Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PARKSIDE REALTY INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNR, MNSD, FF

Introduction

This hearing dealt with monetary cross applications. The tenants had applied for return of their security deposit and pet damage deposit. The landlord applied for monetary compensation for unpaid rent, unpaid utilities; and, authorization to retain the security deposit and pet damage deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the outset of the hearing, I confirmed that each party had served the other party with their Application for Dispute Resolution and supporting documents. I have considered all of the submissions and evidence presented to me, including those provided in writing and orally.

The owners enlisted the services of a property management company to act as their agent with respect to renting the rental unit to the tenants. Section 1 of the Act defines “landlord” to include the owners of the property and/or an agent acting on behalf of the owner(s). Accordingly, the property management company named in this case meets the definition of “landlord” and is referred to as such in this decision. To distinguish between the owners and the property management company, or its agents, I have made that distinction where it is necessary or appropriate.

On a procedural note, during the hearing I informed the parties that the Act requires that in certain circumstances a landlord must repay a tenant double the security deposit and/or pet damage deposit. The parties were also informed that if a tenant is entitled to doubling of the deposit, I must award the tenant double the deposit unless the tenant expressly waives entitlement or otherwise settles for a lesser amount. The tenants did not waive entitlement to doubling of the deposits and a settlement agreement was not

reached during the hearing. Accordingly, I have considered whether the tenants are entitled to return of the single amount or double the amount of their deposits in making this decision.

Issue(s) to be Decided

1. Are the tenants entitled to return of their security deposit and/or pet damage deposit in the single amount or double the amount?
2. Is the landlord entitled to recover the amounts claimed for unpaid rent and utilities?
3. Is the landlord authorized to retain all or part of the tenants' security deposit and/or pet damage deposit?

Background and Evidence

The parties executed a written tenancy agreement for a fixed term tenancy set to commence on December 1, 2016 and end on November 30, 2017. The tenants paid a security deposit of $750.00 and a pet damage deposit of $750.00. The tenants were required to pay rent in the amount of $1,500.00 on or before the first day of every month.

The tenants participated in a move-in inspection of the property with the landlord's agent at the start of the tenancy and a move-in inspection report was prepared.

The parties were in agreement that the tenants gave the landlord oral notice that they would be ending the tenancy at the end of August 2017. The tenants met an agent for the landlord at the property on August 30, 2017 to perform the move-out inspection. The tenants provided their forwarding address in writing on the move-out inspection report. The tenants did not authorize the landlord to retain any portion of their security deposit or pet damage deposit on the move-out inspection report or any other document at the end of the tenancy or any time after the tenancy ended. The tenants have not received a refund of their security deposit or pet damage deposit.

Tenants' application

The tenants applied for return of their security deposit and pet damage deposit since the landlord had indicated to them that they would not be receiving a refund of the deposits without any further explanation.

The property manager stated that the deposits were transferred to the owners of the property. During the hearing, the property manager acknowledged that the rental unit was left clean and undamaged at the end of the tenancy and he had recommended to the owners that they refund the deposits to the tenants and if they did not agree to do so they would have to go to arbitration. The owners did not refund the deposits and neither the owners nor the property management company filed an Application for Dispute Resolution within 15 days of the tenancy ending.

On page 2 of the tenancy agreement is the following statement with respect to return of the security deposit: "Any dispute to the amount returned by the Owner is between the Tenant and the Owner".

The tenant testified that he requested the names of the owners from the property manager and it was not provided. I note that it does not appear anywhere in the tenancy agreement presented to me. Rather, the parties to the tenancy agreement are identified as being the tenants and the property management company.

The property manager also pointed to page 2 of the tenancy agreement as a basis for landlord continuing to hold the tenants' deposits. On page 2 of the tenancy agreement is a section entitled "DEDUCTIONS" which provides as follows:

> The Landlord may deduct reasonable charges from the Security Deposit for:
> a. Rent owed to the Landlord.
> b. Late charges
> c. Costs of cleaning, deodorizing and repairing the home/unit and its contents for which the Tenant is responsible as noted in the Rental Agreement.
> d. Pet violation charges.
> e. Replacing unreturned keys or other security devices.
> f. Packing, removing or storing any abandoned Tenant's property.
> g. Removing abandoned or illegally parked/stored vehicles.
> h. Lawyer/Management fees and costs of Court incurred for any proceeding against the Tenant.
> i. Other items the Tenant is responsible to pay under this Rental Agreement.

The property manager pointed out that the tenants owed rent for September 2017 and utilities and the sum exceeds their deposits. The property management company eventually filed an Application for Dispute Resolution to make a claim for unpaid rent and utilities on February 26, 2018 and I proceed to describe those claims in the section that follows.

Landlord's Application

I noted that the landlord had claimed recovery of unpaid rent and utilities from the tenants and added the security deposit and pet damage deposit to the claim. The deposits are already in the landlord's possession and the deposits are used to offset any awards to the landlord, not added to the award. The property manager confirmed that the landlord seeks to retain the deposits in partial satisfaction of the landlord's claims for unpaid rent and utilities. I amended the landlord's claim accordingly.

1. Unpaid and/or loss of rent for September 2017

The landlord submits that on August 7, 2017 the tenant gave oral notice of their intention to end the tenancy at the end of August 2017. According to the property manager, he told the tenant that the tenant needed to give a notice to end tenancy in writing, although email would be sufficient, but he did not receive any such notice from the tenants. The property manager also claimed that he advised the tenants that they would continue to be held responsible to pay rent until such time a suitable replacement tenant was secured or the end of the fixed term.

The landlord testified that a new tenancy started on October 1, 2017 so the tenants were liable to pay the landlord for September 2017 rent in the amount of $1,500.00.

The tenant had a different version of events. The tenant stated that he met the property manager at the end of July 2017 and learned that the owners were going to significantly increase the rent to $1,950.00 per month upon expiry of their fixed term. The tenants did not want to pay such an increase and the female tenant was pregnant at the time. The tenants decided to end the tenancy earlier in the pregnancy than wait until the end of the fixed term. The tenant stated that orally told the property manager that they would be ending the tenancy effective August 31, 2017 at the end of July 2017. According to the tenant, the property manager indicated that finding a replacement tenant would be no problem since there was a long waiting list of tenant applicants. According to the tenant, the tenant asked the property manager if he needed to give written notice and the property manager stated that it was not necessary.

The tenants are of the position that the landlords did not take sufficient action to mitigate losses and the tenants should not be held responsible to compensate the landlord for September 2017 rent. The landlord efforts to mitigate losses was explored in depth.

The landlord was of the position that reasonable efforts were made to secure replacement tenants and that a suitable replacement tenant was secured for a tenancy that started October 1, 2017. The landlord stated the new tenant is paying rent of $1,900.00.

The tenants testified that they became concerned about the landlord's efforts to mitigate when there were no showings of the unit by August 10, 2017 and there was only one showing to prospective tenant in the month of August 2017. The tenants testified that in the latter part of August 2017 they placed an advertisement indicating an availability date of September 1, 2017 and even at the greatly increased rate of $1,950.00 they received a lot of interest in a very short amount of time. The tenants passed the contact information for the interested parties to the landlord. The tenants determined that the owners had no intention of renting the unit for September 1, 2017 and when the tenant asked for an explanation he was not provided one. The tenants submitted that the owner's advertised the property at the monthly rate of $1,950.00 with a starting date of October 1, 2017.

The property manager pointed out that despite a lot of interest in a property, not all prospective tenants are suitable or do not wish to proceed with a tenancy. Some prospects declined to proceed to apply for tenancy due to the properties location; the amount of rent sought; or the prospect was unsuitable to the landlord such as in one case where a prospective tenant had been evicted previously. Also, most prospective tenants have to give 30 day's notice and would not be in a position to rent the property starting September 1, 2017.

The property manager stated that in addition to the owner's advertisements, he also contacted prospective tenants who had provided rental applications to his office in the past; he called other real estate offices in the City to inform them of the rental unit availability; the real estate office has weekly advertisements in the local newspaper; and, the property manager has property management advertisements on four major bus benches. The tenants were of the position that most tenants search for rental unit on-line.

The property manager testified that the new tenant secured for the property was one that had submitted a rental application in the past and responded to the owner's advertisement and she could not move in until October 1, 2017 because she had to give a month's notice

2. Utilities

The landlord submitted that the tenants were responsible to pay for utilities at the property during their tenancy and that there was an outstanding utility bill from the City that the tenants did not pay. The landlord produced a copy of the utility bill from the City. The City charged $472.57 for electricity, water and garbage up to September 1, 2017. The utility bill shows a “balance forward” of $453.93 plus electricity for the period of August 27 – September 1, 2017 in the amount of $15.97 and water of $1.58 for the same period, plus levies for garbage of $0.48, plus tax.

Since the tenants did not satisfy the utility bill the liability was transferred to the owners of the property. The landlord produced a letter from the City addressed to the owners on November 16, 2017 indicating there was an outstanding utility bill related to the tenant’s account in the amount of$472.57 that would be transferred to the owner’s property tax account.

The tenants acknowledge responsibility to pay for electric and water consumed during their tenancy but the tenants were of the position they had paid for their portion of the utilities. The tenants pointed out that there had been a water leak at the property in July 2017 and they are not responsible for water lost as a result of the leak and the “balance forward” likely reflects water lost during the water leak.

The property manager testified that the utility account was credited for the water leak and/or paid by the owners and that the “balance forward” represents water and electricity owed by the tenants.

I noted that in the absence of other evidence, I could not verify the composition of the “balance forward”. The property manager stated that he could get a more detailed breakdown from the City and submit the additional evidence. The tenants were agreeable to reviewing the detailed breakdown with the property manager and were agreeable to paying any amount they may owe, except for any charges related to the water leak. I did not authorize the submission of any further evidence or order an adjournment since this evidence was available to the landlord prior to the hearing and should have been submitted as evidence prior to the hearing since the applicant landlord had the burden to prove its case.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons with respect to each application before me.

Tenant's application

As provided in section 38(1) of the Act, a landlord has 15 days, from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to return the security deposit and/or pet damage deposit to the tenant, reach written agreement with the tenant to keep some or all of the deposit(s), or make an Application for Dispute Resolution claiming against the deposit(s). If the landlord does not return the deposit or file for dispute resolution to retain the deposit within fifteen days, and does not have the tenant's agreement to keep the deposit, the landlord must pay the tenant double the amount of the deposit pursuant to section38(6) of the Act.

The tenants provided their forwarding address to the landlord's agent on the move-out inspection report completed on August 30, 2017. Section 44 of the Act provides that a tenancy ends when a tenant vacates the rental unit. As of August 30, 2017 the landlord regained possession of the rental unit and was in possession of a written forwarding address for the tenants. Accordingly, I find the landlord had 15 days from August 30, 2017 to comply with section 38 of the Act.

The tenants did not authorize the landlord to retain any part of the deposits in writing. The landlords did not refund the deposits to the tenants. The landlord filed a claim against the deposits in February 2018 but that is well past 15 day time limit for doing so. Accordingly, I find the landlord violated section 38(1) of the Act.

With respect to the landlord's position that the deposits were transferred to the owners and it was upon the owners to take action with respect to the deposits, I reject that position as it is inconsistent with the Act. The tenants paid their deposits to the property management company; the property management company is named as the landlord on the tenancy agreement; the property management company and its agents dealt exclusively with the tenants; the tenants were not given notice of the identity or service address of the owners; and, the property management company meets the definition of "landlord" under the Act. Accordingly, the dispute concerning the deposits is between the tenants and the property management company and the decision to transfer the deposits from the property management company to the owners is a business decision

that is outside the scope of the Act and any dispute between the property management company and the owners must resolved in the appropriate forum.

Even though the tenancy agreement states that any dispute concerning the refund of the security deposit is between the tenants and the owners, I find that term is unenforceable. Parties to a tenancy agreement may not contract out of the Act as provided under section 5 of the Act and any term in a tenancy agreement that conflicts with the Act is not enforceable pursuant to section 6 of the Act.

With respect to the landlord's position that the tenancy agreement permits the landlord to make deductions from the deposit for certain things, including unpaid rent and utilities, I reject that position as being a basis not complying with section 38(1) as I find that portion of the tenancy agreement conflicts with section 20 of the Act. As stated earlier, any term in a tenancy agreement that conflicts with the Act is not enforceable pursuant to section 6 of the Act. Section 20 of the Act provides, in part:

> **Landlord prohibitions respecting deposits**
>
> **20** A landlord must not do any of the following:
>
> (e) require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement

I also noted that the tenancy agreement provides another clause that states: "In the event the Tenant requests to break the lease, the Owner will keep the security deposit as liquidated damages. I also find this term violates section 20 of the Act and is not enforceable pursuant to section 6 of the Act.

In light of the above, I find the landlord did not have the right to withhold the deposits from the tenants; and, did not comply with section 38(1) of the Act with respect to administration of the deposits. Therefore, I order the landlord to pay the tenants double the deposits, or $3,000.00.

I further award the tenants recovery of the $100.00 filing fee they paid for their application.

Landlord's application

1. Loss of rent

The parties entered into a fixed term tenancy agreement that was set to expire on November 30, 2017. A tenant may not legally end a fixed term tenancy agreement except in a few limited and specific circumstances provided under the Act, which are cases where the landlord has violated a material term of a tenancy agreement; a tenant is fleeing domestic violence or going into a care home; or, as authorized by the Director. The tenants' reasons for ending the tenancy do not constitute a legal basis for ending the fixed term early and I find it is undeniable that the tenants breached their tenancy agreement by ending the tenancy early.

Where a tenant breaches their fixed term tenancy agreement, the tenant may be held liable to compensate the landlord for loss of rent up to the end of the fixed term. Section 7 of the Act provides that where a landlord claims against a tenant for loss of rent the landlord has a burden to prove the landlord took made every reasonable effort to minimize losses. The primary focus in this claim is whether the landlord met its burden to mitigate loss of rent.

Residential Tenancy Policy Guideline 3: *Claims for Rent and Damages for Loss of Rent* provides information and policy statements with respect to claiming for loss of rent. The policy guideline states, in part:

> In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.
>
> In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent or damages, but any remainder is not recoverable by the tenant.

In this case, the tenants asserted that the owners advertised the rental unit at the monthly rate of $1,950.00 although the documentary evidence before me, an email dated August 25, 2017, indicates the owners were seeking $1,900.00 per month. The tenants were paying rent of $1,500.00 per month that amount was set only 20 months

prior which does appear to be a significant increase in a relatively short amount of time. However, the owners were successful in obtaining a number of prospective tenants which is seen in the email they sent to the property manager and the unit was re-rented for $1,900.00 per month. I find I am satisfied that advertising the rental unit at either $1,900.00 or $1950.00 appears to be at or near the economic rent for the property at the relevant time.

In keeping with the policy guideline, since the landlord benefited from increased rent for the months of October 2017 and November 2017 I find it appropriate to deduct the increased rent amount from the unpaid rent for September 2017 in determining the landlord's loss of rent. I find the landlord's loss of rent is actually $700.00 which I calculated as follows:

> Rent payable by tenants for remainder of tenancy:
> $1,500.00 x 3 months = $4,500.00
>
> Less: rent payable by new tenants in October and November 2017:
> $1,900.00 x 2 months = $3,800.00
>
> Equals: loss of $700.00

I was also presented another argument by the tenants with respect to the landlord's effort to mitigate, which is that the rental unit was advertised as being available starting October 1, 2017 instead of September 1, 2017. I was not presented copies of the owner's advertisements by either party. Rather, I was presented an email from the owner to the property manager dated August 24, 2017 indicating the owner had four possible tenants for an October 1, 2017 start date. The property manager testified that he did search for an available tenant o September 1, 2017 and was unsuccessful. This appears to be supported in an email he sent to the tenant on August 24, 2017 where he writes: "I have no one able to move in for September so the rent will have to be covered for September. The owner will hold you to the Lease if we are not able to rent it. I will do the best I can to secure a tenant. We are getting lots of calls." I am satisfied that the property manager did make efforts to find a replacement tenant in August 2017 for September 1, 2017 and was unsuccessful due to multiple reasons which I find reasonable including the reason that prospective tenants have to give sufficient notice to end their existing tenancy.

The parties were in dispute as to whether the tenants had given the landlord notice in late July 2017, as alleged by the tenants, or August 7, 2017 as alleged by the property

manager. The parties were also in dispute as to whether the property manager informed the tenants that they had to give a written notice. It is clear that the property manager and the owners accepted the oral notice since they commenced efforts to advertise the unit in August 2017 and set up a move-out inspection with the tenants. Clearly, the benefit of the providing a notice in writing is that it would aid in demonstrating when the notice was given. Certainly, if the property manager received notice in July 2017 there would have been more time to secure a replacement tenant for September 1, 2017; however, I find the disputed oral testimony is inconclusive and I find the person giving notice bears the burden to prove when notice was given. Since it was the tenant who gave notice I find the tenants had the burden of proof and I am unconvinced that it was given in late July 2017 as opposed to August 7, 2017.

In light of all of the above, I find I am satisfied that reasonable efforts were made to mitigate losses; however, I find the landlord's losses are only $700.00 and that is the amount I award to the landlord for loss of rent.

2. Utilities

It is undisputed that the tenants are responsible for utilities they consumed during the tenancy; however, I also heard that there was a water leak at the property in July 2017 and I find that such a loss of water and its associated costs are not the tenants' liability.

What is unclear from the evidence before me is whether the "balance forward" of $453.93 that appears on the utility bill includes any charges related to the water leak. I find there is insufficient documentary evidence before me to make a determination. Since the landlord bears the burden to prove an entitlement to recover the amount claimed, I find I am unconvinced that the "balance forward" is entirely the responsibility of the tenants. As the parties agreed during the hearing, I leave it upon the landlord to present the detailed history of the account to the tenants and the tenants to pay the charges they are responsible for, if any.

From the utility bill that is before me, I am satisfied that it includes water and electricity consumed between August 27, 2017 and September 1, 2017, as well as garbage and environmental/garbage levies and taxes up to September 1, 2017. I find the tenants are responsible for these utility charges since they were in possession of the unit until august 30, 2017 and the unit was vacant in the two days that followed because of their breach of the fixed term tenancy. Therefore I award the landlord utilities for the period of August 27, 2017 to September 1, 2017 in the amount of $18.64.

Since the landlord's claim had some merit and I further award the landlord recovery of the $100.00 filing fee.

Monetary Order

Pursuant to section 72 of the Act, I offset the landlord's awards against the tenants' awards and I provide the tenants a Monetary Order in the net amount calculated as follows:

Awards to tenants:	
Double security deposit and pet damage deposit	$3,000.00
Recovery of filing fee	100.00
Less awards to landlord:	
Loss of rent	(700.00)
Utilities	(18.54)
Recovery of filing fee	(100.00)
Monetary Order for tenants	$2,281.46

Conclusion

The tenants were awarded return of double the security deposit and pet damage deposit. The landlord was awarded loss of rent and utilities, in part. After offsetting, the tenants are provided a Monetary Order in the net amount of $2,281.46 to serve and enforce upon the landlord.

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: April 12, 2018

Residential Tenancy Branch