



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PETERSON COMMERCIAL
CAMELLIA LIMITED PARTNERSHIP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL MNDCL-S MNRL-S
 FFT MNSD OLC

Introduction

This hearing was convened by way of conference call concerning applications made by the landlord and by the tenants, which have been joined to be heard together, although the named of the landlord is not the same on the 2 applications. The landlord has applied for a monetary order for unpaid rent or utilities; a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenants for the cost of the application.

The tenants have applied for a monetary order for return of all or part of the pet damage deposit or security deposit; for an order that the landlord comply with the *Act*, regulation or tenancy agreement; and to recover the filing fee from the landlord.

An agent for the landlord attended the hearing and gave affirmed testimony. Both tenants also attended and each gave affirmed testimony. The parties were given the opportunity to question each other and give submissions. No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Has the landlord established a monetary claim as against the tenant for unpaid rent?
- Has the landlord established a monetary claim as against the tenant for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for liquidated damages?
- Should the landlord be permitted to keep all or part of the security deposit in full or partial satisfaction of the claim, or should the landlord be ordered to return any portion of it to the tenants?

- Have the tenants established that the landlord should be ordered to comply with the Act, regulation or tenancy agreement?

Background and Evidence

The first tenant (JZT) testified that this fixed term tenancy began on December 1, 2017 and was to expire on November 30, 2018 thereafter reverting to a month-to-month tenancy. Rent in the amount of \$1,650.00 per month was payable on the 1st day of each month. At the outset of the tenancy the landlord collected a security deposit from the tenants in the amount of \$825.00 as well as a fob deposit of \$150.00, both of which are still held in trust by the landlord. The rental unit is an apartment in an apartment rental complex.

A copy of the tenancy agreement has been provided as evidence for this hearing, which specifies liquidated damages in the amount of \$825.00 if the tenants cause the tenancy to end earlier than the fixed term. The tenants vacated the rental unit on February 27, 2018 and paid rent to the end of that month. The move-out condition inspection was completed on February 27, 2018 and the tenants provided the landlord with a forwarding address in writing.

The tenant further testified that the neighbouring tenant in the unit below continued to harass the tenants and throw stuff at their living room window. On one occasion, the neighbouring tenant went to the tenants' rental unit aggressively. The tenants complained to the building manager and to the property management company beginning in mid-December, and no one gave the tenants the sense that they were addressing the issues. The neighbouring tenant continued to bang on the ceiling and swear at the tenants.

On December 22, 2017 the tenant sent an email to the building manager and received a response that the building manager would remind the neighbouring tenant, and perhaps that tenant made a mistake about which suite caused annoyances. However, the response didn't mention aggressive behaviour or throwing stuff at the window.

On January 11, 2018 the tenants sent another email because they hadn't heard anything else from the landlord, and the neighbouring tenant continued to harass the tenants. Anytime the tenants made any sound, the neighbouring tenant would hit the ceiling so hard it would shake the tenants' rental unit. The tenants told the landlord that it made them fearful and uncomfortable.

The neighbouring tenant made noise complaints as well, which were only in the afternoon while putting together IKEA furniture, which required no hammering. The landlord emailed the tenant asking that they let the landlord know if they were going to be making noise, which they did by text messaging, even though they didn't think it was normal. Then only a couple of nails had to be hammered into a dresser. The neighbouring tenant below was banging on the ceiling, then went onto the patio yelling at the tenants and slammed his patio door hard.

The tenants were being kept up late at night from other tenants' TVs at 1:00 a.m. or later. When the tenants emailed the building manager on January 21 and January 22, 2018, he didn't pursue it. The landlord's agent replied simply saying she had forwarded it to the property manager, and effectively, nothing was being done. The tenant felt targeted and persecuted. On January 23, 2018, the building manager replied saying that the tenants should tell the neighbouring tenant below when they were going to make noise. The landlords took no responsibility.

The tenants looked at newspapers, Craigslist and Kijiji for the landlord's advertisement, and none were located for this rental unit until February 9 on Craigslist and February 13 on Kijiji. The tenants gave notice to end the tenancy on January 31, 2018. The landlord has advertised other units, some written in Chinese, but they are for a studio apartment, and 1 and 2 bedroom apartments. The rental unit was a 1 bedroom with a den. The landlord's evidence includes photographs as well as 44 pages of interest from prospective tenants starting February 10, and the tenant questions why the landlord would not have been able to re-rent for March 1, 2018.

Over Christmas the tenants went away and paid January's rent by sliding a cheque under office door before leaving as told to do by the building manager. Then he said the tenants didn't pay rent. The landlord is not on top of the business; he even deposited the cheque. Added to the stress, the landlord served the tenants with a notice to end the tenancy.

The tenant testified that they were justified in ending the tenancy early.

The second tenant (PCPY) testified that there were 4 or 5 incidents that the neighbouring tenant was very unreasonable. A letter from a friend has been provided as evidence for this hearing to corroborate the tenants' testimony.

The tenant further testified that there is nothing in the tenancy agreement specifying that the tenants have to get permission to put together furniture, and now for that person to blame the tenants for making noise is not acceptable. The tenants are both teachers working long hours and advised the landlord and building manager about being woken up in the night on January 21, 2018. Through emails between the landlords and the neighbouring tenants below, they denied noise complaints about loud music, gaming, movies, which continued throughout February. The tenants gave notice to end the tenancy on January 31, 2018, and the landlord's evidence shows that nothing was addressed until after that, on February 13, 2018.

The tenant also testified that the rental complex is pet friendly, and the landlord's evidence shows 40-some pages of interested tenants. To claim that the landlord was not able to re-rent the rental unit for March 1, 2018 is not fair.

The landlord's agent testified that the tenants did return the fob and agrees that the \$150.00 fob deposit should be returned to the tenants.

The landlord's agent further testified that soon after the tenants moved in, the neighbouring tenants in the unit below started to complain about noise at different times of the day, so the resident manager asked them to be more specific and provide dates and times. They emailed the landlords on December 16 and again on December 18, so the landlord wrote a letter to the tenants about the noise complaints between 5:00 and 7:00 p.m. On December 21, 2017 the tenants responded to the email saying they weren't making any noise and that the tenant below had approached them on December 17; the parties came to a mutual understanding, and the neighbouring tenant left satisfied. A few hours later, the tenants started building something. The landlord's agent agrees that the neighbouring tenant below didn't respond properly by banging on the ceiling and other things, so the landlords contacted that tenant asking him to report such issues to the landlord, and sent a letter to them on January 3, 2018. When the neighbouring tenant below complained to the landlord, the landlord did the same.

There were no further complaints between December 23 and January 11, when the tenants emailed asking what had been done. The landlord advised that a letter had been sent to the neighbouring tenants in the lower unit. The landlords thought that it had been dealt with and were not aware of any other issues at that time.

On January 21, 2018 the tenants were building more furniture after texting the resident manager, but that was a Sunday and they knew the resident manager wasn't working. He was not in the building so could not have notified the tenant below. The neighbouring tenant in the lower unit over-reacted again, and the resident manager was notified again on Monday even though he wasn't working at the time, and he contacted the neighbouring tenants in the lower unit, who explained that he knocked on the ceiling to let the tenants know that he was disturbed, but was not threatening.

The tenants complained to the landlord by email on January 22 that a neighbouring tenant was making noise in the middle of the night, but didn't know which unit. The landlord received the complaint on January 23 and sent a letter to the neighbouring tenant in the lower unit on January 30 about it. However, the tenants gave notice to end the tenancy the next day, only 7 days after the landlord received the complaint.

The landlord sent a letter to the tenants about the liquidated damages clause in the tenancy agreement, and started advertising this rental unit on February 9, 2018. Several applications were received and a tenant was selected but that person backed out, so the landlord had to again advertise the rental unit. It was re-rented for April 1, 2018.

Analysis

The parties agree that the tenancy began on December 1, 2017 and that the tenancy agreement specifies liquidated damages in the amount of one half a month's rent, or \$825.00, if the tenants fail to comply with the fixed term expiring on November 30, 2018. The parties also agree that the tenants gave notice to end the tenancy on January 31, 2018 for the tenancy to end on February 28, 2018, being 3 months after it began and 9 months before the fixed term

expired. The landlord seeks liquidated damages and loss of rental revenue, and the test for determining that include:

- whether or not the tenants were justified in ending the tenancy early; and
- whether or not the landlord mitigated the loss by advertising the rental unit at the same rate and terms within a reasonable time after the notice to end the tenancy was received.

The onus is on the landlord to establish the test.

The tenants claim they were justified in ending the tenancy early, and there's no question that the tenants and the neighbouring tenants in the lower unit were having difficulties with respect to noise and disturbing one another. I also accept that the tenant(s) in the lower level were aggressive and/or over-reacted. I have reviewed the evidentiary material provided by the parties, and although I am satisfied that the tenants were disturbed, there were other measures the tenants could have taken rather than ending the tenancy. Such measures include making an Application for Dispute Resolution seeking an order that the landlord comply with the *Act* by ensuring the tenants' right to quiet enjoyment.

In the circumstances, I am satisfied that the landlord has established a claim of \$825.00 for liquidated damages.

With respect to the claim of loss of rental revenue, the landlord waited 9 days after the tenants gave notice to advertise, and the landlord's agent explained in her testimony that the advertisements were not consistent because a tenant was selected and then backed out causing the landlord to have to re-advertise. I accept that testimony. I also find that the landlord lost revenue possibly as a result of that, but in the absence of any tenancy agreement with another tenant, the fixed term applies, and the tenants are responsible for the payment of rent until the rental unit was re-rented. I find that the landlord has established mitigation.

In summary, I find that the landlord has established a claim of \$825.00 for liquidated damages and loss of rental revenue in the amount of \$1,650.00, for a total of \$2,475.00. Since the landlord has been successful with the application the landlord is also entitled to recovery of the \$100.00 filing fee.

The tenants' application is dismissed.

The landlord received the tenants' forwarding address in writing on February 27, 2018 and filed the Application for Dispute Resolution on March 9, 2018, which is within the 15 days as required by the *Act*. Also, the landlord has agreed to return the \$150.00 fob deposit, however, having found that the landlord has established the claims, I order the landlord to keep the \$825.00 security deposit and \$150.00 fob deposit in partial satisfaction, and I grant a monetary order in favour of the landlord as against the tenants for the difference of \$1,600.00.

Conclusion

For the reasons set out above, the tenants' application is hereby dismissed in its entirety without leave to reapply.

I hereby order the landlord to keep the \$825.00 security deposit and the \$150.00 fob deposit, and I grant a monetary order in favour of the landlord as against the tenant pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$1,600.00

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: May 10, 2018

Residential Tenancy Branch