



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding OAK WEST REALTY LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes Landlord: MNDCL-S FFL
 Tenants: MNSD MNDCT FFT

Introduction

On September 27, 2018, a hearing was held to address applications from both the landlord and the tenants pursuant to the *Residential Tenancy Act* (the *Act*), as follows:

The landlord applied for:

- a Monetary Order for compensation for damage or loss under the *Act*, regulation or tenancy agreement; and authorization to retain the tenants' security deposit in partial satisfaction of this claim pursuant to section 67 of the *Act*; and
- recovery of the filing fee for this application from the tenants pursuant to section 72 of the *Act*.

The tenants applied for:

- the return of the security deposit pursuant to section 38 of the *Act*;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement, pursuant to section 67 of the *Act*; and
- recovery of the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

After over an hour of hearing time, and after providing the parties an opportunity to privately discuss a settlement of their disputes, the parties were unable to reach a settlement. The hearing was adjourned as it was clear that more time would be required for all aspects of both parties' claims to be heard. The parties were advised not to submit any further evidence until the hearing was reconvened. The reconvened hearing was held on November 13, 2018 resulting in this Decision.

Issue(s) to be Decided

Is the landlord entitled to retain all or a portion of the security deposit in satisfaction of their claim against the tenants? If not, are the tenants entitled to the return of the security deposit, or a doubling of the security deposit?

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

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

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

A written tenancy agreement was submitted into evidence. There was disagreement between the parties regarding the start date and end date of this fixed term tenancy. The written tenancy had been amended to reflect December 1, 2017 as the beginning of the tenancy, and November 30, 2018 as the scheduled end date, at the request of the tenants. Monthly rent of \$3,950.00 was payable on the first day of the month. A security deposit of \$1,975.00 was paid by the tenants at the beginning of the tenancy and continues to be held by the landlord. Both parties participated in a condition inspection of the rental unit at move in, and a written report was prepared by the landlord. The written report was emailed to the tenants, however the landlord acknowledged that it was not sent to the tenants within the seven-day time limit required under the regulations of the *Act*.

From the start of the tenancy, the tenants requested from the landlord for a mutual agreement to end the tenancy but it was not until January 9, 2018 that the tenants sent the landlord an email stating that they planned to move out and would soon provide the landlord with a specific move out date. On January 18, the tenants confirmed they would move out on January 21, 2018, which they did. A condition inspection was conducted by the parties on January 22, 2018, and I note that the tenants provided their forwarding address in writing to the landlord on that same day.

The landlord filed an Application for Dispute Resolution on February 5, 2018 seeking to retain the tenants' security deposit in partial satisfaction of their claim against the tenants for liquidated damages of \$2,073.75, which represents one-half of a month's rent of \$1,975.00 plus GST.

The landlord testified that the liquidated damages cost is charged to the rental unit owner for costs related to re-renting the unit. The landlord testified that a new tenancy agreement was signed on February 14, 2018 with a tenancy start date of March 1, 2018. The landlord did not submit any receipts for costs incurred in re-renting the unit.

On September 4, 2018 the tenants filed an Application for Dispute Resolution seeking the return of double the amount of the security deposit, rent paid for the months of December 2017 and January 2018, and moving costs, for a total claim of \$12,990.45.

The tenant testified that she found cleaning deficiencies in the rental home at move-in. She also experienced issues with the functioning of the heating and hot water system in the rental home. The tenant testified that due to the issues experienced, the tenants moved out of the rental home prior to the end of the fixed term tenancy, incurring moving costs.

Both parties provided testimony and referred to their submitted documentary evidence regarding the time line pertaining to the tenants' notification to the landlord of issues and the landlord's response to the issues raised by the tenant.

Analysis

Section 67 of the *Act* provides that an arbitrator may determine the amount of the damage or loss and order compensation to the claimant, if an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement.

The burden of proof is on the claimant to prove the existence of the damage or loss and that it stemmed directly from a violation of the tenancy agreement or contravention of the *Act* on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. A claimant is not eligible for compensation that is found to be a penalty against the other party, as opposed to an actualized loss. Finally, it must be proven that the claimant took reasonable steps to address the situation and to mitigate the damage or losses that were incurred.

Section C of Residential Tenancy Policy Guideline #16. Compensation for Damage or Loss examines the issues of compensation in detail, and explains as follows:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. 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:

- *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.*

I have addressed the two parties' claims separately below.

Landlord's Claim

The landlord has claimed that the tenant ended the fixed-term tenancy early in contravention of section 45(2) of the *Act*, which states:

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 landlord is seeking compensation of one-half month's rent plus GST for a total of \$2,073.75 for liquidated damages.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance to 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.

In this case, the landlord testified that the liquidated damages claim represents the cost her property management company charges to the rental unit owner for re-renting the unit. The cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. In this case, the landlord did not provide copies of any advertisements posted to re-rent the unit, nor did she supply any receipts for advertisement costs. The landlord did not provide any calculation of the labour costs required to re-rent the unit. The landlord testified that showings took place on January 25, 26 and February 4, 2018, and that a new tenancy agreement was signed on February 14, 2018.

Although the tenants vacated the rental unit prior to the end of their fixed term, based on the testimony and evidence before me, on a balance of probabilities, I do not find that the landlord provided sufficient evidence to show how the \$2,073.75 claimed for liquidated damages in clause 5 of the tenancy agreement was a genuine pre-estimate of the cost of re-renting the unit and not a penalty. For the above reasons, I dismiss the landlord's claim of \$2,073.75 for liquidated damages without leave to reapply.

Tenant's Claim

The tenant has claimed that the landlord failed to provide a rental unit suitable for living, in contravention of section 32(1) of the *Act*, which states:

A landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The tenant is seeking the return of rent paid for the months of December 2017 and January 2018, and moving costs.

Based on the testimony and evidence before me, on a balance of probabilities, I do not find that the tenant provided sufficient evidence to prove, on a balance of probabilities, that the landlord contravened the *Act*, regulations or tenancy agreement. I find that the landlord responded in a reasonable manner and within a reasonable amount of time to try to address the tenant's concerns by scheduling a handyman to assess the issues and then scheduling the appropriate tradesperson to service the heat and hot water systems. I note the tenant gave notice to end the tenancy approximately one month and a week after moving into the rental, and as such, the landlord had a limited time frame to address the issues before the tenant had already decided to end the tenancy.

As I have not found that the landlord failed to comply with the *Act*, regulations or tenancy agreement, the tenants' claim for compensation on this basis is dismissed without leave to reapply.

The tenant is also seeking double the security deposit as part of her claim. Section 38 of the *Act* sets out comprehensive provisions pertaining to the return of the security deposit at the end of a tenancy, therefore, I have addressed the issue of the security deposit in a separate section of this Decision below.

Security Deposit

The landlord continues to hold the \$1,975.00 security deposit.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of:

- (a) the date the tenancy ends, and
- (b) the date the landlord receives the tenant's forwarding address in writing

In this case, the tenant provided her forwarding address in writing to the landlord's agent on January 22, 2018. On February 5, 2018, the landlord filed an Application for Dispute Resolution to retain the security deposit in satisfaction of their claim for compensation, which is within the 15-day time limit provided in the *Act*.

As the landlord's claim for compensation is dismissed, the landlord is ordered to return the security deposit to the tenant. I issue a Monetary Order in the tenant's favour in the amount of the security deposit, \$1,975.00.

The parties shall each bear their own costs of the filing fee.

Conclusion

I issue a Monetary Order in the tenant's favour in the amount of \$1,975.00 pursuant to sections 38, 67 and 72 of the *Act*.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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 parties bear the costs of their own filing fees.

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 6, 2018

Residential Tenancy Branch