Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DOWNTOWN SUITES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FF; MNDC, MNSD, OLC, FF

Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* ("*Act*") for:

- authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for their application, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the *Act* for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of double the amount of the security deposit, pursuant to section 38;
- an order requiring the landlords to comply with the *Act*, *Regulation* or tenancy agreement, pursuant to section 62;
- authorization to recover the filing fee for her application, pursuant to section 72.

"Tenant BM" did not attend this hearing, which lasted approximately 41 minutes. The landlords' two agents, agent NJ ("landlord") and "agent LT" and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed that she was the property manager for this rental unit and that agent LT was the leasing property manager and that both had authority to speak on behalf of the landlord company named in this application as well as the individual "landlord owner" named in this application, as agents at this hearing.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that both parties were duly served with the other party's application.

Pursuant to section 64(3)(c) of the *Act*, I amend the tenant's application to remove tenant BM as a tenant-applicant and to correct the spelling of the landlord company name. The tenant requested these amendments. The landlords consented to the landlord company name correction. The tenant stated that she only included tenant BM's name in her application so that he could pick up documents on her behalf from the RTB, he was not a tenant of the rental unit or part of this tenancy. I find no prejudice to either party in making these amendments.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlords' application to add the relief for a monetary order for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement. In their application, the landlords only applied to retain the deposit, but indicated in their money order worksheet that they wanted amounts in addition to the $650.00 security deposit. The tenant confirmed that she had notice of the landlords' additional claims and received their monetary order worksheet and I see no prejudice to either party in adding this claim.

At the outset of the hearing, the tenant confirmed that she had vacated the rental unit and was not seeking any other compliance orders from the landlords. Accordingly, her application for an order requiring the landlords to comply with the *Act*, *Regulation* or tenancy agreement, is dismissed without leave to reapply.

Issues to be Decided

Is either party entitled to a monetary order for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Are the landlords entitled to retain the tenant's security deposit in partial satisfaction of the monetary award requested?

Is the tenant entitled to a return of double the amount of her security deposit?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings are set out below.

Both parties agreed to the following facts. The landlord owner purchased the rental unit in April 2016. The tenant was living in the rental unit prior to the purchase, since May 1,

2012. This tenancy began on April 1, 2016 and ended on February 28, 2017 by way of a new written tenancy agreement, a copy of which was provided for this hearing. Monthly rent in the amount of $1,350.00 was payable on the first day of each month. A security deposit of $650.00 was paid by the tenant and the landlords continue to retain the deposit. Move-in and move-out condition inspection reports were completed for this tenancy. The tenant gave permission in emails for the landlords to keep the security deposit of $650.00. The landlords filed their application to retain the deposit on March 15, 2017.

The landlords seek liquidated damages of $750.00, a credit check fee of $16.75, and the $100.00 application filing fee from the tenant. The tenant seeks recovery of the $100.00 application filing fee and a return of double the value of her security deposit totalling $1,300.00.

Analysis

Section 67 of the *Act* requires a party making a claim for damage or loss to prove the claim, on a balance of probabilities. To prove a loss, the landlords must satisfy the following four 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 tenant 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 landlords followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Landlords' Application

Credit Check Fee

Section 15 of the *Act* states the following:

> *Application and processing fees prohibited*
> *15 A landlord must not charge a person anything for*
> *(a) accepting an application for a tenancy,*
> *(b) processing the application,*
> *(c) investigating the applicant's suitability as a tenant, or*
> *(d) accepting the person as a tenant.*

I dismiss the landlords' application for a credit check fee of $16.75. This is a fee for investigating an applicant's suitability as a tenant and is not allowed under section 15 of the *Act*. This is despite the fact that the tenant initially agreed to pay it because she testified that she was unaware that it was not allowed under the *Act* and she thought it was a minimal allowable fee.

Liquidated Damages

Subsection 45(2) of the Act sets out how a tenant may end a fixed term tenancy:

> *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*
>
> *(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.*

The above provision states that a tenant cannot give notice to end the tenancy before the end of the fixed term. If she does, the tenant could be liable to pay for a loss of rent and liquidated damages to the landlords.

Both parties agreed that the landlords and tenant entered into a fixed term tenancy for the period from April 1, 2016 to March 31, 2017, after which the tenant was required to vacate the rental unit. The tenant vacated the rental unit one month early on February 28, 2017. The landlords said that they mitigated their losses by re-renting the property, with some difficulty, beginning on March 1, 2017. Therefore, the tenant breached the fixed term tenancy agreement by vacating early.

Residential Tenancy Policy Guideline 4 provides information 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.

The landlords did not provide documentary evidence of the amount claimed of $750.00 and show how this was a genuine pre-estimate of the costs of re-rental. The landlord company is the property manager for the landlord owner of this rental unit and said that the liquidated damages were $750.00 as per a statement issued to the landlord owner. However, the landlords did not provide a copy of this statement, despite the fact that it was in front of them during the hearing. The landlords also failed to indicate this fee in the move-out condition inspection report, despite the fact that they included other fees in there such as strata or bylaw fines.

I find that the cost of re-renting a unit to new tenants is part of the ordinary business of landlords. Throughout the lifetime of a rental property, landlords must engage in the process of re-renting to new tenants numerous times. In this case, the landlord owner opted to use a property manager to post two advertisements online, one on a free website. Yet, none of these advertisements were provided for this hearing. The landlords did not know how many showings were conducted of the unit, guessing that it was around four to five, which the tenant disputed stating that there were likely only two showings because she only had to leave her rental unit one time.

The landlords did not indicate in the addendum to the tenancy agreement the amount for the pre-estimate of the loss. It simply states under paragraph 28 for liquated damages: “re-leasing fees the owner must pay to DTS to re-let the property (half of 1 month’s rent).” In their testimony, the landlords stated that this liquidated damages fee was based on the new rent charged to the new tenants when the property was re-rented, not the rent that the tenant was previously paying to the landlords under the written tenancy agreement. So the tenant was unaware of the amount of the fee when she initialled beside this provision and signed the addendum agreeing to pay liquidated damages. The fee is only created once new tenants are secured so it cannot be a genuine pre-estimate of the loss because it depends on a future event. Since the new tenants began paying $1,500.00 per month for rent instead of the $1,350.00 that the tenant was paying, not only did the landlords obtain a higher profit from the re-rental but also they intended to charge the higher amount back to the tenant in the form of liquidated damages of $750.00 (rather than $675.00) based on the $1,500.00 newer and higher rent.

For the above reasons, I dismiss the landlords’ claim of $750.00 for liquidated damages without leave to reapply. This is despite the fact that the tenant, by way of emails to the landlords, initially agreed to allow the landlords to keep her security deposit to pay for liquidated damages. Emails are also not a recognized form of providing written permission as per section 88 of the *Act*. Further, at the hearing, the tenant confirmed

that she was unaware of her rights until she talked to the Residential Tenancy Branch. She also stated that she was initially told by the landlords that the cost for liquidated damages would only be $650.00, but it was later increased to $750.00 because it was re-rented for a higher amount.

The landlords confirmed that they are not seeking a loss of rent from the tenant because there was none. They said that they re-rented the unit as of March 1, 2017 and that the tenant paid rent until the end of February 2017.

As the landlords were unsuccessful in their application, I find that they are not entitled to recover the $100.00 filing fee from the tenant.

Tenant's Application

Section 38 of the *Act* requires the landlords to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlords are required to pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit. However, this provision does not apply if the landlords have obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlords, which remains unpaid at the end of the tenancy (section 38(3)(b)).

Both parties agreed that the tenancy ended on February 28, 2017 and the tenant provided a written forwarding address to the landlords on the same date. The landlords did not return the deposit to the tenant. The landlords made an application for dispute resolution to claim against this deposit, within 15 days of the written forwarding address being provided. The landlords' application was made on March 15, 2017. Therefore, I find that the tenant is not entitled to the return of double the value of her deposit, only the original amount of $650.00.

The landlord continues to hold the tenant's security deposit of $650.00. Over the period of this tenancy, no interest is payable on the deposit. I order the landlords to return the tenant's entire security deposit of $650.00 to the tenant.

As the tenant was partially successful in her application, I find that she is entitled to recover the $100.00 filing fee from the landlords.

Conclusion

I issue a monetary order in the tenant's favour in the amount of $750.00 against the landlords. The landlord(s) must be served with this Order as soon as possible. Should the landlord(s) fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The landlords' entire application is dismissed without leave to reapply.

The tenant's application for an order requiring the landlords to comply with the *Act*, *Regulation* or tenancy agreement, is dismissed without leave to reapply.

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: August 22, 2017

Residential Tenancy Branch