Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Gordon Nelson Inc.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- authorization to obtain a return of all or a portion of her pet damage and security deposits (the deposits) pursuant to section 38; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that she received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on August 14, 2013. The female landlord (the landlord) testified that the landlords received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on August 21, 2013. Both parties also confirmed that they received one another's written evidence packages. I am satisfied that the parties served the above documents to one another in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, losses of rent or damages arising out of this tenancy? Is the landlord entitled to a monetary award for damage

arising out of this tenancy? Which of the parties are entitled to the tenant's deposits? Are either of the parties entitled to recover their filing fees from one another?

Background and Evidence

With the landlord's permission, the tenant moved into this rental unit on February 12, 2013, ahead of the scheduled March 1, 2013 commencement date for her one-year fixed term tenancy. Monthly rent was set at $1,400.00, payable in advance on the first of each month. The landlord continues to hold the tenant's $800.00 security deposit paid on or about May 15, 2012 and $500.00 security deposit paid on June 1, 2012, both from a previous tenancy in another building with this landlord.

The parties agreed that they participated in a joint move-in condition inspection on February 12, 2013, the results of which were outlined in the landlord's joint move-in condition inspection report of that date. No joint move-out condition inspection was conducted at the end of this tenancy. However, the landlord entered into written evidence a copy of a joint move-in condition inspection of the same rental unit with the next tenant who moved into these premises on August 1, 2013.

On July 27, 2013, the tenant sent an email to the landlord advising that she could no longer remain living in the rental unit because of her parents' health problems requiring her to stay on Vancouver Island. In that email, the tenant advised that she would be ending her tenancy by July 31, 2013. She apologized for the short notice given and noted that the landlord could keep her deposits. While the landlord acknowledged receiving the tenant's email, the parties agreed that the tenant did not put her notice to end this tenancy into writing, nor did she give the landlord signed written authorization to retain any portion of her deposits.

Shortly after the tenant notified the landlord that she would be vacating her rental unit by July 31, 2013, the landlord advised the tenant that one of the other tenants in this building was willing to take possession of her rental unit on August 1, 2013. The tenant assumed that the landlord's actions in finding another tenant mitigated their losses arising out of her early end to this tenancy before the scheduled February 28, 2013 end date for her tenancy. At this point, the tenant discontinued efforts she was making to pay her August 2013 rent and find someone to sub-let the rental unit from her for all or a portion of August. She testified that she never advised the landlord that she was considering this option.

The landlord entered written evidence and sworn testimony that they had to find someone to rent Unit 302 in this building, the smaller rental unit previously occupied by the new tenant they had located for the tenant's rental unit on the first floor of this

building. The landlord testified that the new tenant who took occupancy of the tenant's first floor rental unit is paying the same monthly rent, $1,400.00, as that paid by the tenant in her tenancy agreement. The landlord testified that the landlords were able to find a new tenant to take possession of Unit 302 as of August 15, 2013. They said that the monthly rent they receive from this new tenant in Unit 302 is $1,250.00, as opposed to the $1,300.00, they were previously receiving from the previous tenant in Unit 302.

The landlord's application for a monetary award of $2,075.00 included the following items listed in the Details of the Dispute section of their application:

Item	**Amount**
Loss of Rent for Unit 302 Arising out of the Tenant's Premature Ending of her Tenancy Agreement	$625.00
Liquidated Damages	700.00
Damage to Kitchen Cabinets and Fridge Doors	300.00
Painting	300.00
Cleaning	150.00
Total Monetary Order Requested	**$2,075.00**

The landlords subsequently entered written evidence revising the amounts noted above to request:

- $109.20 instead of $150.00 for cleaning;
- $325.00 instead of $300.00 for painting;
- $585.72 for the freezer door replacement; and
- $560.00 for advertising and showing of the apartment (in lieu of a claim for liquidated damages).

The landlords did not submit any amendment to their application for a monetary award, although the total of the amounts identified in their written evidence resulted in a request for $2,254.92, instead of $2,075.00 cited in their original application.

The tenant applied for a return of her two deposits, totalling $1,300.00. Both parties requested the recovery of their $50.00 filing fees from one another.

Analysis

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. I find that there is undisputed evidence that the tenant was in breach of her fixed term tenancy agreement because she vacated the

rental premises prior to the February 28, 2014 date specified in that agreement. As such, the landlord is entitled to compensation for losses incurred as a result of the tenant's failure to comply with the terms of their tenancy agreement and the *Act*.

There is undisputed evidence that the tenant did not pay any rent for August 2013, a portion of which was claimed by the landlord for loss of rent arising out of the tenant's failure to abide by the terms of her fixed tenancy agreement. Even in a periodic tenancy, a tenant must give a landlord notice to end a tenancy the day before the day in the month when rent is due. In this case, in order to avoid any responsibility for rent for August 2013 in a periodic tenancy, the tenant would have needed to provide her notice to end this tenancy before July 1, 2013. Section 52 of the *Act* requires that a tenant provide this notice in writing. From the above information, there is no doubt that the tenant contravened the requirements of the *Act* and her tenancy agreement by notifying the landlord by email on July 27, 2013 that she was intending to end her tenancy four days later.

Section 7(2) of the *Act* also places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss. In this case, I find that the landlord took swift action to reduce the tenant's exposure to losses by locating another tenant in a smaller unit, paying less monthly rent than the tenant, to take possession of this rental unit as of August 1, 2013. While this did not look after the problem of finding someone to take over Unit 302, the unit vacated by the new occupant of the tenant's first floor rental unit, it did have the effect of at least reducing the tenant's exposure to losses for the vacant Unit 302. The landlord also located a new tenant to take occupancy of Unit 302 by August 15, 2013. Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable to mitigate losses arising out of the tenant's early end to this tenancy. As such, I am satisfied that the landlord has discharged his duty under section 7(2) of the *Act* to minimize the tenant's exposure to losses.

Since the landlord subsequently located a tenant who took possession of Unit 302 as of August 15, 2013, I find that the landlord's actual loss in rent for that month arising out of the tenant's actions was $675.00 ($1,300.00 – (50% x $1,250.00) = $675.00). I therefore allow a monetary award in the landlord's favour in the amount of $675.00 for loss of rent arising out of the tenant's actions in ending this tenancy early.

Section 5 of the Residential Tenancy Agreement (the Agreement) reads in part as follows:

> ***Liquidated Damages****. …if the tenant provides the landlord with notice, whether written, oral or by conduct, of an intention to breach this Agreement and end the*

> *tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of $700 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated...*

The landlord has claimed loss of revenue for August 2013, as well as liquidated damages of $700.00 pursuant to the above-noted clause.

The tenant entered written evidence and sworn oral testimony regarding the landlord's claim for liquidated damages. She noted the following wording of Residential Tenancy Branch (RTB) Guideline 4 with respect to Liquidated Damages;

> *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.*

She alleged that the landlord's liquidated damages clause in her tenancy agreement is in fact a penalty. To support this assertion, the tenant entered into written evidence a copy of the Tenant Welcome Package provided to her at the commencement of her tenancy by the landlord. She noted that the section of this Package entitled "Notice to Vacate" specifically referred to the charge to tenants who end their tenancy within the initial lease period as "a lease termination penalty."

I find that the tenant has submitted convincing written evidence in the form of the landlord's own Tenant Welcome Package that the liquidated damages charge applied by the landlord is in fact a penalty. In accordance with Guideline 4 and sections 5 and 6 of the *Act*, I find that the landlord cannot enforce a provision of the Agreement that applies a penalty on the tenant. Despite this term being included in the Agreement, section 5 of the *Act* establishes that parties cannot contract out of the provisions of the *Act*. For these reasons, I dismiss the landlord's application to obtain a monetary award for liquidated damages without leave to reapply.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual

monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

In this case, the landlord testified that no repairs have been undertaken with respect to the alleged damage to the kitchen cabinets and refrigerator in this rental unit. The landlord was also unable to demonstrate that there has been a loss in income from this rental unit as the new tenant in the tenant's former rental unit is paying the exact same monthly rent as occurred during the tenancy under dispute. For these reasons, I dismiss the landlord's application for a monetary award for damage to the kitchen cabinets and refrigerator without leave to reapply.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. The joint move-in condition inspection report of February 12, 2013, entered into evidence by the landlord showed that the rental unit was in good condition at that time. The landlord entered sworn oral testimony and written evidence that the rental unit was recently renovated in November 2012, and was in very good condition when the tenancy began. However, no joint move-out condition inspection was conducted, and the condition inspection report submitted into written evidence by the landlord was conducted with the new tenant who took occupancy of the rental unit on August 1, 2013. The tenant maintained that she had to take a BC Ferry to participate in what she believed would be a joint move-out condition inspection on August 9, 2013. When she arrived, at considerable expense, she learned that the landlord had not made any arrangements with the new tenant of her former rental unit to inspect the condition of the rental unit. The landlord testified that she understood that the tenant was attending the rental property as a formality to sign off on the necessary documents and not to conduct a joint move-out condition inspection. The landlord's two representatives confirmed that they did not send any written request to conduct a final inspection of the rental premises. However, they noted that the timing of the tenant's notice to end this tenancy, her move from this rental unit, and the subsequent occupancy of the rental unit by the new tenant were all conducted in very tight time frames.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy. Section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

> ***36*** *(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord*
>
> > *(a) does not comply with section 35 (2) [2 opportunities for inspection],*
> >
> > *(b) having complied with section 35 (2), does not participate on either occasion, or*
> >
> > *(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...*

Since the landlord did not follow the requirements of the *Act* regarding the joint move-out condition inspection and inspection report, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is limited. Photographic evidence and sworn testimony from the tenant maintained that she left the rental unit in very good condition at the end of her tenancy. She testified that she spent 5 hours cleaning the rental unit. She said that she could not accept that the landlord needed to incur significant cleaning costs as her tenancy only lasted 5 months. She also testified that she created 4 small nail holes in the wall to hang pictures and the rental unit was left in very good condition.

Based on a balance of probabilities, I find that the landlord has not demonstrated to the extent necessary that damage occurred beyond that which would result from reasonable wear and tear. Without a valid joint move-out condition inspection, which the tenant clearly attempted to participate in, I find that the landlord is not entitled to any monetary award for cleaning or painting at the end of this tenancy. I dismiss these aspects of the landlord's claim for a monetary award without leave to reapply.

As both parties have been partially successful in their applications, I find that they are both entitled to recover their filing fees from one another. As their filing fees are the same amounts, these filing fees cancel each other out.

I allow the landlord to retain the monetary award of $675.00 issued in this decision from the $1,300.00 in deposits currently held by the landlord. I order the landlord to return the remaining $625.00 of the tenant's deposits, plus applicable interest, forthwith. No interest is payable over this period.

Conclusion

I issue a $625.00 monetary Order in the tenant's favour under the following terms, which allows the landlord to recover loss of rent in the amount of $675.00 from the tenant's deposits:

Item	**Amount**
Loss of Rent for Unit 302 Arising out of the Tenant's Premature Ending of her Tenancy Agreement	$675.00
Less Deposits ($800.00 + $500.00 = $1,300.00)	-1,300.00
Total Monetary Order	**($625.00)**

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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