Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

On August 9, 2022, the Landlords applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the "*Act*"), seeking to apply the security deposit towards these debts pursuant to Section 38 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

N.S. attended the hearing as an agent for the Landlords, and both Tenants attended the hearing as well. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

N.S. advised that each Tenant was served a Notice of Hearing package on August 25, 2022, by registered mail, and Tenant P.S. confirmed that these packages were received. As well, she submitted that the Landlords' evidence was served to the Tenants by email on April 18, 2023, despite not having written consent to exchange documents in this manner. The Tenants confirmed that they eventually received this evidence, that they had reviewed it, and that they were prepared to respond to it. As such, I am satisfied that the Tenants were sufficiently served the Landlords' Notice of Hearing and evidence packages. Despite this evidence being served so late, as the Tenants were prepared to respond to it, I have accepted all of the Landlords' evidence and will consider it when rendering this Decision.

P.S. advised that their evidence was served to the Landlords by email on May 1, 2023, despite not having written consent to exchange documents in this manner. He testified that this was done so late because they forgot about the date of the hearing. N.S.

confirmed that this evidence was received, that she had reviewed it, and that she was prepared to respond to it. Despite this evidence being served so late, as N.S. was prepared to respond to it, I have accepted the Tenants' evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Are the Landlords entitled to a Monetary Order for compensation?
- Are the Landlord entitled to apply the security deposit towards these debts?
- Are the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on February 22, 2022, as a fixed term tenancy ending on February 28, 2023. However, the tenancy ended when the Tenants gave up vacant possession of the rental unit on July 31, 2022. Rent was established at $5,500.00 per month and was due on the first day of each month. A security deposit of $2,750.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence for consideration.

They also agreed that the Tenants provided their forwarding address by writing it on the move-out inspection report on July 31, 2022.

N.S. submitted that the Landlords are seeking compensation in the amount of **$2,750.00** for the cost of liquidated damages because the Tenants ended the fixed term tenancy early. She referenced the addendum to the tenancy agreement, which indicated that the liquidated damages clause was noted and agreed upon as "half of 1 month's rent". When she was asked to explain how this amount was calculated as a genuine pre-estimate of loss, she stated that her company simply charges their customers half of a month's rent for liquidated damages for every rental unit that they are hired to manage. Other than testifying that this amount covered "administrative costs", she could not provide any specific information about what actions were taken to justify this amount as a genuine pre-estimate of loss.

The Tenants made submissions about why they believed they were justified in ending the tenancy early; however, these reasons were not relevant as they acknowledged that they did not end the tenancy due to a breach of a material term. Tenant H.B. then advised that there was only one viewing of the rental unit that was conducted, and that the unit was rented to this person for August 1, 2022.

N.S. confirmed that there was only one viewing and that this tenant still lives in the rental unit. She then stated that her company has a “strong marketing platform” and that multiple applications were processed; however, she did not know specifically how many were completed. As well, she testified that there was minor repainting and touch ups that were completed in the rental unit.

She then advised that the Landlords are seeking compensation in the amount of **$33.50** for the cost of two credit checks that were completed for the two prospective tenants that had applied to rent the unit. While this was noted in the addendum as an additional charge, she could not explain how this amount was separate from the liquidated damages amount that would account for the Landlords’ genuine pre-estimate of loss when trying to re-rent a unit.

The Tenants did not have any submissions with respect to this issue.

Finally, N.S. advised that the Landlords are seeking compensation in the amount of **$200.00** for the cost of a move-out fee that the Landlords had already paid for. However, she did not submit any documentary evidence to substantiate the claim that the Landlords actually paid this amount. Furthermore, she testified that the Tenants agreed to the bylaws when they signed the Form K, that the bylaws were provided to the Tenants at the start of the tenancy, and that it is her belief that the bylaws indicated that this amount was required to be paid by the Tenants. However, she was not entirely sure that this was specifically stated in the bylaws, and a copy of the bylaws were not submitted as documentary evidence for consideration.

P.S. advised that they paid a $200.00 deposit to the building concierge upon move-in, and that this was refunded to them after it was determined that there was no damage caused by them. As well, he testified that they also paid a $200.00 deposit to the building concierge upon move-out, and that this was also refunded to them after it was determined that there was no damage caused by them. He confirmed that they received a copy of the bylaws at the start of the tenancy, but he could not recall if there was any amount indicated that was required to be paid as a move-in or move-out fee.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the

following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 38 of the *Act* outlines how the Landlords must deal with the security deposit at the end of the tenancy. With respect to the Landlords' claim against the Tenants' security deposit, Section 38(1) of the *Act* requires the Landlords, within 15 days of the end of the tenancy or the date on which the Landlords receive the Tenants' forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlords to retain the deposit. If the Landlords fail to comply with Section 38(1), then the Landlords may not make a claim against the deposit, and the Landlords must pay double the deposit to the Tenants, pursuant to Section 38(6) of the *Act*.

Based on the consistent and undisputed evidence before me, the Landlords received the Tenants' forwarding address on July 31, 2022. Furthermore, the Landlords made an Application, using this same address, to claim against the deposit on August 9, 2022. As the Landlords made this Application within 15 days of receiving the Tenants' forwarding address in writing, I am satisfied that the doubling provisions do not apply in this instance.

With respect to the Landlords' claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

Regarding the Landlords' claim for compensation in the amount of $2,750.00 for the costs associated with re-renting the unit after the Tenants broke the fixed term tenancy, I am satisfied that the Landlords included a charge for liquidated damages in the tenancy agreement that both parties agreed to. Policy Guideline # 4 states that 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" and that the "amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into". This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- 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.

Moreover, this Policy Guideline states that “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.”

While N.S. attempted to outline the efforts made to re-rent the unit, I find it important to note that this amount is meant to be calculated as a genuine pre-estimate of the Landlords’ loss to do so. However, she could not provide any details for what specific efforts were taken to substantiate this amount as being a genuine pre-estimate. As well, given that she acknowledged that her company simply charges half a month’s rent for liquidated damages for every tenancy, I find that this further supports a conclusion that this clause is not a genuine pre-estimate of loss. It is apparent that little thought was actually put into what would be considered a genuine pre-estimate of loss, as this amount was simply chosen as it happened to be conveniently equivalent to the amount of the security deposit.

Ultimately, I find that the amount of liquidated damages noted on the tenancy agreement constituted a penalty, and I dismiss this claim in its entirety.

With respect to the Landlords’ claim for compensation in the amount of $33.50 for the cost of two credit checks, it is not clear to me why these fees would not be considered under a claim for liquidated damages. In my view, these would clearly be related to the Landlords’ efforts to re-rent the unit. Given that it is evident that the Landlords’ put little effort into their tenancy agreement with respect to outlining liquidated damages, I am satisfied that this claim, if anything, should have been incorporated as a cost under the liquidated damages amount. As such, I dismiss this claim without leave to reapply.

Finally, regarding the Landlords’ claim for compensation in the amount of $200.00 for the cost of a move-out fee, I note that the Landlords have not submitted any documentary evidence to substantiate that they actually paid this amount. Furthermore, there has been no documentary evidence provided to corroborate that the bylaws indicated that this amount was permitted to be charged to the Tenants. As I am not satisfied that the Landlords have provided sufficient evidence to establish this claim, this is also dismissed in its entirety.

As the Landlords were not successful in these claims, I find that the Landlords are not entitled to recover the $100.00 filing fee paid for this Application.

Conclusion

Based on the above, the Landlords’ Application is dismissed without leave to reapply.

Furthermore, the Tenants are provided with a Monetary Order in the amount of **$2,750.00** for the return of their security deposit. The Landlords must be served with **this Order** as soon as possible. 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: May 3, 2023

Residential Tenancy Branch