Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) 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 its filing fee for this application from the tenant 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 was represented by its agent.

Preliminary Issue – Evidence

The landlord submitted its evidence to the Residential Tenancy Branch on 24 September 2015. The landlord testified that she sent the tenant the first evidence package with the dispute resolution package in April 2015. The second package was sent 22 September 2015 by registered mail. The tenant testified that she received one package from the landlord and that it did not contain the two invoices.

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

> In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, qualified by the words “not less than”, the last day for the landlord to file and serve additional evidence was 15 September 2015.

This evidence was not served within the timelines prescribed by rule 3.14 of the Rules to the Branch and two of the pages were not submitted at all to the tenant. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, some of the evidence was received on time by the tenant and late by the Branch and other evidence was not received by the tenant and received late by the Branch. In respect of the first category of evidence as there is no prejudice to the tenant the evidence received late by the Branch is included; as the tenant has not received the evidence in the second category of evidence, that evidence is excluded.

The tenant did not submit any documentary evidence. The tenant stated that she was confused by the Residential Tenancy website and thought that she needed to file her own cross application to file evidence. The tenant stated that there were emails and text messages that she wished to submit. I informed the tenant that she could read in the emails and text messages.

The tenant asked if she could submit evidence after the hearing. The tenant was made aware of this hearing in early May. The tenant had over four months to inform herself of this Branch’s procedure. As such, I exercised my discretion to refuse to order evidence after the hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for loss arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent/parties, not all details of the submissions and / or arguments are reproduced

here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 19 July 2014. The parties entered into a written tenancy agreement on 16 July 2014 for a fixed term ending 31 July 2015. Monthly rent of $1,000.00 was due on the first. The landlord continues to hold the tenant's security deposit in the amount of $500.00, which was collected at the beginning of the tenancy. The tenant vacated the rental unit on 31 March 2015.

I was provided with a copy of the tenancy agreement. Clause 6 of the agreement contains the liquidated damages clause:

> 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 $1,000.00 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 further rental revenue losses that will remain unliquidated.

Clause 49 of the tenancy agreement sets out that the tenant is responsible for professional carpet cleaning at the end of the tenancy.

The agent testified that the liquidated damages clause represents the landlord's average cost of rerental. The corporate management company is paid 50% of one month's rent to find a new tenant. The landlord also incurred costs of making credit cheques, filling out the "Form K", provided copies of the strata bylaws and correspondence. The agent testified that there was no advertising cost for the rerental. The agent submitted that this amount is not a penalty.

The agent testified that two hours of cleaning were required to bring the rental unit in to rerental condition. The agent testified that the toilet and fridge required cleaning, and that the rental unit was dusty. The agent provided photographs to corroborate this required cleaning.

The landlord provided a receipt for carpet cleaning in the amount of $78.75. The agent testified that the carpet was professionally cleaned before the beginning of the tenancy. The tenant testified that the carpet was not professionally cleaned when she began occupancy and that she had to clean the carpets herself.

The tenant provided her forwarding address by email on 14 April 2015. The agent acknowledged that the landlord received it.

The tenant submitted that she had to break the tenancy agreement early because she is very sensitive to noise and the noise from neighbours in the rental unit was excessive. The tenant testified that she told the landlord this in writing and orally. The tenant testified that told the landlord of her hypersensitivity before entering in to the tenancy agreement. The tenant testified that the landlord did not disclose anything in response to this notice. The tenant testified that the landlord represented that the rental unit was quiet when it was not. The tenant testified that she discovered the excessive noise after she moved in to the rental unit. The tenant testified that she felt like she was living next to a private nightclub. The tenant testified that the strata considered the noise normal.

The agent denied that the noise was excessive. In particular, the agent testified that the tenant was warned that the building was a multi-unit building. The agent acknowledged that she received notice from the tenant in August 2014 that the noise was excessive.

On 27 March 2015 the tenant emailed the agent:

> I will be moving out and moving in on March 31 at the same time I have to be at work all day therefore that day will be very hectic for me. We can aim for 5:00 pm on March 31 for now. I may not be available to do the inspection with you. <u>In that case you can do it without me being present…</u>
>
> [emphasis added]

I was provided with a copy of the condition move in/out inspection report for this tenancy. There is nothing remarkable about the move-in portion. The move out report notes some deficiencies in cleaning. The tenant did not participate in the condition move out inspection; however, the landlord did provide two notices to the tenant of the date and time.

The landlord claims for $1,128.75:

Item	**Amount**
Liquidated Damages	$1,000.00
Carpet Cleaning	78.75
Cleaning	50.00
Total Monetary Order Sought	**$1,128.75**

The landlord has not claimed for rental losses for this tenancy although it was unable to rent the unit for 1 April 2015.

Analysis

Subsection 37(2) of the Act specifies that when a tenant vacates a rental unit, the tenant must leave the unit reasonably clean and undamaged except for reasonable wear and tear. *Residential Tenancy Policy Guideline*, "1. Landlord & Tenant – Responsibility for Residential Premises" states:

> The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. …
>
> 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.

The landlord provided me with a receipt for carpet cleaning in the amount of $78.75. I find that the tenant and landlord agreed in the tenancy agreement that the carpets will be professionally cleaned at the end of the tenancy. I recognize that the total combined tenancy was for less than one year; however, I find that this term does not contradict the Act as the policy guideline is just that: a guideline. Accordingly, I find that the landlord is entitled to recover this amount from the tenant.

The landlord provided testimony and photographs that the rental unit required cleaning after the end of the tenancy. On the basis of this evidence, I find that the tenant did not leave the rental unit in a reasonably clean condition. I find that the tenant breached subsection 37(2) of the Act.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a

contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

I find that the tenant's breach of section 37 of the Act caused the landlord to incur costs of $50.00 to clean the rental unit. I find that this amount is reasonable. The landlord is entitled to recover this cost from the tenant.

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant abandons the rental unit.

Subsection 45(3) of the Act allows a tenant to end a tenancy for breach of a material term:

> 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.

The tenant did not provide documentary evidence to show that the she met the conditions of subsection 45(3). In particular, the tenant did not provide me with her notice to the landlord stating that she considered the failure to provide a quiet rental unit a breach of a material term of the Act. Accordingly, the tenant was not entitled to end the tenancy pursuant to subsection 45(3) of the Act.

The evidence before me is clear that the tenancy was a fixed-term tenancy ending 31 July 2015. The tenant ended the tenancy early on 31 March 2015. The landlord seeks $1,000.00 as liquidated damages pursuant to clause 6 of the tenancy agreement.

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 this case, the liquidated damages clause is intended to compensate the landlord for

losses resulting from the costs of re-renting the rental unit after a tenant breach. The cost of re-renting a rental unit to new tenants is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why landlords enter into fixed-term tenancy agreements is to attempt to limit the number of times the landlord must incur the costs of re-renting.

I find it more likely than not that, when a tenant breaches a fixed term tenancy agreement resulting in an early end to the tenancy, the landlord incurs the costs of re-renting earlier than they would have without the breach. This exposes the landlord to extra costs of rerental. For that reason, I find there is a loss to the landlord associated with the breach. The next question is whether the amount specified ($1,000.00) is a genuine pre-estimate of that loss.

The agent testified that the landlord pays a fee equivalent to one-half month's rent or $500.00. The agent testified that the landlord incurs costs in relation to credit checks and copying documents. The landlord has not provided evidence that indicates that the incidental costs come anywhere close to $500.00. The agent testified that the remainder is a "leaving fee". I find that the $1,000.00 liquidated damages amount is a penalty as it almost doubles the real costs of the landlord. The landlord is not entitled to recover this cost.

As the landlord has been successful in this application, it is entitled to recover its filing fee from the tenant.

The landlord applied to keep the tenant's security deposit. I allow the landlord to retain a portion the security deposit in satisfaction of the monetary award. No interest is payable over this period.

The landlord is entitled to an award of $178.75:

Item	**Amount**
Cleaning	$50.00
Carpet Cleaning	78.75
Filing Fee	50.00
Retained from Security Deposit	-178.75
Total Monetary Order Sought	**$0.00**

Residential Tenancy Policy Guideline, "17. Security Deposit and Set off" provides guidance in this situation:

The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit, or
- a tenant's application for the return of the deposit

unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

Subsection 36(1) of the Act extinguishes the tenant's right to return of the security deposit if the tenant does not participate in the condition move out inspection. The tenant must be offered two opportunities for the inspection. The tenant waived her right to participate in the condition inspection in her email of 27 March 2015. The tenant did not participate in the condition move out inspection. Accordingly, the tenant's right to return of the security deposit is extinguished and the tenant is not entitled to its return.

Conclusion

The landlord's claim for liquidated damages is dismissed. The remainder of the landlord's claim is allowed. The landlord may retain the tenant's security deposit as her right to its return was extinguished by her failure to participate in the condition move out inspection.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: October 30, 2015

Residential Tenancy Branch