Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding TRG THE RESIDENTIAL GROUP REALTY LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act"), for a monetary order of $2,456.00 for damage or compensation for damage under the Act, retaining the security deposit for this claim; and to recover the $100.00 cost of their Application filing fee.

The Tenants, J.T. and S.H., and an agent for the Landlord, L.P. ("Agent"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it. During the hearing the Tenants and the Agent were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary and Procedural Matters

The Agent provided the Parties' email addresses in the Application, and the Parties confirmed these addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they were not allowed to record the hearing, and that anyone who was recording it was required to stop immediately.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order, and if so, in what amount?
- Is the Landlord entitled to recovery of the Application filing fee?

Background and Evidence

The Parties agreed that the fixed term tenancy began on June 1, 2021, and was to run to May 31, 2022, and then operate on a month-to-month or periodic basis; however, the Parties agreed that the Tenants moved out on November 15, 2021, because they purchased a property.

The Parties agreed that the tenancy agreement for this one-bedroom, one-bathroom rental unit required the Tenants to pay the Landlord a monthly rent of $2,000.00, due on the first day of each month. They agreed that the Tenants paid the Landlord a security deposit of $1,000.00, and a pet damage deposit of $1,000.00. The Agent confirmed that the Landlord still holds the deposits in full.

I asked the Agent to explain the Landlord's claims to me, and he provided two claim categories, which I will review consecutively.

#1 RETAINING SECURITY AND PET DAMAGE DEPOSITS → $2,000.00

The Agent explained this claim, as follows:

> Basically, the owner has asked me to file a dispute, because [the Tenants] broke the lease agreement, because they were supposed to stay until May 2022. However, the Tenants moved out in November 2021, so, this is why the Landlord was upset. That's the reason the Landlord has asked to keep the deposits.
>
> However, we found a replacement for these Tenants. The new agreement started November 15, so there was no loss to the Landlord, but the Landlord had to pay a commission to our company for finding a new tenant. Once every new

> lease agreement is placed, the Landlord has to pay a commission. The commission was $1,000.00

The Tenants responded, as follows:

> Regarding everything, I agree in fact, as yes, we did leave on November 15th, and our lease is supposed to last until May 31st. Our position is that we shouldn't have to pay this, because the Landlord didn't lose a single day of rent, and we found the new tenant. There was no damage in the apartment, and we did the work to find the new tenant.
>
> Prior to breaking the lease, subletting was part of the agreement, and when we mentioned this to [the Agent] that we were comfortable subletting, [the Agent] said the owner did not want to sublet and wanted to sign a new lease. That's why we broke the lease as opposed to subletting.

The Agent replied:

> Once we received the notice from [J.T.], we also started searching for a new tenant. Once a tenant was found, the new lease agreement was in place and the owner was happy that we found a replacement. Our company is executing the lease agreement - we are liable for the people we rent to. It doesn't matter who found the tenant, as we are taking full responsibility and liability for new tenants.

J.T. said:

> [S.H.] did most of the leg work for finding the tenant. We placed a [social media] market ad, and we spoke to a lot of people… and we agreed to pay half a month extra, until the new tenant started, so the Landlord wouldn't lose anything.

#2 PROFESSIONAL CLEANING → $356.00

The Landlord is claiming $356.00 for the cost of having to clean the rental unit at the end of the tenancy. I asked the Agent how the Landlord selected the cleaning company they used, and the Agent said:

> Our company works with this cleaning company. We have an agreement with this cleaning company - they have been using them since I started working here. I am just following the rules. They cleaned the place.

> I find it expensive, but I am not the one who is selecting the company. They have been working for us . . . I'm just doing my job. I don't question what they did. It's either the owner or the Tenant has to pay for the work. I wish I could be more flexible to have free hands to hire another cleaning company.

The Tenants said:

> We paid a cleaning fee on the way in and on the way out, and the new tenants paid a cleaning fee, and I don't think the cleaning fee was fair. So, they charged both us and the new tenants, in addition to this fee.

I asked the Agent for the cost of the cleaning fee charged at the start and the end of the tenancy, and he said:

> I don't recall having charged the Tenants for a cleaning fee when they moved in. It's always mentioned in the move-in inspection, if needed. I don't recall that we charged these tenants for a moving or cleaning fee. Also, at the end of their tenancy, it states what they are responsible for – we are not charging them for lost keys. It stipulates in the CIR that cleaning was required, but there was nothing about cleaning in the move-in inspection.

The Tenants said: "I don't recall the exact amount; I think it was like $120 - two cleaning fees - one at the start and one at the end." However the Tenants did not direct me to any invoices or receipts for the cleaning fees.

The Agent said: "We haven't received any invoice from them for the cleaning, so that's something that I have to deny."

Clauses 2 and 8 of the "Addendum to the tenancy agreement" state [reproduced as written]:

> 2. The Tenant agrees to pay a move in & move out fee. Should this not be paid tenant agrees that those fees are deducted from the security deposit.
>
> 8. At the end of the tenancy there will be a cleaning fee applied of approximately $200 + GST for a 1 bedroom, $225 + GST for 2 bedroom and $275 for a 3 bedroom. These amounts are minimum and retained from the tenant's deposit. This fee will vary on the condition the property is left in. (applicable when tenants doesn't not hire professional cleaning company on their

own, and provide receipt of cleaning before or on the move out date), professionally clean carpet (if carpet in the apartment).

The Landlord provided a copy of the move-in/move-out condition inspection report ("CIR") showing the condition of the residential property at the beginning and at the end of the tenancy. The CIR has one column for notes about the condition at move-in, and one column for the condition at move-out. They are virtually identical, having only the notes: "w/t" which I infer to mean "with tenant". In the notes section listing the "Repairs to be completed at start of tenancy" it states: "painting walls, bedroom window stopper and screen". The Tenant, J.T., signed this portion, agreeing with the move-in CIR.

The notes at the end of the CIR state: "lost keys, cleaning required". The Tenants did not sign this agreeing to the move-out CIR. There are no photographs to support the Landlord's claims in this regard to the condition of the rental unit at the end of the tenancy.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Before the Parties testified, I explained how I analyze evidence presented to me. I said that a party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this case, the Landlord must prove:

1. That the Tenants violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Landlord to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Landlord did what was reasonable to minimize the damage or loss.

("Test")

#1 RETAINING SECURITY AND PET DAMAGE DEPOSITS → $2,000.00

Section 45 of the Act sets out a tenant's obligations regarding giving notice to end a tenancy. Section 45(2) of the Act deals with ending a fixed term tenancy, as follows:

45 (2) 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.

The Parties agreed that the Tenants violated the tenancy agreement and section 45 (2) of the Act by ending the fixed term tenancy early, which means the Landlord has fulfilled the first step of the Test. However, I find that the Landlord did not provide sufficient evidence to prove the remaining three steps of the Test. Based on the testimony and documentary evidence before me, I find it more likely than not that the Tenants found the new tenant for the Landlord, and that there was no gap in a tenancy for the rental unit as a result of the breach.

As set out in Policy Guideline #16, “The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party claiming compensation to provide evidence to establish that compensation is due.”

I find that the fee the Agent is claiming is appropriately called a “liquidated damages” clause. This is a clause that parties insert in tenancy agreements where actual damages, though real, are difficult or impossible to prove. It is a contractual provision requiring a party in breach of a contract to pay a pre-determined amount to the other party as compensation for the breaching party’s failure to perform a specific task or comply with a particular duty or obligation.

The purpose of a liquidated damages clause is to increase certainty and avoid the legal costs of determining actual damages later if the contract is breached. Thus, they are most appropriate when (a) the parties can agree in advance on reasonable compensation for a breach, but (b) the court would have a difficult time determining fair compensation at the time of the breach. Under the common law, a liquidated damages amount may not be set so high that it is a penalty clause, rather than fair compensation. When liquidated damages are not proportionate to the real or anticipated losses, the courts can decide they are a penalty. If the court determines that the damages are

actually a penalty, the provision will be voided, and the injured party will only be able to pursue actual damages by the contract being breached.

The Agent did not refer me to a liquidated damages clause in the tenancy agreement, nor could I find one on my own review. Further, the Agent did not provide the costs his company incurred in finding and placing the new tenant in the rental unit on November 15, 2022. He provided no indication of how the $1,000.00 fee was determined. Rather, as noted above, I find it more likely than not that the Tenants found the new tenant, who took over their lease. Now the Landlord is trying to charge the Tenants a fee for work that they did.

The Agent referred to the obligation his company faces in finding the *right* tenant, for which his company is liable, if something goes wrong with the new tenancy. This is something for which it is difficult to pre-determine a cost. This is exactly what a liquidated damages clause would address. However, there was no such clause in the tenancy agreement between these Parties.

In light of there being no liquidated damages clause, I find it unconscionable of the Landlord to try to impose these fees on the Tenants, without providing sufficient evidence that the Landlord incurred *any* cost from the Tenants' breach of the tenancy agreement.

Further, the Agent started by saying that the Landlord made this claim, because he was angry that the Tenants broke the fixed-term tenancy agreement. He said: "This is why the Landlord was upset. That's the reason the Landlord has asked to keep the deposits." I find that such a reason is incompatible with administrative fairness and reasonableness.

Based on the above, I find that the Landlord's claim for $1,000.00 to cover the cost of finding a new tenant is unreasonable and verging on - if not clearly being - unconscionable. As such, I dismiss this claim without leave to reapply, pursuant to section 62 of the Act.

#2 PROFESSIONAL CLEANING → $356.00

The Landlord appears to be double or quadruple charging tenants for cleaning. I find it is more likely than not that the Addendum clauses - 2 and 8 from above – are standard clauses in this Landlord's agreements with all tenants. The clauses were not drafted for this tenancy alone, as clause 8 refers to different prices for different sized rental units. In

fact, for a one-bedroom unit, the Landlord anticipates charging $200.00 plus GST for cleaning.

As such, I find that it is more likely than not that this Landlord has charged the Tenants before me a move-in fee, a move-out fee, a $200 +GST cleaning fee, and now the Landlord is trying to also claim an additional $356.00 fee for cleaning. I also find it more likely than not that the Landlord will charge the *new* tenant(s) the same fees for one cleaning job. The Agent even acknowledged that the $356.00 fee was expensive - even if none of the other fees were charged to these Tenants. The Agent said: “I wish I could be more flexible to have free hands to hire another cleaning company.” I find that this indicates the Landlord’s representative agrees that the Landlord is charging too much.

Based on the evidence before me overall, and given what I find to be spurious billing practises on the part of the Landlord, I find that the Landlord has not met their burden of proof on a balance of probabilities to succeed in this claim. I, therefore, dismiss this claim without leave to reapply, pursuant to section 62 of the Act.

Given the Landlord’s lack of success in this matter, I decline to award the Landlord with recovery of the $100.00 Application filing fee from the Tenants.

I Order the Landlord to return the Tenants’ $1,000.00 security deposit and $1,000.00 pet damage deposit to the Tenants as soon as possible. **I grant the Tenants** a **$2,000.00 Monetary Order** from the Landlord in this regard, if necessary.

Conclusion

The Landlord is unsuccessful in their Application for compensation from the Tenants, as the Landlord failed to provide sufficient evidence to prove their claims on a balance of probabilities. Accordingly, I dismiss the Landlord’s Application wholly without leave to reapply.

The Landlord is **Ordered** to return the Tenants’ **$1,000.00** security deposit and **$1,000.00** pet damage deposit to the Tenants as soon as possible.

Pursuant to sections 62 and 67 of the Act, I grant the Tenants a **Monetary Order** from the Landlord of **$2,000.00** to ensure the reimbursement of these costs to the Tenants.

This Order must be served on the Landlord by the Tenants and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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: July 11, 2022

Residential Tenancy Branch