Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND-S, FF, MNSD

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for money owed or compensation for damage or loss to the rental unit pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover his filing fee for this application from the tenants pursuant to section 72.

The tenants' applied for:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing via conference call and provided testimony. Both parties confirmed that the landlord served the tenants with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on May 15, 2019. The tenants claim that the landlord was served with their notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on May 18, 2019. The landlord disputed that no such package was received. The tenants referred to a copy of the Canada Post Registered Mail Receipt dated May 18, 2019 and a photograph of the returned envelope marked "unclaimed" in support of their

claim. Both parties confirmed the tenants used the proper mailing address for the landlord. No further service issues were raised.

I accept the testimony of both parties and find that the tenants were properly served as per sections 88 and 89 of the Act. As for the tenants service of the notice of hearing package and their submitted documentary evidence, I also find that the tenants have properly served the landlord pursuant to sections 88 and 89 of the Act. Although the package was "unclaimed" by the landlord, I deem the landlord sufficiently served as per section 90 of the Act.

During the hearing both parties confirmed that the named tenant, I.P. does not have an "s" at the end of his name. Both parties agreed to amend the landlord's application to reflect the proper spelling of this tenant. The Residential Tenancy Branch File shall be updated to reflect the proper spelling of this name.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for compensation and recovery of the filing fee?
Is the landlord entitled to retain all or part of the security deposit?
Are the tenants entitled to a monetary order for return of all or part of the security deposit and recovery of the filing fee?

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 respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began on December 1, 2018 on a fixed term ending on November 30, 2019 as per the submitted copy of the signed tenancy agreement dated November 23, 2018. The monthly rent is $4,500.00 payable on the 1st day of each month. A security deposit of $2,250.00 and a pet damage deposit of $2,250.00 were paid.

Both parties confirmed the tenancy ended on April 30, 2019 and that the landlord still holds the combined security and pet damage deposits. Both parties confirmed the landlord re-rented the unit for May 1, 2019 at the same rental rate until September 30, 2019.

The landlord provided both written and verbal submissions. The landlord seeks a monetary claim of $9,000.00 for liquidated damages. The landlord claims that the tenants prematurely ended the tenancy on April 30, 2019 and triggered the landlord's "Liquidity Damages Clause".

The landlord relies on rental term #6 attached to the signed tenancy agreement, which states,

> *In the event of early termination of the lease by Tenant, a Liquidity Damages Clause is established with two months rent $9,000.00 to be paid to Landlord to offset the costs associated with replacing Tenant.*

The landlord claims that the $9,000.00 is a genuine pre-estimate of the landlord's cost(s) in re-renting the unit. The landlord submits that this clause is based upon "Whistler seasons rental average $4,500.00 for 6 months, but only $3,000.00 for the other 6." The landlord stated that when he originally advertised this rental there were 70+ applicants in November @ $4,500.00 per month and when advertised again for May only 1.

The tenants dispute this claim stating that the landlord did not suffer any losses as the tenants assisted in finding the landlord a new tenant. The tenants argue that the clause is punitive. The tenants provided undisputed testimony that new tenants were found with their assistance to begin a tenancy on May 1, 2019, the day after the tenants vacated the rental unit. The tenants also argue that the landlord would not allow for the assignment of the tenancy agreement to the new tenants, but had insisted on entering into a new signed tenancy agreement from May 1, 2019 to September 30, 2019 which is shorter than the original fixed term ending on November 30, 2019.

The tenants' seeks a monetary claim of $4,500.00 which consists of:

$2,250.00	Security Deposit
$2,250.00	Pet Damage Deposit
$4,500.00	Subtotal
-$100.00	Less $100.00, loss of parking pass
$4,400.00	Subtotal
$100.00	Filing Fee
$4,500.00	Total Claim

The tenants credit the landlord for $100.00 for the loss of a parking pass as agreed to at the end of tenancy.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, both parties confirmed that the tenants provided notice to end the tenancy on April 30, 2019 prematurely ending the tenancy which was for a fixed term ending on November 30, 2019. However, the tenants argue that the landlord's claim is unreasonable and unconscionable as new tenants were found for May 1, 2019 with their assistance. The tenants state that no losses were incurred by the landlord. The landlord has argued that despite no losses as per "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."

Residential Tenancy Branch Policy Guideline #4, Liquidated Damages, states in part,

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

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. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.*

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

If a liquidated damages clause if struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

In this case, I find that the $9,000.00 “Liquidity Damages Clause” is unconscionable and unenforceable. The landlord bases this amount on the seasonal rate of rent between the winter and summer months with an approximate $1,500.00 per month difference. This amount is equal to two months rent which is excessively higher than any actual costs to re-rent the unit. I also note that the landlord did not suffer any actual losses. As such, the landlord’s application is dismissed without leave to reappy.

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.

As noted above, both parties confirmed that the tenancy ended on April 30, 2019 and that the landlord currently holds the $2,250.00 security deposit and the $2,250.00 pet damage deposit. Both parties confirmed the tenants provided their forwarding address in writing for the return of the deposits on April 6, 2019. A review of the landlord’s

application shows that the landlord filed for dispute of returning the deposits on May 13, 2019.

As the landlord's claim has been dismissed, I order that the tenants' application be granted as requested, noted below.

$2,250.00	Security Deposit
$2,250.00	Pet Damage Deposit
$4,500.00	Subtotal
-$100.00	Less $100.00, loss of parking pass
$4,400.00	Subtotal
$100.00	Filing Fee
$4,500.00	Total Claim

The tenants are granted a monetary order for $4,500.00.

Conclusion

The landlord's application is dismissed without leave to reapply.
The tenants are granted a monetary order for $4,500.00.

This order must be served upon the landlord. Should the landlord fail to comply with the order, the 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: September 3, 2019

Residential Tenancy Branch