather than replacing the basement carpet with new carpet, he replaced it with a vinyl flooring, which was more expensive ($5,000.00). He testified he is not seeking reimbursement for this higher amount.

Analysis

Credibility of Parties

The parties gave very different evidence regarding the creation of the Addendum. The tenants allege the Replacement Clause was sprung upon them after they thought they had an agreement whereby they could rent the basement suite to subtenants with a pet. The landlord denies this and testified that the Replacement Clause was always part of the agreement, and that he would not have agreed to allow any subtenant to have a pet without it.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

Upon considering both parties' testimony, I find that the tenants' testimony is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. Where the testimony of the landlord and the tenants differ, I accept the testimony of the landlord over that of the tenants.

I find it difficult to accept that, if the tenants did feel pressured into signing the Addendum, they would not have subsequently written the landlord setting out their objections or taken some other step to make their displeasure known. The tenants have provided no evidence (whether documentary or oral) that they objected to the Replacement Clause after signing the Addendum.

As the tenants are alleging that the Addendum does not accurately reflect the oral agreement the parties made on March 28 or 29, 2016 (that is, an agreement without the Replacement Clause), they bear the evidentiary burden to prove this. I find that they have failed to do so.

I find that the parties agreed that the tenants may sublet the basement suite to subtenant with pets on the conditions set out in the Addendum.

Validity of Addendum

Notwithstanding that the parties agreed to the terms in the Addendum, the Replacement Clause may be found to be invalid if its inclusion in the tenancy agreement is a breach of the Act.

The tenants argue that the Replacement Clause not valid under section 20(e) of the Act, which states:

> **Landlord prohibitions respecting deposits**
>
> **20** A landlord must not do any of the following:
>
> (e)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.

The tenant argues that requiring that they replace the basement carpet at the end of the tenancy is the same as requiring that the landlord retain the security deposit or pet damage deposit.

I do not find this argument persuasive for two reasons:

1) The language of section refers only to the deposits themselves and not to renovations, repairs, or improvements; and
2) The Replacement Clause does not require that the security or pet damage deposit to be withheld. The landlord could have returned the deposits in compliance with the Act, and then made an application for damages stemming from the tenants' breach of the tenancy agreement (that is, failing to comply with the Replacement Clause).

Accordingly, I find that the Replacement Clause does not violate section 20(e) of the Act.

I must also consider if the Replacement Clause is unconscionable, per section 6(3) of the Act, which states:

> (3)A term of a tenancy agreement is not enforceable if
> […]
> (b)the term is unconscionable

Policy Guideline 8 states of unconscionability:

> A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

I have already found that I prefer the landlord's evidence regarding the timing of the creation of the Addendum to that of the tenants'. As such, I find that the Replacement Clause is not an unfair surprise (or a surprise at all). The tenants were aware of the Replacement Clause at the time of signing the Addendum.

I do not find that the Replacement Clause is so one-sided as to oppress the tenants, as:

1) It is not oppressive, as the amount claimed by the landlord in relation to the Replacement Clause is less than the combined security and pet damage deposit. Any order I make regarding payment for replacement of carpets would not require the tenants to pay the landlord any additional money.
2) It is not one-sided, as the tenants derived a benefit from the existence of the Replacement Clause. With this clause as part of the Addendum, they were permitted to rent out the basement suite to a subtenant who had a pet. The tenants could have refused to agree to the Replace Clause, and sought other subtenants. This may have prevented them from renting out the basement suite on April 1, 2016. It would seem that the tenants traded a long-term cost (replacing the carpet) for a short-term gain (a subtenant for April 1, 2016).

I do not deny that the Replacement Cause is unfavourable to the tenants, and that they may not have been wise to agree to it. However, for the reasons stated above, I do not find that it rises to the level of unconscionability, as defined in Policy Guideline 8.

Accordingly, I do not find that the Replacement Clause is unconscionable.

Amount of Damages

The landlord provided uncontroverted testimony that it would cost $2,850.00 to replace the carpet in the basement suite. The tenants took no issue with this estimate. However, on his Notice of Dispute Resolution Proceeding, the landlord claimed $2,700.00 for the cost of the carpet. The tenants had no notice that the landlord was seeking to increase the amount he was claiming prior to the hearing (among the documents that the landlord failed to serve in the tenants was an estimate of $2,850.00 for replacing the carpets). I find that that it would be inequitable to allow the landlord to recover more than he claimed, on no notice to the tenants.

Accordingly, I find that the damage caused by the tenants' failure to comply with the Replacement Clause is $2,700.00.

As the tenants accept the landlord's estimate for the damage to the countertop ($50.00) and oven ($50.00), I find that the total amount of damage the landlord suffered as the result of the damage to the countertop and the oven to be $100.00.

As the landlord has been successful in his application I find that he is entitled to recover his filing fee from the tenants in the amount of $100.00.

Pursuant to section 38(1) of the Act, the landlord applied to retain the pet damage deposit and security deposit against any monetary order within 15 days of both the end of the tenancy and the tenants' provision to him of the forwarding address. Accordingly, I find that penalty set out at section 38(6) does not apply. I find that the landlord may apply the full amounts of the security deposit and the pet damage deposit to offset the amount of damage.

In summary, I find that the landlord's damages are as follows:

Cost of replacing carpet	$2,700.00
Damage to countertop	$50.00
Damage to oven	$50.00
Filing fee	$100.00
Pet damage deposit credit	-$1,500.00
Security deposit credit	-$1,500.00
Total	**-$100.00**

Conclusion

Pursuant to section 72 of the Act, I order that the landlord may retain $2,900.00 from the combined amount of both the security deposit ($1,500.00) and the pet damage deposit ($1,500.00) in full satisfaction of the damage suffered by the landlord, and the filing fee

Pursuant to section 67 of the Act, I order that the landlord pay the tenants $100.00 representing the return of the balance of the security and pet damage deposits.

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: February 08, 2019

Residential Tenancy Branch