Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding CASCADIA APARTMENT RENTALS LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The landlord applied for:

- a monetary order for loss under the Act, the regulation or tenancy agreement, pursuant to section 67;
- an authorization to retain the security deposit (the deposit), under section 38; and
- an authorization to recover the filing fee for this application, under section 72.

Tenants DF (the tenant) and DA and the applicant, represented by agent MV (the landlord), attended the hearing. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing all the parties were clearly informed of the Rules of Procedure, including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11, which prohibits the recording of a dispute resolution hearing. All the parties confirmed they understood the Rules of Procedure.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: “A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5,000.00.”

Preliminary Issue – Service

The landlord affirmed she served the notice of hearing and the evidence (the materials) via registered mail. The tenants confirmed receipt of the materials and that they had enough time to review them.

Based on the uncontested testimony, I find the landlord served the materials in accordance with section 89(1) of the Act.

The tenants did not serve their response evidence.

Rule of Procedure 3.15 states:

> The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Except for evidence related to an expedited hearing (see Rule 10) and an additional rent increase for capital expenditures application (see Rule 11), and subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

I excluded the tenants' response evidence, per Rule 3.15.

Issues to be Decided

Is the landlord entitled to:

1. a monetary order for loss?
2. an authorization to retain the deposit?
3. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlord's obligation to present the evidence to substantiate the application.

Both parties agreed they entered into a fixed-term tenancy from June 15, 2021 to June 30, 2022. Monthly rent was $2,200.00, due on the first day of the month. The landlord collected a deposit in the amount of $1,100.00 at the outset of the tenancy and currently holds it in trust. The tenancy agreement was submitted into evidence. It indicates:

> If the tenant terminates the tenancy before the end of the original term, the Landlord may, at the Landlord's option, treat this Agreement at an end and in such event the sum of $1,100.00 shall be paid by the Tenant to the landlord as liquidated damages and not as a penalty. The payment by the Tenant of the said liquidated damages to the landlord is agreed to be in addition to any other right or remedies available to the Landlord.

The tenants vacated the rental unit on May 30, 2022.

The tenant testified that she did not sign the move out inspection because the landlord did not provide a copy of the move in inspection. The landlord does not know if a copy of the move in inspection was provided to the tenants.

Both parties agreed the tenants served and the landlord received the forwarding address in writing on May 30, 2022. The tenants did not authorize the landlord to retain the deposit.

Both parties agreed the tenants served notice to end tenancy via email on March 28, 2022 indicating the tenancy will end on May 30, 2022.

The landlord's application states: "Amount requested: $1,100.00. Tenant broke the lease, which end on June 30, 2022"

The landlord is seeking a monetary order in the amount of $1,100.00 for liquidated damages.

The tenant said that things happen in life and the tenants needed to move out before the end of the fixed-term tenancy. The tenants acted in good faith.

Analysis

Section 7 of the Act states:

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

Residential Tenancy Branch (RTB) Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> 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 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.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove the case is on the person making the claim.

Inspection and deposit

Section 23 of the Act states:

(1)The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.
[…]
(4)The landlord must complete a condition inspection report in accordance with the regulations.

Regulation 18 states:

(1)The landlord must give the tenant a copy of the signed condition inspection report.
(a)of an inspection made under section 23 of the Act, promptly and in any event within 7 days after the condition inspection is completed, and
(b)of an inspection made under section 35 of the Act, promptly and in any event within 15 days after the later of
(i)the date the condition inspection is completed, and
(ii)the date the landlord receives the tenant's forwarding address in writing.
(2)The landlord must use a service method described in section 88 of the Act [service of documents].

Based on the tenant’s undisputed testimony, I find the landlord did not give a copy of the move in inspection to the tenants. I find the landlord failed to comply with Regulation 18.

Section 24 of the Act states:

> (2)The right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord
> […]
> (c)does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

I find the landlord extinguished her right to claim against the deposit, per section 24(c) of the Act, as the landlord did not give the tenants a copy of the move in report when the tenancy started.

Section 38(1) of the Act requires the landlord to either return the tenant's deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

The tenants provided their forwarding address in writing on May 30, 2022. The landlord retained the deposit and submitted this application on June 10, 2022.

RTB Policy Guideline 17 is clear that the arbitrator will double the value of the deposit when the landlord has not complied with the 15 day deadline; it states:

> B. 10. The landlord has 15 days, from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to return the security deposit plus interest to the tenant, reach written agreement with the tenant to keep some or all of the security deposit, or make an application for dispute resolution claiming against the deposit.
> […]
> 11. If the landlord does not return or file for dispute resolution to retain the deposit within fifteen days, and does not have the tenant's agreement to keep the deposit, the landlord must pay the tenant double the amount of the deposit.
> […]
> Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:
> -if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;
> -if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;

In accordance with section 38(6)(b) of the Act, as the landlord extinguished her right to claim against the deposit and did not return the deposit within the timeframe of section 38(1) of the Act, the landlord must pay the tenant double the amount of the deposit.

According to the deposit interest calculator (available at http://www.housing.gov.bc.ca/rtb/WebTools/InterestOnDepositCalculator.html), the interest accrued on the deposit is $3.17.

Under these circumstances and in accordance with section 38(6)(b) of the Act, I find the tenants are entitled to a monetary award of $2,203.17 (double the deposit of $1,100.00 plus the interest accrued).

Liquidated damages

I accept the uncontested testimony that the tenants moved out on May 30, 2022. I find the tenancy ended on May 30, 2022, per section 44(1)(d) of the Act.

The tenancy agreement provides for liquidated damages of $1,100.00 if the tenant ends the tenancy before the end of the fixed-term.

RTB Policy Guideline 4 states the following about 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.
>
> (emphasis added)

In this matter, I find that $1,100.00 is a reasonable pre-estimate of the cost of re-renting the property and I do not find that this provision is a penalty, as this amount is only half of the monthly rent. Accordingly, I find that the liquidated damages clause is valid.

The tenants ended the tenancy early. Accordingly, I award the landlord $1,100.00 in liquidated damages.

Filing fee, summary and set-off

As the landlord was successful, I award the recovery of the filing fee paid for this application in the amount of $100.00.

In summary, the landlord is awarded $1,200.00 and the tenants are awarded $2,203.17.

RTB Policy Guideline 17 sets guidance for a set-off when there are two monetary awards:

> 1. Where a landlord applies for a monetary order and a tenant applies for a monetary order and both matters are heard together, and where the parties are the same in both applications, the arbitrator will set-off the awards and make a single order for the balance owing to one of the parties. The arbitrator will issue one written decision indicating the amount(s) awarded separately to each party on each claim, and then will indicate the amount of set-off which will appear in the order.
> 2. The Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord.

Thus, the tenants are awarded $1,003.17.

Conclusion

Pursuant to section 38 of the Act, I grant the tenants a monetary order in the amount of $1,003.17.

The tenants are provided with this order in the above terms and the landlords must be served with this order. Should the landlords fail to comply with this order, this 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: February 24, 2023

Residential Tenancy Branch