Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNSD MNDC FF
MNSD FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the Landlord and the Tenant.

The Landlord filed on February 08, 2013, seeking a Monetary Order for: damage to the unit, site or property; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; to keep all or part of the security and/or pet deposit; and to recover the cost of the filing fee from the Tenant for this application.

The Tenant filed on November 20, 2012, seeking a Monetary Order for: the return of double her security deposit; and to recover the cost of the filing fee for her application.

The parties appeared at the teleconference hearing, and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Should the Landlord be issued a Monetary Order?
2. Should the Tenant be issued a Monetary Order?

Background and Evidence

The Landlord submitted documentary evidence which included, among other things, copies of: the tenancy agreement and addendum; two estimates for repairs; photos of a damaged wall and chair rail; numerous e-mails between the parties; and two pictures of a blackberry phone displaying a text message.

The Tenant did not submit documentary evidence. She confirmed that she received a notice to pick up registered mail however; she has not had time to pick it up. She said she was aware that the registered mail contained the Landlord's evidence. She affirmed that she wished to proceed with today's hearing even though she has not seen the Landlord's evidence.

The following facts were not in dispute and were confirmed during this proceeding:

- The parties entered into a written fixed term tenancy that began on January 1, 2012 and was scheduled to end on December 31, 2012; and
- Rent was payable monthly in the amount of $1,150.00; and
- On December 15, 2011 the Tenant paid $575.00 as the security deposit; and
- On July 2, 2012 the Tenant provided the Landlord notice that she would be ending her tenancy effective August 31, 2012; and
- No move-in and no move-out condition inspection report forms were completed; and
- The rental unit was re-rented effective September 1, 2012.
- The Tenant provided an accurate forwarding address to the Landlord on October 18, 2012, after providing an incomplete address on October 5, 2012; and
- The parties confirmed that e-mail and text messaging was an agreed upon form of communication between them.

The Landlord has claimed one month's rent of $1,150.00 as liquidated damages as per section 11 of their tenancy agreement. He stated that the payment of liquidated damages was owed to him because the Tenant breached the tenancy agreement. He initially stated that it was a penalty to the Tenant for breaking the lease and later stated that it was not a penalty as it was just something he was owed in case there was a delay in getting another tenant. He confirmed there was no delay in getting a new tenant. The new tenant took occupancy on September 1, 2012.

The Landlord is also seeking $761.60 to repair, patch, prime, and paint an entire wall and chair rail in the living room. He stated this work is required due to damage caused

by the Tenant during her tenancy. The work has not been completed as of yet as he was awaiting the outcome of this hearing.

The Tenant confirmed that she installed the screws in the wall during her tenancy and that the resulting holes were not repaired. She denies causing damage to the chair rail and stated it was pre-existing damage.

The Tenant seeks the return of double her security deposit because the Landlord did not complete proper condition inspection report forms and did not return her deposit to her within 15 days as required. She did not give the Landlord permission to keep her deposit.

In closing, the Landlord confirmed he does not have the Tenant's permission to keep the deposit, he did not make application to keep the deposit before February 8, 2013, and he does not have an Order authorizing him to keep the deposit. He has not returned any portion of the deposit.

Analysis

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and
2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

Landlord's claim

The tenancy agreement provided for liquidated damages at section #11 as follows:

> *If the Tenant terminates the tenancy before the date specified in Clause4, then the Landlord shall charge and the Tenant agrees to pay the sum of $_____ as liquidated damages and such sum may be deducted from the security deposit or otherwise collected. Such payment shall release the Tenant from liability to pay rent for the balance of the term of this agreement. The Tenant agrees to give*

> *ones months notice, plus pay the equivalent of one months rent as liquidated damages* [sic].

The Landlord confirmed that he did not complete the sum amount with the Tenant which is located in the first sentence. He argued that he was seeking one month's rent as per the last sentence in section #11, as compensation for the Tenant breaking the lease. He initially called it a penalty and then changed his testimony to say it was not a penalty but compensation "in case" he was not able to re-rent the unit. The unit was re-rented effective September 1, 2012, and he did not lose rental income.

The *Residential Tenancy Policy Guideline # 4* provides that a liquidated damages clause is a clause in a tenancy agreement where the parties are to agree in advance on 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. When considering the sum of the liquidated damages the Dispute Resolution Officer will determine if the clause may be held to constitute a penalty which would render the clause unenforceable.

When reviewing the amount being claimed by the Landlord for liquidated damages I have considered the following: (1) the circumstances surrounding the signing of the tenancy agreement as there are no initials at clause 11 that would indicate the parties discussed liquidated damages; and (2) the fact that the amount the Tenant allegedly agreed to is left blank; and (3) the clause provides contradictory information as it states it could be for a pre-agreed amount (if completed) and it states the amount is one month's rent which could be automatically deducted from the security deposit which is a breach of the Act; and (4) there is no proof of what the actual cost was to re-rent the unit such as advertising costs or credit checks; and (5) the Landlord has not suffered a loss of rent as the unit was re-rented; and (6) the Tenant disputed this claim arguing that she provide the 1 month notice as required.

Based on the aforementioned I find the amount claimed for liquidated damages of $1,150.00 constitutes a penalty as it far exceeds a reasonable estimate of what it would cost to re-rent the unit; not to mention that clause 11 is unclear. This term breaches the *Residential Tenancy Act* because a tenancy agreement cannot include an automatic deduction from a security deposit. In this case, even if the Landlord had paid to advertise the unit rather than posting it for free on the internet, and he showed the unit to three prospective tenants, his costs would be far less than $1,150.00. Accordingly, I find the liquidated damages clause to be unenforceable and I dismiss the Landlord's claim for $1,150.00 without leave to reapply.

When a landlord fails to properly complete a condition inspection report, the landlord's claim against the security deposit for damage to the property is extinguished. Because the landlord in this case did not carry out move-in or move-out inspections or complete condition inspection reports, he lost his right to claim the security deposit for damage to the property. That being said, this does not prevent a Landlord from making a claim for compensation for damages; it simply means they cannot make application for dispute resolution to keep the deposit for damages.

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

In this case, the Landlord has the burden to prove damages occurred during the course of this tenancy. The Tenant disputes the claim for damage to the chair rail and argued it was pre-existing and was damaged prior to the start of her tenancy. Accordingly, in the absence of a move-in and move-out condition inspection report form, I find the Landlord provided insufficient evidence to prove the damage to the chair rail occurred during this tenancy.

The Tenant has confirmed that the damage to the wall caused by screw holes was caused during her tenancy. Accordingly, I find the Tenant has breached section 32(3) of the Act by leaving the rental unit with damage to the wall at the end of the tenancy.

Upon review of the quotes provided in evidence by the Landlord I find the amounts estimated to complete the work to be excessive. I make this finding in part because the quote appears to include a quote for work on more than one wall, including priming of an entire area greater than the holes, as well as repairs to chair rail(s). Furthermore, the work has not been completed and therefore I cannot consider charges for HST as the Province is reverting back to PST as of April 1, 2013. I accept that given the current color of paint that the entire wall will need to be repainted but only the holes need to be patched and primed.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations

> or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

As per the foregoing I find the Landlord has met the burden of proof for damages to one wall and I award him damages in the amount of **$175.00** which includes two hours of labour $110.00 (2 x $55.00) plus material costs inclusive of tax of $65.00.

The Landlord has been partially successful with their application; therefore I award partial recovery of the filing fee in the amount of **$25.00**.

Tenant's claim

The evidence supports the tenancy ended August 31, 2012, and the Landlord received the correct forwarding address on October 18, 2012. The Landlord has not returned any portion of the security deposit.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address the landlord must repay the security deposit, to the tenant with interest.

In this case the Landlord extinguished his right to make a claim against the security deposit and was therefore required to return the Tenant's security deposit in full no later than **November 2, 2012.**

Based on the above, I find that the Landlord has failed to comply with Section 38(1) of the *Act* and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and the landlord must pay the tenant double the security deposit.

Based on the aforementioned I find the Tenant has met the burden of proof to establish her claim and I award her double her security deposit plus interest in the amount of **$1,150.00** (2 x $575.00 + $0.00 interest).

The Tenant has succeeded with her application; therefore, I award recovery of the **$50.00** filing fee.

Monetary Order – Each party has been awarded monetary compensation which meets the criteria under section 72 of the *Act* to be offset against each other as follows:

Tenant's award ($1,150.00 + $50.00)	$1,200.00
LESS: Landlord's award ($175.00 + $25.00)	- 200.00
Offset amount due to the Tenant	**$1,000.00**

Conclusion

The Tenant has been issued a Monetary Order in the amount of **$1,000.00**. This Order is legally binding and must be served upon the Landlord. In the event that the Landlord does not comply with this Order it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

This decision is legally binding 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: February 27, 2013

Residential Tenancy Branch