



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Nacel Properties Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNR, MND, MNDC, FF

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. An Order to retain the security deposit – Section 38;
2. A Monetary Order for unpaid rent – Section 67;
3. A Monetary Order for damages to the unit – Section 67;
4. A Monetary Order for compensation – Section 67; and
5. An Order to recover the filing fee for this application - Section 72.

The Tenants and Landlord were each given full opportunity to be heard, to present evidence and to make submissions under oath

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Is the Landlord entitled to recovery of the filing fee?

Background and Evidence

The tenancy started on November 1, 2012 on a fixed term ending October 31, 2013. On July 11, 2013 the Tenants gave notice to end tenancy for July 31, 2013 and the tenancy ended on that date. Rent of \$1,100.00 was payable monthly and at the outset of the tenancy the Landlord collected \$550.00 as a security deposit.

The Landlord states that upon receiving the Tenants' notice the unit was immediately advertised on various online sites. The Landlord states that as the unit contained cockroaches and had to be treated three times each a week apart and as other units were available the Landlord was not able to obtain a new tenant until October 15, 2013. The Landlord states that they had to reduce the rent in order to fill the unit. The Landlord states that the Tenants did not inform the Landlords of the cockroaches until July 18, 2013. The Landlord states that it could be possible that the Tenants caused the cockroaches to be present. The Landlord claims \$1,100.00.

The Tenants state that the cockroaches were present in the unit at move-in. The Tenants submit that the presence of the cockroaches was reported to the previous management in December 2013.

The Landlord states that the tenancy agreement provides for liquidated damages. The Landlord claims \$550.00.

Analysis

The tenancy agreement provides that "if the Tenant terminates the tenancy before the end of the original term, the Landlord may, at the Landlord's option, treat this Tenancy Agreement at an end and in such event, the sum of \$550.00 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 rights or remedies available to the landlord." Given this provision, I find that the Landlord had an option to either claim the liquidated damages or treat the tenancy agreement as continuing and seek lost rental income. Although this provision appears to allow the Landlord to seek any other rights or remedies, given that the liquidated damages arise from the same act, the breach of a fixed term tenancy, I find that this part of the provision does not provide the right to claim both lost rental income and liquidated damages. As the Landlord did not treat the tenancy as an end and has pursued lost rental income, I find that the Landlord's choice results in the liquidated damages clause to be inoperable. I therefore dismiss this claim.

Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. In a claim for damage or loss under the Act, regulation or tenancy agreement, the party claiming costs for the damage or loss must prove, inter alia, that the damage or loss claimed was caused by the actions or neglect of the responding party, that reasonable steps were taken by the claiming party to minimize or mitigate the costs claimed, and that costs for the damage or loss have been incurred or established. Given the undisputed evidence that cockroaches were present in the unit, that other units were available to prospective tenants and considering the length of time it took to obtain a new tenant, I find on a balance of probabilities that the Landlord has failed to substantiate that the Tenants caused any loss of income. Although the Landlord suggests that the Tenants failed to report the infestation to the Landlord causing the Landlord to make repairs into the following month after the end of the tenancy, I accept the Tenant's more believable evidence that this was reported to the previous management. Accordingly, I dismiss the claim for lost rental income. As the Landlord's application has met with no success, I decline to award recovery of the filing fee and the Landlord's application is in essence dismissed.

As the Landlord still holds the Tenants' security deposit and has no right to retain any part of this deposit, I order the Landlord to return the security deposit of \$550.00 plus zero interest to the Tenants forthwith.

Conclusion

The Landlord's application is dismissed.

I grant the Tenant an order under Section 67 of the Act for **\$550.00**. If necessary, this order may be filed in the Small Claims 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: November 20, 2013

Residential Tenancy Branch

