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 MNDC-LS, FF

Introduction

This hearing dealt with the landlord's 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 tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed the landlord served the tenants with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on December 6, 2019. Both parties also confirmed the tenants served the landlord with their submitted documentary evidence in person on April 14, 2020. Neither party raised any service issues. I accept the undisputed affirmed evidence of both parties and find that both parties have been sufficiently served as per sections 88 and 89 of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss and recovery of the filing fee?
Is the landlord entitled to retain all or part of the security deposit?

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 applicant's claim and my findings are set out below.

This tenancy began on March 1, 2019 on a fixed term tenancy ending on February 29, 2020 as per the submitted copy of the signed tenancy agreement dated February 25, 2019. The monthly rent was $1,675.00 payable on the 1st day of each month. A security deposit of $837.00 and a pet damage deposit of $837.00 were paid on March 1, 2019.

Both parties completed and signed the condition inspection reports for the move-in on March 1, 2019 and again for the move-out on November 28, 2019.

The landlord seeks a monetary claim of $1,112.00 which consists of:

$837.00	Liquidated Damages
$120.00	Cleaning, 4 hours @ $30/hr.
$55.00	Window Cover Cleaning
$100.00	Filing Fee

The landlord stated that the tenants entered into a tenancy on March 1, 2019 on a fixed term ending on February 29, 2020, but pre-maturely ended it on November 30, 2019 after giving 1 months' notice. The landlord stated that clause #5 of the signed agreement which the tenants initialled in acknowledgement when the agreement was signed on February 25, 2019 provides for a $837.00 for liquidated damages if the tenants breaches this agreement.

Clause #5, Liquidated Damages states,

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 $837.00 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.*

Although the tenants acknowledged their understanding and initialling of this clause in the signed tenancy agreement at the start of the tenancy, the tenants dispute the landlord's claim arguing that proper 1 months' notice was given to the landlord despite

pre-maturely ending the tenancy on November 30, 2019 instead of ending on February 29, 2020. The tenants further argue that the landlord incurred no costs and that a new tenant was found for December 2019. The tenants stated at no time has the landlord provided any details of any costs incurred for the tenants ending the tenancy.

The landlord seeks $120.00 for the cost of cleaning for 4 hours at $30/hour. The landlord stated that after the tenants had vacated the rental unit that the inside of the oven and behind the stove were found to be dirty requiring cleaning. The landlord stated that a 4 hour minimum fee is charged for cleaning when tenants fail to complete the cleaning required. The tenants' disputed this claim stating that they were informed by the landlord that it was not required to clean the stove if it was not on rollers. The tenants argued that they did not receive the move-out package instructions and as a result were unable to provide evidence of this instruction. The tenants also argue that no notice of the minimum 4 hour charge for cleaning was ever given to them. The landlord submitted 3 photographs of the stove, of which only 1 shows under the stove dirty and with a spill mark requiring cleaning.

The landlord seeks $55.00 for window covering cleaning. The landlord stated that as a condition of the tenancy, the window covering must be professionally cleaned at the end of tenancy. The landlord referenced clause #23, Carpets and Window Coverings, which states,

> *The tenant is responsible for periodic cleaning of carpets and window coverings provided by the landlord. While professional cleaning is recommended at all times, if the carpets and window coverings are new or professionally cleaned at the start of the tenancy, the tenant will pay for professional cleaning at the end of tenancy.*

The tenants disputes this claim arguing that upon vacating the rental unit the window coverings were clean. The tenants also argue that at no time has the landlord provided any evidence that the carpets were new or that they were professionally cleaned at the start of their 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, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

Residential Tenancy Branch Policy Guideline #4, Liquidated Damages, 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…

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 actual damages may have exceeded he 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…

In this case, I accept the undisputed affirmed evidence of both parties that the tenants entered into the signed tenancy agreement with full knowledge of clause #5 regarding the liquidated damages. Both parties confirmed this and acknowledged it by initialling this section of the agreement. Both parties confirmed that the $837.00 listed amount was agreed to. Although the tenants have disputed this claim arguing that proper 1 months' notice was given, the tenants confirmed that at the time of signing the agreement, they were aware of this clause and had agreed to it. I find that the liquidated damages clause to be valid. On this basis, I find that the landlord has established a claim for the liquidated damages of $837.00.

On the landlord's claim of $120.00 in cleaning for a 4 hour minimum at $30/hr is dismissed. I find that the landlord has failed to provide sufficient evidence of notice of the 4 hour minimum charge for cleaning to the tenants. Although the landlord stated that this was part of the move-out package, the tenants have argued that no such package was received. The landlord did not provide a copy for the hearing or any evidence of service of this package. I find that the 4 hour charge for the small area of cleaning required under the stove to be excessive. This portion of the landlord's claim is dismissed.

On the landlord's claim for $55.00 for professional carpet cleaning, I find that the landlord has failed. As per the tenants' dispute, the landlord has not provided any evidence that the carpets were professionally cleaned at the start of the tenancy. However, I note that the landlord has not argued that the window coverings were left dirty nor is there any notation on the completed condition inspection report for the move-out.

Residential Tenancy Branch Policy Guideline #8, Unconscionable and Material Terms, states in part,

> *Under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.*
>
> *Terms are unconscionable are not enforceable. Whether a term is unconscionable depends on a variety of factors.*
>
> *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 cause 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…*

In this case, I find that the requirement for the tenants to pay for professional cleaning at the end of tenancy if the carpets or window coverings are new or were professionally cleaned at the start to be unconscionable. The landlord's only issue for this claim was that the tenants did not have the window coverings professionally cleaned, despite them not being dirty or stained. I also note that the landlord failed to provide any evidence

that the window coverings were professionally cleaned at the start of the tenancy. On this basis, this portion of the landlord's claim is dismissed.

The landlord has established a total monetary claim of $837.00. The landlord having been partially successful is entitled to recovery of the $100.00 filing fee. In offsetting this claim, I authorize the landlord to retain $937.00 from the security deposit of $837.00 and the pet damage deposit of $837.00 held by the landlord, leaving a balance $737.00 owed to the tenants. The landlord is ordered to return the $737.00 to the tenants forthwith.

Conclusion

The tenants are granted a monetary order for $737.00.

This order must be served upon the landlord. Should the landlord fail to comply with this 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: May 12, 2020

Residential Tenancy Branch