Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNSD, MND, MNR, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the tenant's Application for Dispute Resolution, in which the tenant has requested a monetary Order for return of double the security deposit and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

The landlord applied requesting compensation for damage to the rental unit, unpaid rent, compensation for damage or loss under the Act and to recover the filing fee cost.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Matters

The landlord's application did not set out a sum that was claimed; a calculation of the claim was included with the evidence the tenant confirmed he received on December 4, 2013. From the evidence before me I determined that the landlord had made a claim totaling $2,095.00. The tenant confirmed his understanding of the claim.

The landlord's claim did not include any detailed calculation relating to damage to the rental unit or unpaid rent.

Issue(s) to be Decided

Is the tenant entitled to return of double the security deposit paid?

Is the landlord entitled to compensation for loss of August 2013 rent revenue and a rent levy?

Is either party entitled to filing fee costs?

Background and Evidence

The fixed term tenancy agreement commenced on April 1, 2013 and was to end on March 31, 2014. The parties agreed that rent in the sum of $1,095.00 was due on the last day of each month. A security deposit in the sum of $500.00 was paid. A copy of the tenancy agreement was supplied as evidence.

Condition inspection reports were not completed.

Term seventy-three of the tenancy agreement indicated:

> *"if the tenant moves out prior to the expiration of this Lease, a rerent levy of $1,000.00 will be charged to the tenant."*

There was no dispute that on July 6, 2013 the tenant issued notice ending the tenancy which was mailed to the landlord; the landlord confirmed receipt of that letter several days later. The tenant paid July rent owed and vacated on July 22, 2013.

The landlord confirmed that in early August he received the tenant's forwarding address and the key; sent via mail. The landlord said the tenant had given him verbal permission to retain the security deposit; the tenant said he had not given any permission.

The landlord placed ads in 2 local newspapers but was not able to do so immediately after receiving the tenant's notice, as the papers had been issued and would not be published again for a period of time. The landord could not recall the date he was able to place ads, but it was later in July 2013. No other efforts were made to advertise; the landlord said they live in a community where everyone uses the newspaper.

The landlord located new occupants effective September 1 2013. The landlord has claimed $1,095.00 for the loss of August rent revenue.

The landlord has claimed $1,000.00 as a re-rent levy; which represents the cost of the re-renting and the fact that the landlord had repaired the flooring.

Analysis

Section 38(1) of the Act determines that the landlord must, within 15 days after the later of the date the tenancy ends and the date the landlord received the tenant's forwarding address in writing, repay the deposit or make an application for dispute resolution claiming against the deposit. If the landlord does not make a claim against the deposit

paid, section 38(6) of the Act determines that a landlord must pay the tenant double the amount of security deposit.

The landlord confirmed that when he received the tenant's written forwarding address he failed to return the deposit as the tenant had given verbal agreement that the landlord could keep the deposit.

Section 38(4) of the Act provides:

> *A landlord may retain an amount from a security deposit or a pet damage deposit if,*
>
> > *(a) at the end of a tenancy, **the tenant agrees in writing** the landlord may retain the amount to pay a liability or obligation of the tenant, or*
> > *(b) after the end of the tenancy, the director orders that the landlord may retain the amount.*
>
> (Emphasis added)

I find, on the balance of probabilities, that there was no agreement the landlord could retain the deposit. In the absence of written agreement or an Order allowing the landlord tor retain the deposit, as required by the Act, I find that the landlord is holding a deposit in the sum of $500.00.

The amount of deposit owed to a tenant is also contingent on any dispute related to damages and the completion of move-in and move-out condition inspections. In this case there is no dispute related to damages as the landlord failed to supply any detailed calculation of a claim for damage. The monetary claim portion of the application submitted by the landlord did not have a sum included; there was a list contained in the evidence which did not reflect an amount for damage.

The landlord confirmed that a move-in condition inspection and move-out condition inspection were not completed and that the deposit has not been returned to the tenant. Therefore, as the landlord confirmed receipt of the tenant's written forwarding address in August 2013 and he did not claim against the deposit as part of his October 31, 2013 application, I find that the tenant is entitled to return of double the $500.00 deposit paid to the landlord.

In relation to the claim for loss of August 2013 rent revenue, section 7 of the Act provides:

Section 7 of the Act provides:

> ***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.***

(Emphasis added)

The landlord was given notice that the tenant was ending the tenancy, but waited until later in the month to begin any advertising. The landlord did not provide copies of ads or the specific dates ads may have been placed. The landlord did not place ads elsewhere in the community or seek out alternate means of advertising, such as use of popular internet web sites. The landlord did not post a notice on the rental unit or take any other immediate step to mitigate the loss he is claiming.

When the tenant ended the fixed term tenancy before the end of the fixed term he breached section 45 of the Act; he showed no evidence that the landlord had breached a material term of the tenancy. However, a breach of the Act by the tenant did not confer an automatic right of compensation to the landlord. The landlord was required to take steps to minimize the loss and to bring forward evidence of that effort. In the absence of any evidence of advertising by the landlord I find that the landlord has failed to prove he mitigated his claim for loss of revenue for the whole month of August.

I find, on the balance of probabilities that the landlord did advertise in the 2 local newspapers; this was not disputed by the tenant. I have also considered the tenant's responsibility to mitigate. Therefore, I find that the landlord's efforts to mitigate, combined with the tenant's failure to mitigate entitles the landlord to compensation in the sum of $547.50 for one-half of August rent revenue loss; from August 15 to 30, 2013. The landlord did not demonstrate sufficient effort to show that he made efforts to rent the unit effective August 1, 2013. Therefore, I find that the balance of the claim for loss of rent revenue is dismissed.

In relation to the claim for liquidated damages, I have considered Residential Tenancy Branch policy which suggests that liquidated damages must be a genuine pre-estimate of the loss at the time the contract is entered into; otherwise the clause may be found to constitute a penalty and, as a result, be found unenforceable.

Policy suggests that an arbitrator should determine if a clause is a penalty clause or a liquidated damages clause by considering whether the sum is a penalty. The sum can be found to be a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. Policy also suggests that generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

The landlord said that only newspaper advertising in 2 local papers could be carried out; there was no evidence that he sum included as a "rerent levy" reflected the actual cost that might be incurred for ads in two local newspapers. Further, the landlord has said that the levy reflected the cost of repairs completed. A landlord is required to make repairs to a rental unit, in accordance with section 32 of the Act. Repair costs have no relationship to what might have been intended as a liquidated damages clause.

The term included in the tenancy agreement is vague and fails to provide any detail as to what the "levy" actually means.

Section 6(3) of the Act provides:

> *3) A term of a tenancy agreement is not enforceable if*
> *(a) the term is inconsistent with this Act or the regulations,*
> *(b) the term is unconscionable, or*
> *(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

Therefore, as the "rerent levy" is not expressed in a manner that clearly communicates the rights and obligations of the tenant; I find that the term is not enforceable and that the claim for the "levy" is dismissed.

As each application has some merit the filing fee costs are set off against the other.

I find that the tenant has established a monetary claim, in the amount of $1,000.00; less the sum owed to the landlord; $547.50.

Based on these determinations I grant the tenant a monetary Order for $452.50**.** In the event that the landlord does not comply with this Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

I note that the landlord's tenancy agreement included terms which contradict the Act; the landlord was encouraged to seek out an agreement that complies with the legislation, such as the Residential Tenancy Branch form that is available on the internet or through a Service BC office.

Conclusion

The landlord is entitled to compensation in the sum of $547.50 for loss of rent revenue.

The balance of the landlord's claim is dismissed.

The tenant is entitled to double the $500.00 security deposit; less the sum owed to the landlord.

The filing fee costs are set off against each other.

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: December 13, 2013

Residential Tenancy Branch