Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **MNRL-S, MNDL-S**

Introduction

This hearing dealt with the Landlord's application pursuant to the *Residential Tenancy Act* (the "Act") for:

1. An Order for the Tenant to pay to repair the damage that they, their pets or their guests caused during their tenancy – holding security and/or pet damage deposit pursuant to Sections 38 and 67 of the Act; and,
2. A Monetary Order to recover money for unpaid rent – holding security and/or pet damage deposit pursuant to Sections 26, 38, 46 and 67 of the Act.

The hearing was conducted via teleconference. The Landlord, his Agent, the Agent's Assistant, and one Tenant attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

The Landlord testified that they served the Tenants with the Notice of Dispute Resolution Proceeding package and evidence on April 26, 2023 by Canada Post registered mail (the "NoDRP package"). The Landlord also served the Tenants with the NoDRP package by email on April 26, 2023. The Landlord referred me to the Canada Post registered mail receipt with tracking number submitted into documentary evidence as proof of service. I noted the registered mail tracking number on the cover sheet of this decision.

The Tenants confirmed receipt of the Landlord's registered mail NoDRP package on April 28, 2023. The Tenant stated that the Landlord's email message on April 26, 2023 only included his evidence and not the notice for this hearing date. I find that the Tenants were sufficiently served with the NoDRP package on April 28, 2023 in accordance with Section 71(2)(b) of the Act.

The Tenants served their evidence on the Landlord by email on April 25, 2023. The parties have a signed form #RTB-51 – Address for Service. The Landlord confirmed receipt of the Tenants' evidence. I find that the Tenants' evidence was deemed served on the Landlord on April 28, 2023 pursuant to Sections 43(1) and 44 of the *Residential Tenancy Regulation*.

Issues to be Decided

1. Is the Landlord entitled to an Order for the Tenant to pay to repair the damage that they, their pets or their guests caused during their tenancy – holding security and pet damage deposit?
2. Is the Landlord entitled to a Monetary Order to recover money for unpaid rent – holding security and pet damage deposit?

Background and Evidence

I have reviewed all written and oral evidence and submissions presented to me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on January 4, 2022. The fixed term was to end on January 31, 2024. Monthly rent was $4,400.00 payable on the first day of each month. A security deposit of $2,200.00 and a pet damage deposit of $2,200.00 were collected at the start of the tenancy and are still held by the Landlord.

The Landlord stated the tenancy ended when the Tenants abandoned the rental unit in July 2022. The Tenants argued that the tenancy ended when the Landlord illegally changed the locks on the rental unit on July 4, 2022.

The Landlord is seeking compensation for the physical damage done to the rental unit, unpaid rent, and liquidated damages. He testified that the root cause of the damage was due to the Tenants smoking on the premises. The Landlord's Agent sent an email to the Landlord about the extent of damage done to the rental unit. The Landlord's claims are:

ITEMS	AMOUNT
Housecleaning	$1,080.00
Locksmith-change locks	$582.82
Plumbing fixtures	$1,137.08
Lightbulbs	$422.76
Painting	$2,494.71
Hardware store supplies	$328.82
Cleaner-shower	$80.00
Carpets	$420.00
Rescreening door	$101.42
July rent	$4,400.00
Liquidated damages	$2,200.00
TOTAL:	$13,247.61

The Landlord uploaded receipts for the proposed work done.

The Tenants seek the return of double their deposits with interest.

On June 14, 2022, an Arbitrator granted the Landlord an early end of tenancy and an Order of Possession for the rental unit (previous file number is on the cover sheet of this decision). The Tenants continued to reside in the rental unit, and they requested a review of this decision. The review was denied because the Tenants did not apply in time.

The Tenants applied for a judicial review of the June 14, 2022 decision and order. On June 24, 2022, the Tenants were granted an Interim Stay Order for the June 14, 2022 decision and order until the determination of the judicial review. On June 25, 2022, the Tenant messaged the Landlord asking where she could meet him to serve the Court's Interim Stay Order. The Landlord told the Tenant that he was currently out of the country, and she would need to send the Interim Stay Order by registered mail.

The Landlord said on July 2, 2022 he received a telephone call from a neighbour telling him that the front door of the rental unit had been open for some time. The Landlord did not call the neighbour as a witness for this matter. The Landlord went to the rental unit, and stated there was no furniture inside the home.

The Tenant testified that the door to the rental unit was not left open. She maintained that she had moved some of her heavy furniture out of the rental unit and put it into storage, but they still had some of their personal belongings in the rental unit and they were still living there. She said the unit was not abandoned. The Tenant explained that they chose to move some of their items out of the rental unit because they were unsure if the Order of Possession would be upheld on judicial review.

On July 4, 2022, the Landlord had the locks changed on the rental unit. The Landlord uploaded a receipt for this lock change.

The Tenant submitted because of the lock change, they were prevented their opportunity of cleaning the rental unit, or repairing the outstanding damage.

On July 12, 2022, the parties conducted a move-out condition inspection. The Tenant testified that there was shouting and name calling between the parties. Because the Landlord talked about missing lightbulbs, and plumbing fixtures as part of his claim, the Tenant stated on the day of the condition inspection she informed the Landlord where he could find the missing lightbulbs, and plumbing fixtures in the garage. On July 27, 2022, the Landlord's Agent emailed the Tenants a copy of the completed move-out condition inspection report.

The Landlord argued he is entitled to liquidated damages because the Tenants abandoned the rental unit and breached the fixed-term tenancy agreement by causing it to end prior to the end of the fixed term.

The tenancy agreement included a liquidated damages clause. It states:

> 1) The tenant(s) agrees to pay to the Landlord, the sum of $2200.00 as liquidated damages, and not as a penalty, to cover the administration costs of re renting the said premises as well as pay for the advertising costs incurred should the tenant move before the end of the fixed term tenancy. The landlord and tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damages to the said premises and damages as a result of rental income due to the tenant's breach of the terms of this agreement. The tenant(s) agree by evidence of signatures below that these funds be deducted from the deposit;

The Landlord's Agent testified that he charges the Landlord a half month's rent, as a fee for his service, to find new tenants. When this Agent does not manage a property, the practice is to charge one month's rent to find new tenants. In the Landlord's case, the Agent was managing his property, so the liquidated damages are set at half a month's rent because they have a monthly management fee. The Agent found new tenants for the Landlord's rental property whose tenancy began on August 1, 2022.

On April 24, 2023, the Tenants mailed written notices of their forwarding address to the Landlord and his Agent.

Analysis

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 their case is on the person making the claim.

I accept that the Tenants received, on June 24, 2022, an Interim Stay Order from the Supreme Court of British Columbia (the "BCSC") for the June 14, 2022 RTB decision and order. The Tenant alerted the Landlord of the Interim Stay Order on June 25, 2022.

The Landlord did not bring the neighbour who he testified told him that the door of the rental unit was left open. The Tenant stated the door was not left open. I find the Landlord has not substantiated his claim that the rental unit had been abandoned.

The Tenants had moved some of their heavy furniture out of the rental unit, but she said they still had some of their personal property in the rental unit. She stated they were still living in the rental unit. Although the Tenants were in the process of vacating, I do not find that they had fully vacated the rental unit.

I accept the Landlord was aware there was a BCSC Interim Stay Order on July 4, 2022 when he changed the locks on the rental unit. I find the Landlord breached Section 31 of the Act as he did not have a writ of possession.

The Tenants had an Interim Stay Order for the June 14, 2022 Order of Possession, so the tenancy had not legally ended. The Landlord's illegal lock change had the impact of removing the Tenants, and I find their tenancy ended, albeit illegally, on July 4, 2022 according to Section 44(1)(f) of the Act.

Liability for not complying with this Act or a tenancy agreement

7 *(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.

RTB Policy Guideline #16-Compensation for Damage or Loss addresses the criteria for awarding compensation to an affected party. This guideline 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.*" This guideline must be read in conjunction with Sections 7 and 67 of the Act.

Policy Guideline #16 asks me to analyze 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.

Due to the Landlord's illegal lock change, the Tenants were not given an opportunity to clean the rental unit. I do not find that the Tenants failed to comply with the Act, Regulation, or tenancy agreement. I find the Landlord's actions, changing the locks in breach of the Act, were not reasonable to minimize the damage and loss he claimed in his application as required under Section 7(2) of the Act. I dismiss the Landlord's claim for monetary compensation for cleaning and repair.

The Landlord sought compensation for July's rent. The Landlord is entitled to payment for rent for July 1, 2023 to July 3, 2023. I grant the Landlord **$425.81** ($4,400.00 * 3 days/31 days) for this unpaid rent.

RTB Policy Guideline #4-Liquidated Damages ("PG#4") is intended to provide a statement of the policy intent of the Act. A liquidated damages clause is defined as, "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." 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.

PG#4 notes that a liquidated damages clause will be found to be valid if: the sum demanded is not 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; or, 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. Of note is:

> *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.* (emphasis mine)

The liquidated damages clause states, "The tenant(s) agrees to pay to the Landlord [liquidated damages] should the tenant move before the end of the fixed term tenancy. … The tenant(s) agree by evidence of signatures below that these funds be deducted from the deposit." The Tenants signed this part of the tenancy agreement.

The Landlord's Agent submitted because he is managing the rental property, their agreed liquidated damages clause is half a month's rent. He stated this is their fee for finding new tenants for their landlord clients. I find the liquidated damages clause is not penalty, but a genuine pre-estimate of the loss at the time the contract was entered into.

The liquidated damages clause is triggered by the Tenants leaving prior to the end of the fixed term tenancy. The Tenants were forced out of the rental unit by the Landlord illegally changing the locks. Because of the Landlord's flagrant violation of the Act, I find that the tenancy agreement's liquidation clause is not triggered. So, I dismiss the Landlord's claim for compensation for the liquidated damages for the rental unit.

Section 38(1) requires a landlord to return the security deposit and pet damage deposit in full or file a claim with the RTB against it within 15 days of the later of the end of the tenancy or the date the landlord receives the tenant's forwarding address in writing.

I find that the tenancy ended on July 4, 2022. The Tenant's forwarding address was provided to the Landlord in writing on April 24, 2023 and I find that the Landlord received this on April 26, 2023. The Landlord applied to withhold the deposits for unpaid rent and to repair damages done by the Tenants, their guests, or their pets to the rental unit on August 9, 2022.

RTB Policy Guideline #17-Security Deposit and Set off ("PG#17") assists parties to an application understand issues that are likely to be relevant. It states in part:

> **C. RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH DISPUTE RESOLUTION**
>
> 1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
>
>   - a landlord's application to retain all or part of the security deposit; or
>   - a tenant's application for the return of the deposit.
>
>   unless the tenant's right to the return of the deposit has been extinguished under the Act. <u>The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.</u> (emphasis mine)

The Tenants participated in move-in and move-out condition inspections, so I find the Tenants' right to the return of the deposits have not been extinguished under the Act.

The Landlord completed move-in and move-out condition inspections with the Tenants and did not extinguish his right to claim against the deposits. I find the Landlord complied with Section 38(1) of the Act, and the deposits will not be doubled, however, they must be returned to the Tenants.

The Landlord has authorization to retain the $100.00 application filing fee from the Tenants' deposits paid to start the previous application. Despite that the Tenants applied for a judicial review, I find the Landlord was successful in the previous application and is entitled to retain the **$100.00** application filing fee.

Pursuant to Section 38(1)(c) of the Act, the Tenants are entitled to a monetary order as follows:

ITEM	AMOUNT
Security deposit	$2,200.00
Pet damage deposit	$2,200.00
Deposit interest*	$28.68
…Less application filing fee from previous decision	-$100.00
…Less Rent for July 1-3, 2022	-$425.81
TOTAL MONETARY AWARD:	$3,902.87

*Deposit interest in 2022 was 0%, and interest in 2023 is 1.95%. Further to directions in PG#17, interest is calculated on the original security deposit amount, before any deductions are made, and it is not doubled. The total interest amount was calculated using the RTB Online Tools: Deposit Interest Calculator.

Conclusion

I dismiss the Landlord's claim for a monetary order for the Tenant to pay to repair damage to the rental unit.

I grant $425.81 to the Landlord recover rent for July 2022.

I grant a Monetary Order to the Tenants in the amount of $3,902.87. The Landlord must be served with this Order as soon as possible. Should the Landlord fail to comply with

this Order, this Order may be filed in the Small Claims Division of the Provincial Court of British Columbia 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 Act.

Dated: May 05, 2023

Residential Tenancy Branch