Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNDCL-S

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlords on June 13, 2018 (the "Application"). The Landlords sought compensation for monetary loss or other money owed and reimbursement for the filing fee. The Landlords sought to keep the security deposit.

N.C. appeared at the hearing for the Landlords. The Tenant appeared at the hearing.

The parties confirmed the correct address for the rental unit and I amended the Application to reflect this. This is reflected on the first page of this decision.

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

The Landlords had submitted evidence prior to the hearing. The Tenant had not submitted evidence. I addressed service of the hearing package and Landlords' evidence.

The Tenant confirmed she received the hearing package more than a month prior to the hearing.

N.C. testified that the Mold Inspection Report was emailed to the Tenant. He testified that the remaining evidence was mailed to the Tenant at the forwarding address provided on the Condition Inspection Report by the Tenant. He said one package of evidence was sent June 18, 2018 and one package was sent August 2, 2018. The Tenant testified that she did not receive the evidence.

The Landlords submitted a photo of the envelope and documents sent to the Tenant June 18, 2018. The address on the envelope matches the Tenant's forwarding address as noted on the Condition Inspection Report. The Landlords also submitted a photo of the package sent August 2, 2018. It also has the Tenant's forwarding address on it. The Landlords also submitted email correspondence between N.C. and the Tenant in which N.C. refers to the package sent June 18, 2018.

I am satisfied that the Landlords served the Tenant with the evidence in accordance with section 88(d) of the *Residential Tenancy Act* (the "*Act*"). I find N.C.'s testimony in this regard is supported by the evidence submitted including the photos and email noted above. I find the Tenant is deemed to have received the evidence June 23, 2018 and August 7, 2018 pursuant to section 90(a) of the *Act*. I find the evidence was served in time for the Tenant to prepare for the hearing. I acknowledge that the Tenant testified that she did not receive the evidence; however, I am satisfied the Landlords did what was required of them under the *Act* and therefore the evidence is admissible.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all testimony provided and reviewed all documentary evidence submitted. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Are the Landlords entitled to compensation for monetary loss or other money owed?

2. Are the Landlords entitled to keep the security deposit?

3. Are the Landlords entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence. It is between the Landlords and Tenant in relation to the rental unit. The tenancy started May 15, 2018 and was for a fixed term ending May 14, 2019. The rent was $1,500.00 due on the first day of each month. The Tenant paid a $750.00 security deposit. The agreement is signed by the Tenant and on behalf of the Landlords.

The agreement includes a liquidated damages clause stating that the Tenant will pay the Landlords $2,250.00 being one and a half month's rent if the Tenant ends the

tenancy before the end date. It states that this amount is for anticipated reletting expenses (1/2 month) and rental loss (1 month). Both parties agreed the Tenant initialled this clause.

The parties agreed the Tenant vacated the rental unit June 2, 2018.

The parties agreed the Tenant and Landlord did a move-in inspection on May 10, 2018. The parties agreed the Tenant and Landlord did a move-out inspection on June 2, 2018.

The parties agreed the Tenant provided her forwarding address to the Landlords on the Condition Inspection Report on June 2, 2018. The parties agreed the Landlords did not have an outstanding monetary order against the Tenant at the end of the tenancy. The parties agreed the Tenant did not agree in writing at the end of the tenancy that the Landlords could keep some or all of the security deposit.

The Landlords sought the following compensation:

1. $2,250.00 based on the liquidated damages clause in the tenancy agreement; and

2. $157.50 for a mold inspection.

N.C. testified as follows in relation to the liquidated damages. The Tenant insisted there was mold in the rental unit. The Landlords did not know if there was mold as they are not experts in the area and felt they had to believe the Tenant that there was an issue. The Landlords arranged for a mold inspection. The inspection was done and there was no mold in the rental unit. The Tenant ended the fixed term tenancy prior to the end date because of the mold issue. There was no mold, so the Tenant had no reason to end the fixed term tenancy early. The Landlord therefore is enforcing the liquidated damages clause.

I asked N.C. for the basis for the amount of the liquidated damages. He said the amount is what it is because the Landlords might not re-rent the rental unit when a tenant breaks the lease early. He said the Landlords may then suffer loss of one month's rent. He testified that the additional amount is due to the Landlords having to pay the property management company. He testified that the amount relates to the cost of finding new tenants. He submitted that the amount requested is fair and reasonable.

N.C. testified that the rental unit was posted for rent again May 30, 2018. The Landlords submitted screen shots of rental ads supporting this. He said the Landlords could not find new tenants for June of 2018. He testified that the Landlords found new tenants for July 12, 2018 and that the rental unit was vacant for one and a half months.

The Tenant testified that she was told she was being let out of the lease due to the mold issue and that if the position of the Landlords was that she was breaking the lease, she should have been told this. She said she was never told the liquidated damages clause was going to apply. She testified that she was told she would get the security deposit back. The Tenant said she signed a Mutual Agreement to End Tenancy and sent this to the Landlords. She said she never received a copy back from the Landlords. The Tenant said the Landlords should have had someone come and investigate the mold issue and submitted that they could have worked together to address the issue.

The Tenant testified that she did not believe there was no mold in the rental unit. She said she was sick while at the rental unit and that everything smelled bad.

In reply, N.C. testified that the Landlords did not sign the Mutual Agreement to End Tenancy.

The parties provided evidence about email correspondence between the two in relation to the liquidated damages clause. The email states:

> Since you are leaving before the end of a fixed term, based on the lease, you are responsible for compensating landlord for the liquidated damages (i.e. expense for re-letting the unit and possible vacancy loss). However, based on the situation, we will ask landlord to waive the liquidated damages to minimize your financial loss.

The Tenant agreed she received this email.

N.C. testified that if there had been mold, the liquidated damages charge would be waived because the rental unit would not have been livable. He said that it was not waived because there was no mold. N.C. testified that the Landlords never said they would not charge the liquidated damages amount.

In relation to the mold inspection, N.C. testified that the inspection was done at the request of the Tenant. He said the inspection would not have been necessary if the Tenant did not raise the issue. N.C. confirmed that the inspection was completed after the Tenant vacated the rental unit.

In response to questions from me, N.C. testified that he attended the rental unit and did not find anything out of the ordinary. He said the previous tenant had never raised an issue about mold. He pointed out that he is not a professional in relation to mold. N.C. confirmed the Tenant was never told she would be responsible for the cost of the mold inspection.

The Tenant maintained that there is a mold issue in the rental unit. She questioned the accuracy of the inspection given the cost of it. She said she had looked into inspections that would have cost much more than the amount claimed.

Analysis

Section 7(1) of the *Act* states that a party that does not comply with the *Act* must compensate the other party for damage or loss that results. Section 7(2) of the *Act* states that the other party must mitigate the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

> It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Under sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to the security deposit if they do not comply with the *Act* and *Residential Tenancy Regulation* (the "*Regulations*"). Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

Based on the testimony of the parties, I find the Tenant did not extinguish her rights in relation to the security deposit under sections 24(1) or 36(1) of the *Act*.

Pursuant to section 38 of the *Act*, the Landlords had 15 days from June 2, 2018, the date the tenancy ended and the date the Tenant provided her forwarding address in writing, to repay the security deposit or file the Application claiming against it. Based on our records, the Landlords filed the Application June 13, 2018, within the 15-day time limit.

There is no issue that the Landlords and Tenant entered into a fixed term tenancy starting May 15, 2018 and ending May 14, 2019. Further, there is no issue that the Tenant vacated the rental unit June 2, 2018.

Both the *Act* and Residential Tenancy Branch Policy Guidelines address the circumstances in which a tenant can end a fixed term tenancy early. The parties can agree in writing to end the tenancy pursuant to section 44(1)(c) of the *Act*. Further, section 45(3) of the *Act* states:

> If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Policy Guideline 8 deals with breaches of a material term of a tenancy agreement and states in part the following:

> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
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> - that there is a problem;
> - that they believe the problem is a breach of a material term of the tenancy agreement;
> - that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> - that if the problem is not fixed by the deadline, the party will end the tenancy.

Policy Guideline 30 deals with fixed term tenancies and states in part the following:

> During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties, or under section G below (Early Termination for Family Violence or Long-Term Care).
>
> …

> A tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the Legislation. Breach of a material term involves a breach which is so serious that it goes to the heart of the tenancy agreement.
> …
>
> A tenant may not use the one month notice provisions of the Legislation to end the tenancy prior to the end of the fixed term except for breach of a material term by the landlord or under section G below (Early Termination for Family Violence or Long-Term Care). Any other one month notice will take effect not sooner than the end of the fixed term.

I cannot find that the Landlords and Tenant agreed in writing to end the tenancy. There is no evidence before me that this occurred. The Tenant testified that she completed a Mutual Agreement to End Tenancy and sent it to the Landlords; however, N.C. testified that the Landlords never signed this document.

Nor can I find that the Tenant gave notice to end the tenancy early in accordance with section 45(3) of the *Act*. There is no evidence before me that the Tenant gave the Landlords written notice of a breach by the Landlords of a material term or a deadline to address the breach.

I cannot find that the Tenant ended the tenancy in accordance with the *Act* and therefore find that she breached the *Act* and tenancy agreement by ending the fixed term tenancy early.

There is no issue that the tenancy agreement included a liquidated damages clause and that the Tenant signed the agreement and initialed the clause.

Policy Guideline 4 deals with liquidated damages clauses and states in part the following:

> …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. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
>
> - A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
>
> …
>
> If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

I acknowledge the email that speaks to the Landlords waiving the liquidated damages fee. However, upon a review of that email, I find it is not clear that the Landlords were waiving the fee. I find the property management company indicated they would look into waiving the fee without a confirmation that the Landlords would do so. I also note that there is a reference to the Tenant breaking the lease in the email correspondence.

I am not satisfied based on the testimony of N.C. and evidence of the Landlords that the liquidated damages clause is not a penalty. I find the amount to be high and did not find the basis for it to be compelling. I decline to enforce the liquidated damages clause.

However, I am satisfied that the Landlords did in fact suffer damages in the amount of $2,032.25 as a result of the Tenant ending the tenancy agreement early. I accept the testimony of N.C. that the rental unit was posted for rent again May 30, 2018. This is supported by the rental ads submitted as evidence. I also accept that the rental unit was not re-rented until July 12, 2018. The Tenant did not dispute this. I accept that the Landlords therefore lost rent for June and part of July. I calculate this amount to be $2,032.25 and find the Landlords are entitled to compensation for this loss.
I am not satisfied the Landlords are entitled to recover the $157.50 requested for the mold inspection. I cannot find that the Tenant breached the *Act*, *Regulations* or tenancy agreement by advising the Landlords that she believed there was mold in the rental unit or by requesting a mold inspection. I accept that the Tenant believed there was mold in the rental unit and that an inspection was necessary. If the Landlords did not believe this was necessary, they should have declined to have the inspection done. Further, if the Landlords were only willing to arrange for an inspection at the cost of the Tenant, this should have been made clear to the Tenant. I also note that the inspection was done after the Tenant vacated the rental unit. If the inspection was only done because of the Tenant's request, there would have been no need to continue with the inspection

once the Tenant vacated. I am not satisfied the Landlords have shown they are entitled to reimbursement for the mold inspection.

Given the Landlords were partially successful in this application, I grant them reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, I find the Landlords are entitled to compensation in the amount of $2,132.25. Pursuant to section 72(2) of the *Act*, I authorize the Landlords to retain the entire security deposit amount of $750.00. Further, I grant the Landlords a Monetary Order in the amount of $1,382.25.

Conclusion

The Landlords are entitled to compensation in the amount of $2,132.25. The Landlords are authorized to retain the $750.00 security deposit. The Landlords are granted a Monetary Order in the amount of $1,382.25. This Order must be served on the Tenant as soon as possible. If the Tenant fails to comply with this Order, it may be filed in the Small Claims division of the Provincial 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: October 02, 2018

Residential Tenancy Branch