Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVONSHIRE PROPERTIES INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL, MNDCL-S, MNRL-S

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on April 11, 2019 (the "Application"). The Landlord applied for compensation for monetary loss or other money owed, to keep the security deposit, to recover unpaid rent and for reimbursement for the filing fee.

The Agent appeared at the hearing for the Landlord. The Representative appeared at the hearing for the Tenant. During the hearing, T.C. joined to assist the Representative given a language barrier. I explained the hearing process to the Agent and Representative who did not have questions when asked. The parties provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered the documentary evidence and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

I note that the Representative appeared on his own for the first part of the hearing. I found it very difficult to understand the Representative given a language barrier. I asked the Representative if he had someone who could assist him. At first, the Representative did not. The Representative later had T.C. join the conference to assist.

Issues to be Decided

1. Is the Landlord entitled to compensation for monetary loss or other money owed?
2. Is the Landlord entitled to keep the security deposit?
3. Is the Landlord entitled to recover unpaid rent?
4. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord sought the following compensation:

1	Cleaning	$240.00
2	Painting	$350.00
3	Damaged floor	$250.00
4	Liquidated damages	$1,000.00
5	Rent loss for April	$9,000.00
6	Rent loss for May	$9,000.00
7	Filing fee	$100.00
	TOTAL	**$19,940.00**

A written tenancy agreement was submitted as evidence. It is between the Landlord, Tenant and a company as the second tenant. The tenancy started June 01, 2018 and was for a fixed term ending May 31, 2019. Rent was $9,000.00 per month due on the first day of each month. The Tenant paid a $4,500.00 security deposit.

The tenancy agreement is signed by the Tenant under her name but not signed for the company. I asked the parties about this. The Agent did not know why nobody signed for the company. The Agent advised that the Tenant was the director of the company at the time. At first, the Representative agreed the Tenant was the director. The Representative then changed his testimony on this point and denied that the Tenant was the director of the company. The Representative did not know why the company was named. He took the position that the Tenant was not authorized to sign for the company and that the company was not a party to this tenancy agreement.

The tenancy agreement included an addendum with a liquidated damages clause as clause 18. The liquidated damages clause states that the Tenant will pay $1,000.00 to the Landlord if the Tenant does not provide the Landlord with notice required by the *Act* to end the tenancy. The Tenant signed the addendum.

The Agent testified that the Tenant provided a forwarding address on the move-out Condition Inspection Report (CIR) on March 31, 2019. A copy of the CIR was submitted as evidence.

At first, the Representative did not agree that the Tenant provided a forwarding address on the move-out Condition Inspection Report (CIR) on March 31, 2019. The Representative said he did not agree because the Tenant moved out of the rental unit earlier than March 31, 2019. The Representative later agreed given the CIR showing the forwarding address at the bottom.

The Agent acknowledged that the Landlord did not have an outstanding monetary order against the Tenant at the end of the tenancy.

The Agent testified that the Tenant did agree to the Landlord keeping $840.00 of the security deposit on the move-out CIR. The move-out CIR states:

> Other cleaning $240.00
> Painting $350.00
> Damaged floor $250.00
>
> Balance due Tenant $3,660.00
> Balance due Landlord $840.00
>
> I agree with the amounts noted above and authorize deduction of any Balance Due Landlord from my Security Deposit…I further agree to pay the Landlord the amount by which the Balance Due Landlord exceeds the amount of my deposit(s).
>
> Tenant(s) Signature(s) [this is signed by the Tenant]
>
> Date signed: March 31, 2019
>
> Forwarding Address [address provided]

The Representative disputed that the Tenant agreed to the Landlord keeping $840.00 of the security deposit on the move-out CIR. He acknowledged that the signature on the move-out CIR is the Tenant's signature. I did not understand the Representative's explanation for his position on this issue.

The Agent testified that the Tenant and someone for the Landlord did a move-in inspection May 15, 2018. The Representative did not know if a move-in inspection was done.

The Agent testified that the unit was empty at the move-in inspection. The Representative said he thought it was but does not know because he was not there.

The Agent testified that a copy of the move-in CIR was given to the Tenant in person on the date of the inspection. The Representative did not know if the Tenant received this.

The Agent testified that the Tenant and someone for the Landlord did a move-out inspection March 31, 2019. The Representative did not know if a move-out inspection was done.

The Agent testified that items were left in the rental unit on move-out.

The Agent testified that a copy of the move-out CIR was given to the Tenant in person on the date of the inspection. The Representative did not know if the Tenant received this.

The Agent testified as follows in relation to the end of the tenancy. The Landlord received an email from the Tenant February 27, 2019 stating she was vacating April 01, 2019. The Landlord told the Tenant she had to vacate March 31, 2019. The Tenant confirmed she would vacate March 31, 2019 by email March 01, 2019. The Landlord asked the Tenant to sign a form ending the tenancy, but the Tenant would not sign this.

T.C. testified as follows in relation to the end of the tenancy. The Tenant or Representative told staff at the office that the Tenant was vacating prior to the February 27, 2019 email. The first written notice was provided by email on February 27, 2019 with a move-out date of April 01, 2019. The Landlord wrote back saying the Tenant had to vacate March 31, 2019. The Tenant confirmed the March 31, 2019 move-out date by email March 01, 2019.

The parties testified as follows in relation to the Landlord's claims.

Liquidated damages $1,000.00

The Agent testified as follows. Clause 18 in the addendum sets out liquidated damages. The Tenant signed the tenancy agreement and addendum. Clause 18 states that the Tenant will pay the Landlord $1,000.00 if the Landlord cannot re-rent the unit and the lease is broken. The amount in clause 18 is based on the cost to clean, re-paint and advertise the rental unit. The amount is also to cover administrative costs for staff time to show the rental unit.

T.C. testified as follows. The $1,000.00 in clause 18 is high compared to what it would actually cost to re-rent the unit. It would not cost $1,000.00 to re-rent the unit. It would be relatively inexpensive to re-rent the unit. The amount claimed is not realistic.

Rent loss for April and May $18,000.00

The Agent testified as follows. The unit was advertised on the Landlord's website and two additional rental websites. The unit was advertised on the Landlord's website in March. It was advertised for the same rent. The unit was re-rented for July 01, 2019 at the same rent amount. The unit is a three-bedroom three-bathroom penthouse suite, so the clientele is different.

The Agent could not explain why the Landlord had submitted no evidence to support the position on loss of rent.

T.C. testified as follows. There is no evidence the Landlord made an effort to re-rent the unit. The Tenant gave the Landlord ample time to re-rent the unit with advance notice that she was vacating. One and a half months was more than enough time for the Landlord to re-rent the unit. The Landlord should have been making an effort to re-rent the unit.

I have reviewed the Tenant's written submission. It states that the Landlord was given five months to find a new tenant for the unit. It states that the Tenant asked the Landlord to do an inspection at the end of the tenancy but that this was not done and therefore the Landlord extinguished their right to claim against the security deposit for damage.

Analysis

The company "tenant" was named on the Application. I am not satisfied the company was a tenant in relation to this tenancy agreement as nobody signed the tenancy agreement for the company. T.C. and the Representative took the position that the company was not a tenant. In the absence of a signature on the tenancy agreement, or further evidence showing the company was a tenant, I do not accept that it was. I have therefore removed the company name from the style of cause.

Pursuant to rule 6.6 of the Rules of Procedure, the Landlord, as applicant, has the onus to prove the claim. The standard of proof is on a balance of probabilities meaning "it is more likely than not that the facts occurred as claimed".

Under sections 24 and 36 of the *Residential Tenancy Act* (the "*Act*"), landlords and tenants can extinguish their rights in relation to the security deposit if they do not comply with the *Act* and *Residential Tenancy Regulation* (the "*Regulations*"). Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

I accept the testimony of the Agent in relation to the move-in inspection. I find it is supported by the CIR in evidence. The Representative did not know about the move-in inspection and therefore I consider the Agent's testimony to be undisputed.

Based on the Agent's testimony in relation to the move-in inspection, and the CIR, I find neither the Landlord nor Tenant extinguished their rights in relation to the security deposit under section 24 of the *Act*.

I accept the testimony of the Agent in relation to the move-out inspection. I find it is supported by the CIR in evidence. I acknowledge that the Tenant's submissions state that the Landlord did not do a move-out inspection. I do not accept this given the CIR in evidence was signed by the Tenant and someone for the Landlord on March 31, 2019.

Based on the Agent's testimony in relation to the move-out inspection, and the CIR, I find neither the Landlord nor Tenant extinguished their rights in relation to the security deposit under section 36 of the *Act*.

Based on the testimony of the parties about the correspondence between the Landlord and Tenant regarding the Tenant vacating the rental unit March 31, 2019, I find the tenancy ended on this date. Based on the CIR in evidence, and testimony of the Agent,

I find the Tenant provided the Landlord with her forwarding address on March 31, 2019. Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from March 31, 2019 to repay the security deposit or claim against it. The Landlord filed the Application April 11, 2019, within the 15-day time limit. The Landlord complied with section 38 of the *Act*.

Cleaning, painting and damaged floor

Section 38(4) of the *Act* states:

> (4) A landlord may retain an amount from a security deposit or a pet damage deposit if,
>
> > (a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant…

Based on the CIR in evidence, and acknowledgement by the Representative that this contains the Tenant's signature, I find the Tenant agreed in writing at the end of the tenancy that the Landlord could keep $840.00 of the security deposit for cleaning, painting and the damaged floor. Therefore, the Landlord is entitled to this amount.

Liquidated damages

Policy Guideline 4 addresses liquidated damages and states in part:

> 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 considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.
>
> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
>
> - A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
> - If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.

- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum…

Based on the written tenancy agreement in evidence, I find the Tenant entered into a fixed term tenancy ending May 31, 2019. Given the testimony of the parties about the end of the tenancy, there is no issue that the Tenant ended the fixed term tenancy early. This was a breach of section 45(2) of the *Act* in relation to ending a fixed term tenancy. Therefore, I find the Tenant did not give the Landlord notice as required by the *Act* and the liquidated damages clause applies.

The Agent submitted that the amount set out in clause 18 is meant to cover the costs associated with re-renting the unit such as advertising and staff time to show the unit. T.C. and the Representative submitted that it would not cost $1,000.00 to re-rent the unit.

The Tenant signed the tenancy agreement and addendum which included clause 18. For clause 18 to be unenforceable, I would have to find it is a penalty. I do not find that it is. Based on the testimony of the Agent, and clause 18 itself, I accept that the $1,000.00 is meant to cover the cost of re-renting the unit. I accept that re-renting the unit takes time and costs money for advertising and staff time as these points accord with common sense. I do not find the $1,000.00 extravagant in comparison to the greatest loss that could follow a breach as I find it to be a reasonable estimate of the cost to re-rent the unit. The amount itself is reasonable and not oppressive to the Tenant. This is particularly so when one considers the rent amount.

I do not find that the liquidated damages clause is a penalty. I find the clause enforceable. I find the clause applies here. The Tenant must pay the Landlord $1,000.00 pursuant to clause 18 of the tenancy agreement.

Rent loss for April and May

Section 7 of the *Act* states:

> (1) If a…tenant does not comply with this Act…or their tenancy agreement, the non-complying…tenant must compensate the [landlord] for damage or loss that results.
>
> (2) A landlord…who claims compensation for damage or loss that results from the [tenant's] non-compliance…must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

> It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
>
> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

As stated, I accept that the Tenant ended the fixed term tenancy early as this was not in dispute. The Tenant breached the tenancy agreement and section 45(2) of the *Act* by doing so.

I accept the testimony of the Agent that the unit was not re-rented until July 01, 2019 as I did not understand T.C. or the Representative to dispute this. Therefore, I accept that the Landlord lost rent for April and May due to the Tenant's breach of the fixed term tenancy.

There is no issue that rent was $9,000.00 per month and therefore I accept that the Landlord lost $18,000.00 in rent for April and May.

As applicant, the Landlord has the onus to prove they minimized their loss.

The Agent testified that the Landlord advertised the unit on the Landlord's website and two additional rental websites. The Agent testified that the unit was advertised on the Landlord's website in March.

T.C. and the Representative disputed that the Landlord minimized their loss.

The Landlord submitted no evidence to support the Agent's testimony about efforts to re-rent the unit. The Landlord did not submit copies of the rental ads. The Landlord did not submit correspondence from prospective tenants. The Agent did not provide details about prospective tenants or showings of the rental unit nor did the Landlord submit evidence about this.

It would have been easy for the Landlord to submit copies of the rental ads to show when they were posted, where they were posted and to support the Agent's testimony about the unit being posted for the same rent amount. The Agent could not provide an explanation for why the Landlord did not submit evidence to support the Agent's testimony about efforts made to re-rent the unit.

In the circumstances, the Landlord has failed to prove they minimized their loss. The Landlord is not entitled to the compensation sought for loss of rent.

Filing fee

Given the Landlord was partially successful in this application, I award the Landlord $100.00 as reimbursement for the filing fee pursuant to section 72(1) of the *Act*.

In summary, the Landlord is entitled to the following:

1	Cleaning	$240.00
2	Painting	$350.00
3	Damaged floor	$250.00
4	Liquidated damages	$1,000.00
5	Rent loss for April	-
6	Rent loss for May	-
7	Filing fee	$100.00
	TOTAL	**$1,940.00**

Pursuant to section 72(2) of the *Act,* the Landlord can keep $1,940.00 of the security deposit. The Landlord must return the remaining $2,560.00 of the security deposit to the Tenant. The Tenant is issued a monetary order for this amount.

Conclusion

The Landlord is entitled to keep $1,940.00 of the security deposit. The Landlord must return the remaining $2,560.00 of the security deposit to the Tenant. The Tenant is issued a monetary order for this amount. If the Landlord does not return $2,560.00 to the Tenant, this Order must be served on the Landlord. If the Landlord does not comply with the Order, it may be filed in the Provincial Court (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 *Act*.

Dated: August 07, 2019

Residential Tenancy Branch