Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MacDonald Commercial Realty Res. Ltd. (Aka MacDonald Commercial Real Estate Services Ltd.)
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

OPB, OPN, MNDC, MND, MNSD, FF

Introduction

This hearing was convened in response to cross applications.

On August 05, 2016 the Landlords filed an Application for Dispute Resolution in which the Landlords applied for an Order of Possession, for a monetary Order for money owed or compensation for damage or loss, for a monetary Order for damage, to keep all or part of the security deposit, and to recover the fee for filing an Application for Dispute Resolution. The rental unit has been vacated and there is, therefore, no need to consider the application for an Order of Possession.

The Agent for the Landlord #2 stated that on August 13, 2016 the Application for Dispute Resolution, the Notice of Hearing, and 40 pages of evidence the Landlord submitted to the Residential Tenancy Branch sent to the Tenant, via registered mail. The Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

On August 08, 2016 the Tenant filed an Application for Dispute Resolution in which she applied for the return of her security deposit and to recover the fee for filing an Application for Dispute Resolution.

The Tenant stated that on August 12, 2016 the Application for Dispute Resolution, the Notice of Hearing, and 72 pages of evidence the Tenant submitted to the Residential Tenancy Branch were personally delivered to the Landlords' business office. The Agent for the Landlord #2 acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

On December 07, 2016 the Tenant submitted 16 pages of evidence to the Residential Tenancy Branch. The Tenant stated that these documents were mailed to the Landlord on December 07, 2016. The Agent for the Landlord #2 stated that these documents were received by the Landlords and they were accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

All of the documents that were accepted as evidence for these proceedings were reviewed, although will only be specifically mentioned in this decision if they were t particularly relevant to my decision.

Issue(s) to be Decided

Are the Landlords entitled to compensation for damage to the rental unit, NSF fees, and/or costs associated to the early end of the tenancy?
Should the security deposit be returned to the Tenant or retained by the Landlords?

Background and Evidence

The Landlords and the Tenant agree that:

- the tenancy began on January 01, 2016;
- the parties signed a fixed term tenancy agreement, the fixed term of which ended on December 31, 2016;
- the Tenant agreed to pay monthly rent of $1,900.00 by the first day of each month;
- the Tenant paid a security deposit and pet damage deposit of $1,900.00;
- an initial condition inspection report was completed on December 31, 2015;
- on May 01, 2016 the Tenant gave written notice of her intent to vacate the rental unit on July 31, 2016;
- a final condition inspection report was completed on July 20, 2016;
- the Tenant provided the Landlords with her forwarding address, in writing, on July 20, 2016; and
- the Landlords have not repaid any portion of the security deposit or pet damage deposit.

The Tenant stated that the rental unit was vacated on July 18, 2016. The Agent for the Landlord #2 stated that she is not certain when the unit was vacated, but she knows it was vacated by July 20, 2016.

The Tenant stated that she ended this fixed term tenancy as a result of a variety of deficiencies with the rental unit, including:

- a persistent odour in the washing machine;
- a damaged living room blind;
- several small holes in the walls; and
- faucet handles that periodically fell off and had to be replaced.

The Landlords are seeking compensation, in the amount of $950.00, for re-leasing costs. The Agent for the Landlord #2 stated that this is the amount the Agent for the Landlord charged the owner for re-leasing the rental unit.

The Landlords submitted a copy of an invoice, dated July 20, 2016, which declares that the cost of re-renting is $950.00. As this invoice is not addressed to any specific party, it is not clear whether this invoice was written for the Tenant or the owner of the rental unit. The invoice does not specify what services are included with the cost of re-renting.

The Landlords and the Tenant agree that clause #14 of the tenancy agreement that reads, in part:

> If the Tenant ends the fixed term tenancy before the original term as set out above, the Landlord may, as the Landlord's option, treat this tenancy agreement as being at an end. In such event, the Tenant shall pay to the Landlord, as liquidated damages, all administration costs of re-renting the said premises: namely the leasing fee one half of one month's rent ($950.00) plus GST and all the advertising costs as reimbursement to the Landlord for the re-leasing fee charged by the property manager.

The Landlords are seeking compensation, in the amount of $74.00, for the cost of completing credit checks on potential new tenants. The Agent for the Landlord #2 stated that the Landlords incurred this expense, although they did not submit a receipt for the expense.

The Landlords are seeking compensation for GST, in the amount of $51.20, which represents tax on the re-leasing fee and credit checks.

The Landlords are seeking NSF fees, in the amount of $31.50, incurred as a result of a cheque tendered by the Tenant which was not honored by the Tenant's financial institution. The Tenant agreed that the Landlords are entitled to retain this amount from her security deposit.

The Landlords are seeking compensation, in the amount of $177.98, that the Landlords incurred investigating an odour in the washing machine. The Landlord and the Tenant agree that they communicated extensively about an odour emanating from the washing machine, during which the Landlords provided the Tenant with advice on how to eliminate the odour and the Tenant responding that the efforts she had made were not successful.

The Agent for the Landlord #2 stated that the Landlords would send a technician to inspect the washing machine but the Tenant would have to pay for the service call if there was nothing wrong with the machine. The Tenant stated that she did not agree to pay for the service call.

The Agent for the Landlord #2 stated that the manual for the washing machine was in a cupboard above the stove; that she does not know if the Tenant was advised of the location of the manual; and that she presumes the Tenant located the manual. The Tenant stated that she did not locate the manual for the washing machine during her tenancy.

The Agent for the Landlord #2 stated that the Landlords sent a service technician to the rental unit, who reported that the Tenant did not understand how to use the washing machine properly.

The Tenant stated that when the service technician inspected the washing machine he told her that this was a common problem; that once mold accumulated in the washing machine the drum needed to be removed for proper cleaning and that the technician never told her that she was not using the machine properly.

The Landlords submitted an invoice from an appliance repair service, in which a technician declared that he/she advised the Tenant on how to properly use the machine and that his test showed the unit was working properly.

The Landlords submitted an email from the Tenant in which the Tenant declared that this washing machine does not have “a HOT water setting”. The Tenant stated that she is aware that there is a hot water setting on this washing machine and that she was declaring that there is no hot water setting on the cleaning cycle, not simply that the washing machine did not have a hot water setting.

The Tenant stated that she has used several methods of eliminating the odour and that the problem may be related to improper maintenance by the previous tenant.

The Agent for the Landlord stated that her management company manages several units in this residential complex that have the same washing machine and none of them have reported a similar experience.

Analysis

On the basis of the undisputed evidence I find that the Landlords and the Tenant entered into a fixed term tenancy agreement, the fixed term of which ended on December 31, 2016.

Section 44(1)(a) of the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with sections 45, 46, 47, 48, 49, 49.1, or 50 of the *Act.*

Section 45(2) of the *Ac*t allows a tenant to end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and 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. As this is a fixed term tenancy, the Tenant did not have the right to end this tenancy, pursuant to section 45(2) of the *Act*, until to December 31, 2016.

Section 45(3) of the *Act* permits a tenant to end a fixed term tenancy if the landlord has failed to comply with a material term of the tenancy agreement and the landlord does not correct the situation within a reasonable time. I find that a persistent odour in the washing machine; a damaged living room blind; several small holes in the walls; and faucet handles that periodically fall off do not constitute a breach of a material term of the tenancy. I find that these are relatively minor deficiencies that can be easily remedied, with the assistance of the Residential Tenancy branch if necessary. I therefore find that the Tenant did not have the right to end this fixed term tenancy pursuant to section 45(3) of the *Act.*

Section 53(1) of the *Act* stipulates that if a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with the legislation, the notice is deemed to be changed in accordance with sections 53(2) or 53(3) of the *Act*. Section 53(2) of the *Act* stipulates that if the effective date stated in the notice to end tenancy is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

On the basis of the undisputed evidence I find that the Tenant gave written notice of her intent to vacate the rental unit on July 31, 2016. As the Tenant did not have the right to end this fixed term tenancy prior to July 31, 2016, I find that the effective date of this written notice must be corrected to December 31, 2016, pursuant to sections 53(1) and 53(2) of the *Act.*

I find that this tenancy ended well before December 31, 2016 and that the tenancy did not, therefore, end on the basis of the Tenant's written notice to end the tenancy. There is no evidence that the Landlords gave notice to end this tenancy in accordance with section 46, 47, 48, 49, 49.1, and 50 of the *Act.* As tenancy did not end on the basis of the Tenant or the Landlord giving proper notice to end the tenancy, I cannot conclude that this tenancy ended pursuant to section 44(1)(a) of the *Act*.

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. As the rental unit was vacated prior to the fixed term of the tenancy agreement, I find that the tenancy did not end pursuant to section 44(1)(b) of the *Act.*

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. As there is no evidence that the parties agreed in writing to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(c) of the *Act.*

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. I find that this tenancy ended when the Tenant vacated the rental unit. As the parties agree that the final condition inspection report was completed on July 20, 2016, I find it reasonable to conclude that the rental unit was fully vacated

on July 20, 2016. I therefore find that this tenancy ended on July 20, 2016, pursuant to section 44(1)(d) of the *Act.*

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. As there is no evidence that this tenancy agreement was frustrated, I find that the tenancy did not end pursuant to section 44(1)(e) of the *Act.*

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act.*

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or file an Application for Dispute Resolution claiming against the deposits.

I find that the Landlords failed to comply with section 38(1) of the *Act*, as the Landlords have not repaid the security deposit/pet damage deposit and the Landlords did not file an Application for Dispute Resolution until August 05, 2016, which is more than 15 days after the tenancy ended on July 20, 2016 and more than 15 days after the forwarding address was received, in writing.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlords did not comply with section 38(1) of the *Act,* I find that the Landlords must pay the Tenant double the security deposit and pet damage deposit.

I find that there is a liquidated damages clause in the tenancy agreement which requires the Tenant to pay $950.00 to the Landlords if she prematurely end this fixed term tenancy. 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 of liquidated damages agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into. I find that $950.00 is a reasonable estimate given the expense of advertising a rental unit and screening potential tenants; the time a landlord must spend showing the rental unit and screening potential tenants; and the wear and tear that moving causes to residential property. When the amount of liquidated damages agreed upon is reasonable, a tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally liquidated damage clauses will only be struck down when they are oppressive to the party having to pay the stipulated sum, which I do not find to be the case in these circumstances.

As the Tenant agreed to pay liquidated damages of $950.00 and I have concluded that amount is a reasonable estimate, I find that the Landlords are entitled to collect liquidated damages of $950.00.

As the liquidated damages is a genuine pre-estimate of the loss at the time the contract is entered into, I find that this pre-estimate included, or should have included, the cost of completing credit checks on potential new tenants and applicable taxes. I therefore find that the Landlords are not entitled to the cost of completing credit checks or GST in addition to the liquidated damages of $950.00. I therefore dismiss the Landlords' claim for compensation for completing credit checks and GST.

As the Tenant agreed that the Landlords could retain $31.50 from her security deposit for NSF fees, I find that the Landlord is entitled to retain this amount from the security deposit.

When making a claim for damages under a tenancy agreement or the *Act,* the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

On the basis of the testimony of the Tenant and in the absence of evidence to the contrary, I find that the washing machine in the rental unit had an odour; that the Tenant made reasonable efforts to eliminate that odour; and that the Tenant repeatedly brought the odour to the attention of the Landlords.

Section 32(2) of the *Act* requires a tenant to maintain reasonable health, cleanliness, and sanitary standards in the rental unit. As the Tenant was making reasonable efforts to eliminate the odour in the washing machine, I find that the Landlords have submitted insufficient evidence to establish that the Tenant failed to comply with section 32(2) of the *Act.*

Section 32(3) of the *Act* requires a tenant to repair damage to the rental unit that is caused by the actions or neglect of the tenant. As there is no evidence to show that the Tenant was not taking reasonable steps to keep the washing machine clean or that she was using the washing machine for a purpose for which it was not intended, I find that the Landlords have submitted insufficient evidence to establish that the Tenant failed to comply with section 32(3) of the *Act.* I specifically note that there is nothing in the Act that prevents a tenant from reporting a deficiency with the rental unit.

As the Landlords have failed to establish that they established a loss as a result of the Tenant breaching the tenancy agreement or the *Act*, I find that the Tenant is not obligated to pay for the cost of having a technician service the washing machine.

In adjudicating the claim for the washing machine I was influenced, to some degree, by the undisputed evidence that the Landlords arranged for the service call. In the event that the Landlords did not feel they were obligated to inspect the washing machine, they could have simply refused to hire a technician. In that case the Tenant had the option

of living with the odour or seeking an Order from the Residential Tenancy Branch requiring the Landlords to address the problem.

Section 7(2) of the *Act* requires a landlord who claims compensation for damage or loss to do whatever is reasonable to minimize the damage or loss. In these circumstances I find that the Landlords may have eliminated the need for a service call by going to the rental unit and reviewing the cleaning procedures with the Tenant to ensure the Tenant fully understood how to use the machine. There is no evidence that the Landlords went to the rental unit to review the operating procedures with the Tenant.

In adjudicating the claim for the washing machine I was influenced, to some degree, by the absence of evidence to establish that the Tenant was provided with a manual for the washing machine. In reaching this conclusion I was influenced by the absence of any evidence to corroborate the Landlords' submission that there was a manual in the cupboard above the stove. Even if there was a manual in a cupboard in the rental unit, there is no evidence to refute the Tenant's testimony that she did not locate this manual.

In adjudicating the claim for the washing machine I was influenced, to some degree, by the invoice from the service technician. Although this invoice indicates that the technician advised the Tenant on how to properly use the machine and that the unit was working properly, it does not conclude that the odour in the machine is the result of improper use.

In adjudicating the claim for the washing machine I was influenced, to some degree, by the Tenant's testimony that the service technician told her this was a common problem. I find this testimony credible as I am aware that this is a common problem with front loading washing machines.

In adjudicating the claim for the washing machine I was influenced, to some degree, by the Tenant's testimony that the service technician told her that once mould accumulates in the washing machine the drum must be removed to eliminate the odour. I find it entirely possible that the odour in the washing machine was the result of improper cleaning of the machine during a previous tenancy.

In adjudicating the claim for the washing machine I placed little weight on the Tenant's email in which she declared that this washing machine does not have "a HOT water setting", as I find that she provided a reasonable explanation of that statement. On the basis of the information provided I am satisfied that the Tenant made reasonable efforts to eliminate the odour and that there is simply insufficient evidence to establish that the odour was the result of her actions or negligence.

The Landlords' application to recover the fee for servicing the washing machine is dismissed.

I find that the Landlords' Application for Dispute Resolution has merit and that the Landlords are entitled to recover the fee for filing this Application for Dispute Resolution.

I find that the Tenant's Application for Dispute Resolution has merit and that the Tenant is entitled to recover the fee for filing this Application for Dispute Resolution.

Conclusion

The Tenant has established a monetary claim, in the amount of $3,900.00, which includes double the security/pet damage deposit and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution.

The Landlord has established a monetary claim, in the amount of $1,081.50, which includes $950.00 in liquidated damages, $31.50 in NSF fees, and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution.

After offsetting these two claims I find that the Landlords owe the Tenant $2,818.50 and I grant the Tenant a monetary Order in that amount. In the event the Landlords do not voluntarily comply with this Order, it may be served on the Landlords, filed with the Province of British Columbia Small Claims Court 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 *Act*.

Dated: February 08, 2017

Residential Tenancy Branch