Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Proline Management Ltd.
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 Tenant ECC (the tenant) under the *Residential Tenancy Act* (the *Act*). The landlord identified the tenant and her mother, Tenant KC, as respondents in the landlord's application for:

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

The tenant applied for:

- authorization to obtain a return of double the deposits for this tenancy 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, to call witnesses and to cross-examine one another. The landlord's male representative at this hearing (the landlord) confirmed that on November 18, 2013, the landlord received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on November 15, 2013. The tenant confirmed that both she and her mother had received a copy of the landlord's dispute resolution hearing packages sent by the landlord to the forwarding address provided by the tenant at the end of this tenancy by registered mail on January 3, 2014. The tenant testified that her mother was aware of this hearing. I am satisfied that both parties have been served with the dispute resolution hearing packages in accordance with the *Act*. As both parties also confirmed that they had received one

another's written evidence packages, I also find that these documents have been served to one another in accordance with the *Act*.

At the commencement of the hearing, the tenant confirmed that she had received a $262.50 cheque from the landlord as a partial return of her security deposit. The landlord testified that this cheque was sent to the tenant on November 15, 2013. The tenant gave undisputed sworn testimony that she has not yet attempted to cash that cheque, pending the outcome of this hearing.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, damage(s) or losses arising out of this tenancy? Is the tenant entitled to a monetary award for the return of a portion of her pet damage and security deposits? Is the tenant entitled to a monetary award equivalent to double the value of the security or pet damage deposits for this tenancy as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*? Are either of the parties entitled to recover the filing fees for their applications from one another?

Background and Evidence

This one-year fixed term tenancy commencing on April 1, 2013 was scheduled to end on March 31, 2014. Monthly rent as set in the written Residential Tenancy Agreement (the Agreement) was set at $1,525.00, payable in advance on the first of each month. On April 1, 2013, the tenant paid a $762.50 security deposit and a $762.50 pet damage deposit.

The landlord confirmed that the tenant's September 26, 2013 notice to end tenancy was received by the landlord. In that notice, the tenant advised that she was intending to end her tenancy early and vacate the rental premises by October 31, 2013. The parties agreed that the tenant paid all of her October 2013 rent and moved out of the rental unit on October 10, 2013, at which time she met with the landlord's female representative at this hearing (the female landlord) and surrendered all of her keys to the rental unit. As of October 10, 2013, the tenant had no further access to the rental unit.

The parties also agreed that the tenant paid all of the November 2013 rent for this rental unit. Although the tenant provided the landlord with a December 2013 rent cheque, this cheque was returned as NSF, and the landlord has been unable to obtain any rent from the tenant(s) for December 2013.

On April 1, 2013, both parties participated in a joint move-in condition inspection. On October 10, 2013, both parties participated in a joint move-out condition inspection.

The parties entered into written evidence copies of the female landlord's reports of these inspections. The copies of these reports varied as the female landlord testified that she added provisions to the tenant's signed Security Deposit Statement after the tenant signed that document on October 10, 2013.

The copy of the joint move-out condition inspection report signed by the tenant showed that the tenant gave her written agreement that the landlord could deduct the $762.50 pet damage deposit from the two deposits held by the landlord for this tenancy. While the tenant and her advocate maintained that the tenant signed this under duress and on the basis of an oral understanding between the female landlord and the tenant, both parties agreed that the tenant had given the landlord her written authorization to retain all of the pet damage deposit.

The copy of the joint move-out condition inspection report submitted into written evidence by the landlord included a liquidated damages charge that the female landlord inserted into this document after the tenant signed this document. She noted on the document that this $500.00 charge was "discussed verbally w tenant." She also modified the signed Security Deposit Statement by stroking out "0" for the agreed deduction from the security deposit and inserting "$500.00" as the amount of the agreed deduction from the security deposit. She also revised the final balance due at the bottom of the signed Security Deposit Statement by changing the agreed balance due of "$762.50" to "$262.50." At the hearing, the female landlord freely admitted that she had unilaterally changed the wording of the tenant's signed Security Deposit Statement as outlined above after the tenant had signed this portion of the joint move-out condition inspection report.

The tenant's application for a monetary award of $2,287.50 included a request for the following items:

Item	**Amount**
Return of Pet Damage Deposit	$762.50
Return of Double Security Deposit ($762.50 x 2= $1,525.00)	1,525.00
Total Monetary Order	**$2,287.50**

At that time, the tenant had not yet received the landlord's $262.50 cheque returning a portion of her security deposit.

The landlord's claim for a monetary award of $2,521.05 included the following items as outlined in the Monetary Order Worksheet attached to the landlord's application for dispute resolution:

Item	Amount
December 2013 Pro Rated Rent and NSF Fee	$612.92
Advertising Recovery	373.01
Credit Check Recovery	29.40
Tenant Turnover Fee	115.50
Rent Differential (3 months @ $25.00 per month = $75.00)	75.00
Carpet Cleaning	187.74
Estimated Cost to Replace Carpet Underpad	1,103.55
Light Bulb Replacement	6.88
BC Hydro – October 10, 2013 until December 13, 2013	17.05
Total Monetary Order Requested	**$2,521.05**

I note that the landlord's claim was in addition to the $500.00 already retained by the landlord from the tenant's security deposit for liquidated damages.

Both parties also applied for the recovery of their $50.00 filing fees.

Section 5 of the Agreement included the following provision for the payment of liquidated damages:

> ***LIQUIDATED DAMAGES.*** *If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the landlord to end the tenancy before the end of the term as set out in (B) above, or any subsequent fixed term, the tenant will pay to the landlord the sum of $500.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.*

The landlord said that the liquidated damages clause in the Agreement was intended to compensate the landlord for such costs as advertising, showing the rental unit and

processing rental applications. The landlord submitted receipts into written evidence to demonstrate that the actual costs of these activities totalled $517.91, very close to the $500.00 pre-estimate identified in the Agreement.

Analysis – Tenant's Application to Recover Deposits Pursuant to Section 38 of the Act

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposits in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposits. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposits, and the landlord must return the tenant's deposits plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the deposits (section 38(6) of the *Act*). With respect to the return of the deposits, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a deposit if "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."

In this case, although the landlord referred repeatedly to section 38 of the *Act* in his sworn testimony, I found his interpretation of the provisions of section 38 particularly puzzling. For example, at one point the landlord maintained that the tenant had not given her forwarding address in writing to the landlord. The tenant testified that her forwarding address is included below her signature on the Security Deposit Statement included in the joint move-out condition inspection report of October 10, 2013. Although the landlord agreed that the tenant's forwarding address where the female landlord returned a portion of the tenant's security deposit on November 15, 2013 was included in the signed joint move-out condition inspection report, he maintained that this address was placed on the document in the female landlord's handwriting and not the tenant's. The female landlord confirmed that she was the person who wrote the tenant's forwarding address on the joint move-out condition inspection report at the time of the joint move-out inspection as provided to her by the tenant.

At the hearing, I advised the parties of my finding that there was no merit whatsoever to the landlord's claim that the tenant had failed to comply with the requirement to provide her forwarding address in writing to the landlord because the female landlord and not the tenant had actually written the tenant's forwarding address on the joint move-out condition inspection report in the presence of the tenant at the time of the joint move-out condition inspection. I also note that the landlord's actions in sending a portion of the tenant's security deposit to her at the tenant's correct mailing address also confirms that the landlord had received the tenant's forwarding address. The lack of a forwarding

address for the tenant was not the reason that the landlord failed to abide by the provisions of section 38 of the *Act*.

Both of the landlord's representatives agreed that the female landlord had altered the tenant's signed Security Deposit Statement at some point after the tenant left the October 10, 2013 joint move-out condition inspection and surrendered her keys to the rental unit. The female landlord made this alteration to the tenant's signed statement authorizing the landlord to retain only the tenant's pet damage deposit without the tenant's signed agreement to add a $500.00 deduction for liquidated damages to the overall deduction from her deposits.

Tampering with and altering a signed statement is a very serious matter and one which is misleading, incorrect and has grave legal implications. While the female landlord may have believed that her understanding of her conversation with the tenant enabled her to arbitrarily change the terms agreed to in writing by the tenant, I find that there is no legal basis for the female landlord's alteration of the tenant's signed statement and agreement to let the landlord retain a portion of the deposits.

I have carefully considered the tenant's sworn testimony and the position taken by her advocate in claiming that the tenant only signed the Security Deposit Statement enabling the landlord to retain her pet damage deposit under duress. While the tenant maintained that she signed this statement under duress, the female landlord had a different perspective on their discussions at the joint move-out condition inspection. In fact, the female landlord maintained that the tenant had not only agreed to let the landlord retain all of the pet damage deposit, but entered written evidence that the tenant had made an oral agreement to let the landlord retain $500.00 for liquidated damages from the tenant's security deposit as well.

Under such circumstances, where there is disputed evidence of this type, I find that the best evidence of the parties' intention was the Security Deposit Statement that the tenant signed in which she agreed to let the landlord retain all of her pet damage deposit at the end of this tenancy, presumably for damage caused by her pet(s) during this tenancy. I do not find that the tenant has provided sufficient evidence to demonstrate that the tenant's signature on the Security Deposit Statement was provided under duress.

I note that RTB Policy Guideline 31 provides arbitrators with guidance regarding the interpretation of section 38(4)(a) of the *Act* in establishing that "at the end of a tenancy, if the tenant agrees in writing, the landlord may keep all or part of the pet damage deposit." I find that the landlord had the authority pursuant to section 38(4)(a) of the *Act*

to withhold the tenant's pet damage deposit as the landlord obtained the tenant's written agreement at the end of this tenancy to retain the tenant's pet damage deposit in full. As such, I dismiss the tenant's application to obtain a return of her pet damage deposit without leave to reapply.

I find that the landlord has not returned the tenant's security deposit in full within 15 days of receipt of the tenant's forwarding address in writing. There is no record that the landlord applied for dispute resolution to obtain authorization to retain any portion of the tenant's security deposit. The tenant gave undisputed sworn testimony that the landlord has not obtained her written authorization at the end of the tenancy to retain any portion of the tenant's security deposit.

In accordance with section 38 of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the value of her original security deposit with interest calculated on the original amount only. No interest is payable over this period. From this award is deducted the $282.50 already returned to the tenant on November 15, 2013. I make this deduction as the tenant confirmed that she continues to hold a negotiable cheque in that amount from the landlord. I order the tenant to cash this cheque in partial satisfaction of the monetary award issued in her favour.

As the tenant has been primarily successful in her application, I allow the tenant to recover her $50.00 filing fee from the landlord.

Analysis- Landlord's Application for a Monetary Award

The landlord entered written evidence and sworn testimony that this tenancy did not end until the landlord was successful in finding a new tenant(s) who took possession of the rental unit and commenced paying rent on December 13, 2013. However, both parties agreed that the tenant surrendered all of her keys to the rental unit and vacated the rental unit on October 10, 2013, at the end of the joint move-out condition inspection with the female landlord. As noted above, the female landlord arbitrarily withheld $500.00 from the tenant's security deposit for liquidated damages, which could only be undertaken in the event that the tenancy had ended.

Section 44 of the *Act* establishes when a tenancy agreement will end.

> ***How a tenancy ends***
>
> ***44*** *(1) A tenancy ends only if one or more of the following applies:*

> *(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:*
>
> *(i) section 45 [tenant's notice];...*
>
> *(d) the tenant vacates or abandons the rental unit;...*

In this case, there is undisputed evidence that the landlord received the tenant's notice to end tenancy by October 31, 2013, and the tenant surrendered vacant possession of the rental unit to the landlord on October 10, 2013. I find that this fixed term tenancy ended on October 10, 2013, when the tenant vacated the rental unit and breached the terms of her fixed term tenancy agreement.

The Agreement is a contract of adhesion drawn by the landlord. If the tenants wished to rent from the landlord they were obliged to accept the terms of the Agreement submitted by the landlord without modification. The liquidated damage clause must therefore be interpreted having regard to the legal doctrine of c*ontra proferentem.* This doctrine means that any ambiguity in the clause in question must be resolved in the manner most favourable to the tenants.

The liquidated damage clause provided that if the tenants ended the tenancy before the end of the term they will pay to the landlord the sum of $500.00, as liquidated damages and not as a penalty. I have considered RTB Policy Guideline 4 and find that the liquidated damages provision in the Agreement does not constitute a penalty under the *Act* and represents a genuine pre-estimate of the loss estimated by the breach of the contract at the time the contract was drafted. As noted above, the actual receipts confirmed the accuracy of the landlord's pre-estimate of the costs associated with finding new tenants.

The Agreement purported to exclude amounts owed such as unpaid rent or for damage to the rental unit, (emphasis added), but it did not exclude loss of revenue. I regard loss of revenue, which is future rent that is not then owed, but may become payable, to be distinguishable from unpaid rent that is owed when the tenant ends the tenancy.

In contract law the term "liquidated damages" refers to a genuine pre-estimate of the loss that will be suffered in the event of a breach of the contract. It is not used to describe some subset of damage that the landlord requires the tenant to pay, **in addition to** more general damages flowing from a breach of the contract.

In Elsley v. J.G. Collins Ins. Agencies, [1978] 2 SCR 916, Dickson J., speaking for the Court, described liquidated damages in the following terms:

> *It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression. If the actual loss turns out to exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever intimidating force the penalty clause may have in inducing performance, and then ignore the clause when it turns out to be to his advantage to do so. A penalty clause should function as a limitation on the damages recoverable, while still being ineffective to increase damages above the actual loss sustained when such loss is less than the stipulated amount. As expressed by Lord Ellenborough in Wilbeam v. Ashton[23]: "Beyond the penalty you shall not go; within it, you are to give the party any compensation which he can prove himself entitled to." Of course, if an agreed sum is a valid liquidated damages clause, the plaintiff is entitled at law to recover this sum regardless of the actual loss sustained.*
>
> *In the context of the present discussion of the measure of damages, the result is that an agreed sum payable on breach represents the maximum amount recoverable whether the sum is a penalty or a valid liquidated damages clause…*

In this case, the female landlord unilaterally altered a signed document, adding in her election to claim the liquidated damage amount, and arbitrarily withheld this amount from the tenant's security deposit. There is no doubt that the landlord initially opted to claim liquidated damages at the end of this tenancy. Months later and after having received the tenant's application for dispute resolution, the landlord applied for dispute resolution to add to the damages to be obtained from the tenant.

The landlord invoked the liquidated damages clause in the Agreement and elected to claim the liquidated damages amount shortly after this tenancy ended and possession of the rental unit was surrendered to the landlord. I find that by so doing the landlord has fixed the amount of damages to which the landlord is entitled at $500.00. The landlord's claims for additional amounts over and above the liquidated damages amount are dismissed without leave to reapply.

I have also considered the landlord's application for a claim for damage to the rental unit arising during the course of this tenancy. Although the landlord's ability to claim against the tenant's security deposit was extinguished by the landlord's failure to abide by the provisions of section 38 of the *Act*, the landlord is still at liberty to submit a claim for damage and loss arising out of specific damages or losses that may have been incurred

during the course of this tenancy. However, the applicant bears the burden of proof and must also provide evidence that can verify the actual monetary amount of the damage. The onus is also on the landlord, as applicant, 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 considering the landlord's application for a monetary award for carpet cleaning and for the estimated cost to replace the carpet underpad, I first note that the tenant has already agreed to allow the landlord to retain the tenant's $762.60 pet damage deposit, which would presumably have covered much of the damage the landlord has claimed. In addition, the only actual expense incurred by the landlord in this regard was the additional carpet cleaning of $187.74. Even now, almost four months after this tenancy ended and almost two months after a new tenancy began, the landlord has not replaced the carpet underpad claimed in the landlord's application for dispute resolution. In addition, the tenant testified that the carpet was old and the landlord's representatives had no information as to when the carpets in this rental unit were last replaced. Under these circumstances, I dismiss the landlord's application for a monetary award for carpet cleaning and for the estimated cost of replacing the carpet underpad without leave to reapply.

I also dismiss without leave to reapply the landlord's claim for hydro costs incurred from the period between the date this tenancy ended and when the premises were re-rented. I find that the landlord had no right to add these damages to the liquidated damages claimed and withheld from the tenant's security deposit.

The only award I make in the landlord's favour is the landlord's claim for $6.98 in light bulb replacements. I do so as the tenant did not dispute the landlord's claim in this regard and did not challenge the landlord's ability to claim for damage of this type at the end of the tenancy. I dismiss all remaining portions of the landlord's claim for dispute resolution without leave to reapply for the reasons outlined above.

As the landlord has been unsuccessful in most of this application, the landlord bears the costs of the landlord's filing fee.

Conclusion

I issue a monetary Order in the tenant's favour under the following terms, which allows the tenant to recover a monetary award equivalent to double the value of her security deposit and her filing fee, less the amount already returned to her from that deposit by the landlord and the landlord's recovery of a monetary award for light bulb replacement:

Item	Amount
Return of Double Security Deposit as per section 38 of the Act ($762.50 x 2 = $1,525.00)	$1,525.00
Less Returned Portion of Security Deposit	-262.50
Less Light Bulb Replacement	-6.98
Recovery of Tenant's Filing Fee for this Application	50.00
Total Monetary Order	**$1,305.52**

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: February 11, 2014

Residential Tenancy Branch