Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Tridecca Developments c/o Protection Property Marketing & Management Realty Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNDC, MNSD, FF

Introduction

This hearing was convened in response to an application by the Tenant and an application by the Landlord pursuant to the *Residential Tenancy Act* (the "Act").

The Landlord applied on April 19, 2017 for:

1. A Monetary Order for damages to the unit - Section 67;
2. A Monetary Order for compensation - Section 67;
3. An Order to retain the security deposit - Section 38; and
4. An Order to recover the filing fee for this application - Section 72.

The Tenant applied on August 21, 2017 for:

1. A Monetary Order for compensation - Section 67;
2. An Order for the return of the security deposit - Section 38; and
3. An Order to recover the filing fee for this application - Section 72.

The original hearing time was insufficient and the matter was adjourned to this reconvened hearing date. The Tenant and Landlord were each given full opportunity under affirmation to be heard, to present evidence and to make submissions.

Preliminary Matter

The Tenant states that summons was given to the Witness to attend this reconvened hearing. The Witness did not appear. The Tenant was informed of Residential Tenancy Branch (the `RTB`) policy guideline #15 that provides as follows:

If the witness fails to attend in accordance with the summons, the onus is on the party requesting the summons to take necessary steps to enforce the witnesses' attendance through the Supreme Court. The director may, on request, adjourn the hearing to allow this to be done.

The Tenant elected to continue with the hearing and does not seek an adjournment.

The Tenant did not provide a monetary worksheet for any costs other that the costs claimed for damaged items in a storage locker. The Tenant's application sets out a total monetary claim for $21,774.22. The Tenant states that this amount is calculated based on claimed amounts of $9,212.95 for the storage locker items plus $8,561.27 for the Tenant's time putting together her claim plus $4,200.00 for the return of the double the security, pet and fob deposit. The Tenant states that she is also seeking an undetermined amount for her time in removing and disposing of damaged items from the locker and from her back yard.

Section 59(2)(b) of the Act provides that an application for dispute resolution must include full particulars of the dispute that is to be the subject of the dispute resolution proceedings. Rule 2.2 of the RTB Rules of Procedure provides that a claim is limited to what is stated in the application. As the Tenant did not provide any monetary details or identify any costs that were being claimed for removing and disposing of damaged items and as the other costs identified by the Tenant totals more than the total amount claimed in the application I restrict the Tenant to the total amount claimed of $21,744.22 and dismiss the claims for the undetermined costs that were not included in this figure.

As there is nothing in the Act that provides compensation or costs to prepare and participate in the proceedings other than the filing fee I dismiss the Tenant's claim for these costs claimed by the Tenant in the amount of $8,561.27.

Issue(s) to be Decided

Is the Tenant entitled to the monetary amounts claimed?
Is the Landlord entitled to the monetary amounts claimed?

Background and Evidence

The following are agreed facts: The tenancy started on October 1, 2016 for a fixed term to end on September 30, 2017. The agreement provides that after the end of the fixed term the tenancy agreement continues on a month to month basis. On February 20, 2017 the Tenant gave notice to end the tenancy for March 31, 2017 and the Tenant moved out on that date. During the tenancy rent of $1,950.00 was payable on the first day of each month. At the outset of the tenancy the Landlord collected $975.00 as a security deposit, $975.00 as a pet deposit and $100.00 as a fob deposit. The Tenant provided its forwarding address to the Landlord on April 6, 2017. The Parties mutually conducted move-out inspection with a completed report provided to the Tenant and the Tenant did not agree with the report as completed by the Landlord. The Tenant returned the fob at the end of the tenancy. None of the deposits have been returned to the Tenant.

The Tenant states that the Parties did not mutually conduct a move-in inspection and that the Agent who appeared for the Landlord and who is not the Agent attending at this hearing gave the Tenant a completed condition report form to sign. The Tenant states that when the Tenant refused to sign the report the Tenant was told that without signing the document the Tenant would have to leave the unit and find storage for her belongings. The Tenant provides a witness letter from the Tenant's mover in relation to this report incident. The Landlord states that the Parties mutually conducted the move-in inspection with a completed report copied to the Tenant. The Landlord states that the Agent informed the Landlord that the Tenant was difficult but that the Agent did not tell the Tenant that she could not move into the unit.

The Landlord states that the Tenant breached the fixed term tenancy agreement by moving out of the unit prior to the end of the term. The Landlord states that the tenancy agreement includes a "lease breach" fee that states as follows: "if the tenant vacates prior to the expiration of Lease the tenancy will be responsible for any costs incurred by the Landlord to re rent the premise including liquidated damages of: One month rent plus gst. This will include but not limited to loss of rent up to the expiration of the lease, fees paid to management agencies and credit checks.`` (Reproduced as written) The Landlord states that the liquidated damages fee includes costs such as credit checks, management fees and other costs. The Landlord states that he believes that although the liquidated damages section is not initialled by the Tenant and that there is no practise followed to have the sections initialled it is the practice to point the

sections out. The Landlord states that he was not present for the signing of the tenancy agreement. The Landlord claims $1,023.75.

The Tenant states that the tenancy agreement was sent to her by email and that none of the sections were gone over. The Tenant states that even if she did initial that section she does not think she understood and that the lease breach was never discussed. The Tenant states that in the email the Landlord told her the lease break fee was $975.00.

The Tenant states that she ended the tenancy due to being very nervous an uncomfortable at the unit where there were homeless people on drugs that would be on various floors of the building and as her fob did not work properly and the property manager was not good. The Tenant states that she sent three emails to the Landlord about her concerns over safety. The Tenant provides copies of these emails dated December 5 and 29, 2016 and January 2, 2017. The Tenant states that the Landlord did not communicate or cooperation well however action was taken in relation to the entry by homeless people who were gone by the end of January. The Tenant states that she also received complaints about her dog so the Tenant ended the tenancy so that she would not be evicted.

The Landlord states that they took steps as quickly as possible but had to follow remedial steps and go through a process such as giving warnings before issuing the notice to end tenancy. The Landlord states that they did receive complaints about the Tenant but did not act on those complaints since the Tenant was leaving.

The Landlord states that a new tenancy immediately followed with a tenant moving in on April 1, 2017. The Landlord states that the new tenancy send a letter of complaint of bad carpet odor and after an inspection the Landlord confirmed the smell of urine. The Landlord states that the carpet itself was clean but the underlay had to be removed. The Landlord claims $1,241.32 and provides the invoice. The Landlord provides a copy of the complaint letter. The Landlord states that while he was present to inspect the reported smell he never looked at the underlay. The Landlord states that he trusted their contractor of several years and that if there is urine it has to be removed as it cannot be cleaned. The Landlord states that the underlay was new at the onset of the tenancy and that the unit was in a brand new building. The Tenant states that there was never any smell while living in the unit and that he dogs did not pee on the carpets. The

Tenants states that the Landlord did not provide any photos of damaged underlay and the Tenant had the carpets cleaned and no smell of urine was noticed by the cleaners. The Tenant states that her cleaner noted no stains.

The Landlord states that the Tenant left various touch up marks and that the Tenant agreed to the costs of $225.00 on the move-out report. The Landlord states that the actual costs were $325.00 and that the agent who did the work was the person who noted the cost of $225.00. The Landlord claims $325.00. The Tenant states that the marks that were left were not significant and were only reasonable wear and tear marks. The Parties agree that the Tenant will be responsible for **$112.50** for the costs of painting.

The Landlord states that the Tenant left the fridge door damaged with dents. The Landlord states that the door has not been replaced and no rental discount was provided to the next tenant for having the fridge that was otherwise working and only 6 months old. The Landlord states that no photos were provided as the stainless steel surface did not show the dents on photos. The Landlord states that the dents are hard to determine and that you have to really look at it to see it. The Landlord claims the estimated cost of $794.50. The Tenant states that the Landlord increased the next tenancy rent by $100.00.

The Tenant states that she had given notice to end the tenancy in February 2016 and was preparing for the move at the end of March 2017 when on March 8, 2017 the Tenants discovered her items in storage were damaged by mold. The Tenant states that she immediately informed the Landlord who brought in a restoration company. This company sorted through the Tenant's belongings and set aside items that were completely damaged and could not be restored. The Tenant states that she later discovered that the Landlord knew about a moisture problem in the storage lockers in December 2016 and did not inform the Tenant about any possible damage to her belongings. The Tenant states that another tenant had also informed the Landlord of damage to its belongings in February 2017. The Tenant provides an email dated March 14, 2017 that informs the Tenant of the dates of damage being discovered and reported by that tenant. The Tenant also provides a copy of a text from a former building manager dated March 24, 2014 that indicates that the damage occurred in December 2016. The Tenant states that on March 21, 2017 the Landlord informed her that the problem arose due to ventilation and timer activation problems. The Tenant states that the Landlord gave the

Tenant a choice to leave the damaged items for the Landlord to dispose of or to remove the items when the Tenant moved out of the unit. The Tenant states that she chose to remove all her belongings, including the damaged items.

The Tenant states that she tried to make a claim with her insurance company however it was refused on the basis that her belongings were not covered for the mold. The Tenant states that she obtained estimates for the replacement costs of all the items that were damaged as set out in the evidence package along with photos of all the damaged items. The Tenant states that some of the items claimed were under a year old such as the dog cages. The Tenant also states that she replaced some items for more than the amount claimed, such as the replacement of her bike for $1,100.00 for which she only claimed $800.00.

The Landlord states that the building was brand new and that sometime around January 2017 the Landlord started to notice condensation on that parkade ceiling. The Landlord states that they were trying to determine the source of the problem and were inspecting the area on a near daily basis. The Landlord states that there was an unusually high amount of snow at this time and the Landlord thought that maybe this was the cause of the moisture. The Landlord states that the locker room containing 10 lockers was adjoining this same area. The Landlord states that they determined that the tenant who first reported the moisture was found to have a few drops of water into the locker and that the drips stopped almost immediately after its report. The Landlord states that this tenant covered her belongings with plastic in order to prevent further damage from the leak. The Landlord states that at this point they peered into the other lockers through the slats and determined that no other lockers were affected. The Landlord states that none of the other tenants with these lockers were notified of the moisture in the locker room as they believed the damage to be contained to the one locker and it was not a major issue. The Landlord states that it was ultimately determined that the ventilation system was subject to tampering and since securing the system no further problems have occurred.

Analysis

Section 6(3) of the Act provides that a term of a tenancy agreement is not enforceable if, inter alia, the term is not expressed in a manner that clearly communicates the rights and obligations under it. There is no set dollar figure set out in the “lease breach” fee provision or a g.s.t. amount. The lease fee includes coverage for credit checks and management agency fees. The

Act does not allow a landlord to charge a fee for credit checks and a tenant is not responsible for the costs of carrying out the obligations of a landlord. I also consider that the Tenant did not initial this provision and given the email from the Landlord stating that the fee was half a month's rent I accept that the Tenant was not aware of the provision as written and that the term is not clear. Given the conflict with the Act in relation to the liquidated damages amount including an unallowable charge and the contradictions by the Landlord on the amount of the fee I find that the term is not expressed in a manner that clearly communicates the amount of the fee and is inconsistent with the Act. For these reasons I find the fee is not enforceable and I dismiss the Landlord's claim for liquidated damages.

Section 37 of the Act provides that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. Section 7 of the Act provides that where a landlord or tenant does not comply with the Act, regulation or tenancy agreement, the landlord or tenant must compensate the other for damage or loss that results. Given the Landlord's direct evidence of the smell and the supporting evidence of smell from the next tenant I find on a balance of probabilities that the Tenant left the underlay soiled by pet urine. For these reasons and given the invoice substantiating that costs were incurred I find that the Landlord has substantiated an entitlement to the costs to replace the underlay in the amount of **$1,241.32**.

Based on the Parties agreement I find that the Landlord has substantiated the entitlement of **$112.50** for the costs of painting.

Given the lack of any photos showing damage to the fridge door, the lack of any evidence of any rental loss caused by dents to the fridge door and the lack of any evidence of repair or replacement costs in relation to the fridge door I find that the Landlord has not substantiated that the Tenant caused the damage to the extent claimed or that the Landlord has incurred any losses and I dismiss this claim.

Given the undisputed evidence that as part of the tenancy agreement the Tenant was provided with a storage locker I find that the Landlord owed the Tenant a duty of care to ensure that the storage locker was suitable for its use. The Landlord's evidence is that they knew of moisture coming into the storage locker area months before the Tenant's belongings were found to be

damaged. The Landlord's evidence is that they only peered into the other storage lockers when the moisture was first discovered and never informed the Tenant that there may be cause for concern. For these reasons and considering there is no dispute that the moisture caused the damage to the Tenant's belongings in the storage unit I find on a balance of probabilities that the Tenant has substantiated that the Landlord was negligent in relation to its provision of a storage locker. I note that the Landlord did not dispute the items claimed as damaged by the Tenant. However given that the items claimed by the Tenant were not new at the time of the damage and considering that the Tenant is claiming replacement costs for new items I find that the Tenant has not substantiated the amount of costs claimed. In seeking a balance between new and used items for the determination of overall loss, I find that the Tenant is entitled to half the amount claimed of **$4,606.48**.

Section 23 of the Act provides that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day and the landlord must complete a condition inspection report and provide a copy to the tenant in accordance with the regulations. Section 24 of the Act provides that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not make an offer for an inspection at move-in, does not complete a report and does not provide a copy of that report to the tenant. Given the Tenant's supported oral evidence that there was no mutual inspection of the unit at move-in I find that the Landlord's right to claim against the security deposit was extinguished at move-in. However I note that the Landlord's right to claim against the security deposit for other losses such as liquidated damages is not affected by this extinguishment.

Section 38 of the Act provides 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 repay the security deposit or make an application for dispute resolution claiming against the security deposit. Where a landlord fails to comply with this section, the landlord must pay the tenant double the amount of the security deposit. As the Landlord applied within 15 days of receipt of the forwarding address I find that the Tenant is not entitled to return of double the security deposit.

As the Landlord's application has met with some success I find that the Landlord is entitled to recovery of the **$100.00** filing fee for a total entitlement of **$1,453.82 ($1,241.32 + 112.50 + 100.00)**. Deducting this amount from the Tenant's combined security, pet and fob deposit plus zero interest of **$2,050.00** leaves **$596.18** to be returned to the Tenant.

As the Tenant's claims have met with some success I find that the Tenant is entitled to recovery of the **$100.00** filing fee for a total entitlement of **$4,706.48**. I make the monetary order to the Tenant to include this total entitlement and the remaining deposits of **$596.18** in the amount of **$5,302.66**.

Conclusion

I grant the Tenant an order under Section 67 of the Act for the amount of **$5,302.66**. If necessary, this order may be filed in the 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 *Residential Tenancy Act*.

Dated: December 15, 2017

Residential Tenancy Branch