Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes:

Landlord's application filed December 20, 2013: MNSD; MNDC; FF

Tenant's application filed March 5, 2014: MNSD; MNDC; FF

Introduction

This Hearing was scheduled to consider cross applications. The Landlord's application filed December 20, 2013, sought a monetary award for unpaid rent and to apply the security deposit against its monetary award. On April 2, 2013, the Landlord amended its application, withdrawing its claim for loss of revenue for the months of January and February, 2014, and seeking compensation for damage or loss under the Act, regulation or tenancy agreement. The Landlord also seeks to recover the cost of the filing fee from the Tenant.

The Tenant seeks compensation for damage or loss under the Act, regulation or tenancy agreement and to recover the cost of the filing fee from the Landlord.

The parties gave affirmed testimony at the Hearing.

It was determined that the parties served each other with their Notice of Hearing documents and copies of their documentary evidence by registered mail. The Tenant also provided a USB stick, which the Landlord acknowledged receiving and that they were able to open it.

Issues to be Decided

- Is the Landlord entitled to a monetary award for the cost of shampooing the carpets; the cost of replacing a key and a fob; liquidated damages; and to apply the security deposit and remote control deposit towards partial satisfaction of its monetary claim?
- Is the Tenant entitled to return of the security deposit; compensation for loss of furniture; a rent reduction; cost of replacing a broken car window; and partial return of remote control deposit?

Background and Evidence

This was a one year term tenancy agreement, set to expire on August 31, 2014. Monthly rent was $1,375.00. The Tenant paid a security deposit in the amount of $687.50 at the beginning of the tenancy, and a remote control deposit in the amount of $100.00. The Tenant moved out of the rental unit on December 19, 2013. Initially, the Landlord had sought loss of revenue, but the Landlord's agents stated that the rental unit was re-rented effective January 1, 2014.

Regarding the Landlord's application:

The Landlord's agents stated that clause 23 of the tenancy agreement provided that the Tenant must have the carpets professionally cleaned or pay for professional cleaning at the end of the tenancy. The Landlord's agents stated that the Tenant did not have the carpets professionally cleaned and therefore, the Landlord seeks compensation in the amount of **$115.00** for the cost of having the carpets professionally cleaned. The Landlord provided a copy of the tenancy agreement and a copy of the "resident ledger" indicating the $115.00 carpet cleaning charge.

The Tenant stated that clause 23 only applied if the carpets were *professionally* cleaned at the beginning of the tenancy, which he denies. The Tenant stated that he only lived in the rental unit for 3 ½ months and the carpets were very clean when he moved out. The Tenant stated that the carpets were so clean that the Landlord's agent could not tell whether or not they had been shampooed and had to ask the Tenant.

The Landlord seeks **$100.00** for key and fob replacement: $25.00 for one unreturned key; and $50.00 for one unreturned fob. The Tenant agreed that he returned only one of the two sets of keys and fobs, but questioned the amount that the Landlord is seeking.

The Landlord seeks liquidated damages, pursuant to a clause in the tenancy agreement, in the amount of **$805.33**. The Tenant argued that this amount is more of a penalty than a genuine pre-estimate of the cost of re-renting the renal unit. The Tenant submitted that the Landlord's calculation (provided in evidence) is "highly inflated" and over-estimates the amount of times the rental unit would have to be shown; the length of each showing; the hourly rate ($45.00 per hour) paid to the Landlord's employee for showing the rental unit; and the amount of time required to screen applicants. In addition, the Tenant submitted that the Landlord's assessment of $433.33 for the Landlord's "general marketing efforts" is based on an average cost for all of the Landlord's properties and therefore cannot be a "genuine pre-estimate" of loss. The Tenant also argues that he ended the tenancy early because of the Landlord's breach

of the Act, and therefore it should not be entitled to liquidated damages because the Landlord "directly caused the breach to occur".

The Landlord's agents stated that the Landlord has 46 rental properties with over 4,000 suites and that it did a cost analysis based on its annual marketing budget plus the marketing department's cumulative salary and divided that amount by 12 months. An average turnover of 125 units per month at an average of 6 showings per unit gave them an estimate of the cost to re-rent the rental unit. The Landlord's agents submit that this is a genuine pre-estimate and not a penalty clause.

Regarding the Tenant's application:

The Tenant stated that the Landlord breached clause 27 of the tenancy agreement by renting him the rental unit when it knew, or ought to have known, that there were cockroaches in the rental unit when the Tenant moved in. The Tenant stated that the Landlord also failed to take sufficient steps to eradicate the cockroaches after the Tenant notified the Landlord's agents of the problem. The Tenant submitted that he is entitled to full refund of December's rent **($1,375.00**) and a retroactive rent adjustment of September, October and November, 2013 (an unspecified amount), due to the cockroach infestation.

The Landlord's agents denied that the rental unit was infested when the Tenant moved in. They stated that they acted quickly to get rid of the cockroaches once the Tenant notified them about pests. The Landlord's agents stated that the Tenant's own evidence indicated that the Tenant "could have brought them in" when he moved in. The Landlord's agents stated that the rental unit was treated three times and that only two roaches were found, twice. The Landlord's agents suggested that the second pair of cockroaches could have been the same ones discovered at an earlier treatment. The Landlord's agents testified that the rental unit was treated again after the Tenant moved out and that the new occupant has not sighted any cockroach activity.

The Tenant stated that he was afraid to bring some of his furniture with him when he moved because he was concerned that he might bring the cockroaches with him to his new place. He stated that he threw his couch, 2 side tables and a mattress and box spring cover away. The Tenant stated that the furniture was approximately 5 years old. The Tenant seeks a monetary award in the amount of **$500.00** for the couch, **$60.00** for the side tables, and **$95.95** for the covers.

The Landlord's agents disputed this portion of the Tenant's claim and stated that cockroaches are attracted to food and moisture and are not found in furniture. The

Landlord's agents suggested that the Tenant didn't find anything in the furniture and just decided to get rid of it.

The Tenant testified that his car window was broken by vandals while parked at the rental property. He stated that the Landlord did not take adequate security precautions and that he seeks to recover the cost of replacing the window, in the amount of **$217.62**.

The Landlord's agent stated that the parking agreement is separate from the lease agreement. They testified that there has been a rash of break-ins, not particular to the rental property, and that they have hired a security company to patrol the parking area.

Analysis

Section 7(1) of the Act states that if a landlord or tenant does not comply with the Act, regulations or tenancy Agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results from the breach. Section 67 of the Act provides me with authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Section 7(2) of the Act requires the party claiming compensation to do whatever is reasonable to minimize the damage or loss.

Therefore, to prove a loss and have a party pay for the loss requires the other party to satisfy four different elements:

1. Proof that the **damage or loss exists**,
2. Proof that the damage or loss occurred **due to the actions or neglect of the other party in violation of the Act, regulation or tenancy agreement**,
3. Proof of the **actual amount required to compensate** for the claimed loss or to repair the damage, and
4. Proof that the party followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

The onus is on the party making the claim to establish its claim on the civil standard, the balance of probabilities.

Regarding the Tenant's Application:

Section 44 of the Act provides the only ways that a tenancy can end in British Columbia.

Section 45 of the Act provides for ways that a tenant may end a tenancy. This was a term lease and therefore the Tenant could not end the tenancy before the end of the term unless he complied with Sections 45(3) and (4) of the Act. Section 45 of the Act, provides:

> **Tenant's notice**
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> **45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice, and
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> (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
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> (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice,
>
> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
>
> (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
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> (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.
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> (4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

In this case, the Tenant alleges that the Landlord did not comply with a material term of the tenancy agreement and did not correct the situation within a reasonable period after being given notice to do so. However, the Tenant did not provide evidence that he gave **notice in writing** that complied with the requirements of Section 52 of the Act. Furthermore, **I find that the Landlord acted within a reasonable period of time to rid the rental unit of cockroaches** and the Tenant did not provide sufficient evidence

that there was an infestation after the rental unit was treated**.** Therefore, the Tenant's application for a complete refund for December's rent is dismissed, and I find that the Tenant did not provide sufficient evidence to support a claim for a reduction in the value of the tenancy for the months of September, October and November, 2013.

With respect to the Tenant's claim for compensation regarding his furniture, I find that the Tenant did not provided sufficient evidence to prove parts 1, 2 or 3 in the test for damages as set out above. This part of his application is also dismissed.

Section 62 if the Act provides me the authority to determine disputes with respect to matters related to disputes that arise between landlords and tenants under the Residential Tenancy Act or a tenancy agreement. I find that any agreement between the parties with respect to parking fees is not a part of the tenancy agreement and is not under the jurisdiction of the Act and therefore I decline to accept jurisdiction with respect to this part of the Tenant's application.

Regarding the Landlord's Application:

Residential Tenancy Policy Guideline 1 provides the following with respect to carpet cleaning:

> **CARPETS**
> 1. At the beginning of the tenancy the landlord is expected to provide the tenant with clean carpets in a reasonable state of repair.
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> 2. The landlord is not expected to clean carpets during a tenancy, unless something unusual happens, like a water leak or flooding, which is not caused by the tenant.
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> 3. The tenant is responsible for periodic cleaning of the carpets to maintain reasonable standards of cleanliness. Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year. Where the tenant has deliberately or carelessly stained the carpet he or she will be held responsible for cleaning the carpet at the end of the tenancy regardless of the length of tenancy.
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> 4. The tenant may be expected to steam clean or shampoo the carpets at the end of a tenancy, regardless of the length of tenancy, if he or she, or another occupant, has had pets which were not caged or if he or she smoked in the premises.

In this case, the Tenant lived in the rental unit for 3 ½ months, and did not smoke or have a pet.

The Landlord stated that the carpets were professionally cleaned at the beginning of the tenancy and therefore the Tenant was required to have then professionally cleaned, or pay the cost, at the end of the tenancy pursuant to clause 23 of the tenancy agreement.

However, the Tenant disputed that the carpets were professionally cleaned at the beginning of the tenancy. The Landlord's agent BR was not able to provide certainty that the carpets were professionally cleaned after the Tenant moved out. BR stated that he was not sure because it was his day off, but that it was the Landlord's practice to shampoo the carpets. The tenant ledger indicates a fee of $115.00 for cleaning the carpet, but there is no invoice from, or proof of payment to, a professional carpet cleaning service. Therefore, I find that the Landlord has not provided sufficient evidence to support this part of its claim and it is dismissed.

Likewise, I find that the Landlord did not provide sufficient evidence of the cost to replace the key and the fob. I find that the amount claimed is high. However, the Tenant agreed that he had lost one key and one fob, and therefore I apportion the amount of $10.00 for replacing the key and $50.00 for replacing the fob, for a total award of **$60.00** for this portion of the Landlord's claim.

Policy Guideline 4 provides the following statement regarding "liquidated damages":

> A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance 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, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.
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> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
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> - A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
> - If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
> - If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.
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> If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. 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. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

In this case, the Tenant agreed to the liquidated damages clause when he signed the tenancy agreement. I do not find that the amount is extravagant in comparison to the

greatest loss that could follow a breach of the tenancy agreement. I do not find that the Tenant provided sufficient evidence that the Landlord breached clause 27 (Section 32 of the Act) and therefore directly caused the Tenant to breach the tenancy agreement. I find that **$805.33** is a reasonable and genuine pre-estimate of the cost of re-renting the rental unit. This portion of the Landlord's application is granted.

The Landlord has established a total monetary award of **$865.33**.

Regarding the security deposit, the remote control deposit and the filing fees:

I find that the Landlord's application had merit and therefore the Landlord is entitled to recover the cost of the **$50.00** filing fee from the Tenant. I find that the Tenant must bear the cost of his own filing fee.

The Landlord is holding a total amount of $787.50 in deposits. I hereby set off the security deposit against the Landlord's monetary award and provide the Landlord with a Monetary Order for the balance, calculated as follows:

Landlord's monetary award	$865.33
Recovery of the filing fee	$50.00
Less set off of deposits	<$787.50>
TOTAL	**$127.83**

Conclusion

The Tenant's application is **dismissed**.

I hereby provide the Landlord with a Monetary Order in the amount of **$127.83** for service upon the Tenant. This Order may be filed in the Provincial Court of British Columbia (Small Claims) 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: May 05, 2014

Residential Tenancy Branch