Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL MNDCL MNDL-S FFT MNSD

Introduction

This hearing dealt with applications from both the landlord and tenant pursuant to the *Residential Tenancy Act* ("*Act*").

The landlord applied for:

- a Monetary Order for damages and loss pursuant to section 67;
- authorization to retain the security deposit for this tenancy pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord represented herself with assistance.

The tenant confirmed receipt of the landlord's application for dispute resolution dated September 4, 2018 and evidence. Based on the testimony I find that the tenant was served with the landlord's materials in accordance with sections 88 and 89 of the Act.

Preliminary Issue – Service of Tenant's Application

The tenant testified that they served their application for dispute resolution dated November 26, 2018 and evidence by registered mail on the landlord. The tenant was unable to provide a Canada Post tracking number as evidence of service. The landlord disputed that they had been served with the tenant's materials.

Section 89(1) of the *Act* establishes the following Special rules for certain documents, which include an application for dispute resolution for a monetary award:

89(1) An application for dispute resolution,...when required to be given to one party by another, must be given in one of the following ways:

- *(a) by leaving a copy with the person;*
- *(b) if the person is a landlord, by leaving a copy with an agent of the landlord;*
- *(c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;*
- *(d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;*
- *(e) as ordered by the director under section 71(1) [director's orders: delivery and service of document]...*

While registered mail is an acceptable means of service, I find that there is insufficient evidence in support of the tenant's submission that the landlord was served by registered mail. The onus is on the applicant to submit sufficient evidence to demonstrate service. The tenant failed to provide a tracking number and could not articulate why they did not obtain a tracking number if they had served the landlord. The tenant testified that they had made a previous application that was dismissed for failure to prove service. The tenant was aware of their requirement to serve the other party and to present evidence of that service but did not prepare or submit documentary evidence in support of their submission for the hearing.

Based on the evidence provided I am not satisfied on a balance of probabilities that the landlord was served with the tenant's application and evidence in accordance with the *Act* or at all. Accordingly, I dismiss the tenant's application without leave to reapply.

Issue(s) to be Decided

Is the landlord entitled to a monetary award as claimed?
Is the landlord entitled to retain the security deposit for this tenancy?
Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

The parties entered into a one year written tenancy agreement that provided that the tenancy would start on March 1, 2018 and end on February 28, 2019. The rent was $1500 per month payable by the first day of each month. The tenant paid a security deposit of $750 at the start of the tenancy and it is still held by the landlord. The parties participated in a condition inspection at the start of the tenancy.

The tenancy ended in March, 2018. The tenant was represented by her partner who attended the move out inspection and provided a forwarding address in writing on the move out condition inspection report. The parties did not agree on the assessment of damage to the suite and the move out inspection was not signed by either party.

The landlord seeks a monetary award of $1,750.00 for various damages they claim was caused by the tenant.

Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit and pet damage deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act,* equivalent to double the value of the security deposit and pet damage deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the deposits as per section 38(4)(a).

The tenancy ended on March 30, 2018. The landlord filed their application for authorization to retain the security deposit on September 4, 2018. The landlord

disputes that they were provided with the tenant's forwarding address but it is clearly noted on the move out condition inspection report.

The landlord said that the address on the report is an address of the tenant's partner and should not be considered a forwarding address. I find the landlord's position to be nonsensical and disingenuous. The tenant appointed her partner to attend the move out inspection on her behalf and they provided a forwarding address. The information is clearly provided in the portion of the inspection report that is reserved for the tenant's forwarding address. It is not open for the landlord to dispute information provided by the tenant or their agent and claim that they did not receive a forwarding address when it is clearly shown on the inspection report. I find that the landlord's position that they were never presented with the tenant's forwarding address to be without any merit. I find that the landlord was served with the tenant's forwarding address on the condition inspection report on March 30, 2018.

Therefore, I find that the landlord had 15 days from March 30, 2018 to either return the security deposit in full or file an application for authorization to retain the deposit. The landlord did not do either. The landlord did not file an application to retain the security deposit until September 4, 2018, nearly half a year since the tenancy ended. I find that the landlord failed to return the deposits in full within 15 days of March 30, 2018 nor did they file their application within the timeframe permitted under the Act. I accept the tenant's evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenant is entitled to a $1,500.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

The landlord applies for a monetary award for damages and loss. Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the Act, regulations or a tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. The claimant also has a duty to take reasonable steps to mitigate their loss.

I find that there is insufficient evidence in support of the landlord's claim. The landlord submitted a typewritten list of items that they have titled a receipt. I do not find it to be convincing or evidence of any losses. Similarly, I find the photographs submitted do not show anything more substantial than the wear and tear expected after even a short term tenancy. I find that the landlord has not submitted sufficient evidence in support of their claim for damages and loss and have not met their evidentiary burden on a balance of probabilities.

The landlord claims that the tenancy agreement includes a clause allowing for retention of the full amount of the security deposit as liquidated damages.

Residential Tenancy Policy Guideline 4 provides the following guidance in determining if a clause is an effective liquidated damage clause or a penalty clause:

> A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance 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 considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.
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> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
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> - A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
> - If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
> - If a single lump sum is to be paid on occurrence of several events,

I find that the clause contained in the tenancy agreement to be more in the nature of a penalty clause. It claims the full amount of the security deposit is to be surrendered which I find to be far in excess of any cost of re-renting the suite. As outlined above a true liquidated damage clause is a pre-estimate of potential losses agreed to by the parties. I find that the clause in the present tenancy agreement requiring the surrender of the full deposit to be an unconscionable penalty clause and therefore unenforceable.

While the landlord makes some reference to penalties from the strata they have not provided sufficient evidence to show that penalties were incurred, the monetary amount

or that they resulted due to the actions or negligence of the tenant. Accordingly, I dismiss this portion of the landlord's application.

As the landlord's application was unsuccessful the landlord is not entitled to recover their filing fee.

Conclusion

The tenant's application is dismissed without leave to reapply.

The landlord's application is dismissed without leave to reapply.

I issue a Monetary Order in the tenant's favour in the amount of $1,500.00 against the landlord. The tenant is provided with a Monetary 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.

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: January 8, 2019

Residential Tenancy Branch