Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Diamond Doors Real Estate Services Inc. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, FFT

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("*Act*") for a monetary claim of $6,730.31 to recover the money for unpaid rent – holding the security deposit, and to recover the cost of their filing fee.

The tenants, J.M and L.T, (the "Tenants") and an agent for the Landlord (the "Agent") appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process.

During the hearing, the Tenants and the Agent were given the opportunity to provide their evidence orally and respond to the testimony of the other Parties; I reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure; however, only the evidence relevant to the issues and findings in this matter are described in this decision.

Neither party raised any concerns regarding the service of the Application for Dispute Resolution and documentary evidence. The Tenants indicated that they had received all of the Landlord's documents relating to the amended claim amount, so I agreed to amend the Application in the hearing.

Issue(s) to be Decided

- Is the Landlord entitled to a monetary order under the *Act,* and if so, in what amount?
- Is the Landlord entitled to the recovery of the cost of the filing fee under the *Act?*

- Is the Landlord entitled to retain all or a portion of the security deposit in full or partial satisfaction of any amounts owed?

Background and Evidence

The Parties agreed that they entered into a tenancy agreement dated and signed on June 12, 2018. This was for a fixed term tenancy with occupancy starting on July 1, 2018, and running until June 30, 2019, and then on a month-to-month basis, until ended in accordance with the *Act*. The rent was $2,950.00 per month, due on the first day of each month, and the Tenants paid a security deposit of $1,475.00 and a cleaning deposit of $250.00. The tenancy agreement was signed by the Tenants, J.M. and L.T., as well as J.M.'s father, W.M., and an agent for the Landlord.

On July 23, 2018, L.T. gave the Landlord a letter saying that she intended to vacate the rental unit and that she would not be paying any further rent, but saying that she understood that her co-tenant J.M. was going to continue living there.

The Parties agreed that J.M. moved out of the rental unit on September 11, 2018; he had arranged with the Landlord to pay a pro-rated rent for the number of days in which he would be in the rental unit in September 2018. In the hearing, the Parties agreed that this amounted to $1,081.67.

J.M. and the Landlord completed the move-out portion of the condition inspection report on September 11, 2018, which stated that there was "no damage, keys returned." This document was signed by J.M. and an agent of the Landlord. J.M.'s forwarding address was on the condition inspection report.

In the hearing, the Agent said that J.M. had a history of having paid rent on time; however, his rental payment for September 2018 did not go through. The Agent said she had already given him a good reference to another landlord before realizing that the cheque he gave her had insufficient funds.

The Landlord submitted a bank statement dated September 17, 2018, indicating that a payment of $1,081.67 from J.M. to the Landlord was returned as having insufficient Funds; however, the statement does not include any bank charges for processing the insufficient funds.

In the hearing the Tenant, J.M. said:

> As far as the rent being withheld for the last 11 days in September, I didn't want to leave and liked [the Agent] as a Landlord. But as soon as [L.T.] left, [the Agent] asked me to move out. When I said I didn't want to move she started pressuring the co-signer. She didn't feel comfortable with me living there, so she wanted me to leave. I just wanted my security deposit back. It was clear that she wasn't going to pay me the security deposit back, because of ending the lease early.
>
> The security deposit was $1,475.00, and the prorated rent was $1081.67 – that's a difference of about $394.00. My argument is that she asked me to leave, so she shouldn't get to keep the damage deposit.

The Agent said that they discovered that there was a problem with the washer/dryer set in the rental unit after the move-out condition inspection report was completed. She said new tenants moved in on September 21, 2018, and informed the Landlord that the washer/dryer was not working.

The move-in condition inspection report notes that there was a "dint in door" of the dryer, but nothing else is noted in the move-out condition inspection report for the dryer or the washer.

The Landlord submitted photos of a washer or dryer with a panel missing from the front. The Landlord also submitted a document from an appliance store regarding a service visit to the rental unit. The first page of this document refers to a part number for a "filter cover" for "$205.41 + tax" with an "ETA for the part: 2 – 3 days" and "Labor to install the part would be about $269.00 (estimated)". The second page of this document is an invoice for a "filter cover" costing $205.41 plus tax for a total of $230.06.

The Landlord submitted an invoice from an appliance chain's clearance outlet setting out the cost of a new washer/dryer unit, which was $2,293.60, including the cost of removing the old washer/dryer unit in the apartment. This invoice said the new unit would be delivered to the rental unit in question.

J.M. said that there was nothing wrong with the washer and dryer. He said "How much laundry do you do? There was a panel missing that was missing when we moved in. There was nothing wrong with the washer or dryer, and I only used it once or twice."

Analysis

The Tenant, J.M., admitted in the hearing that he did not pay the pro-rated rent the Parties had agreed upon for the time he was in the rental unit in September 2018. In essence, his testimony was that he did not pay this, because he was afraid the Landlord would not return his security deposit, so he withheld rent for September in lieu of the security deposit.

As set out in section 26 of the *Act*, a tenant's obligation to pay rent remains, even if the landlord has violated the *Act*, regulations or tenancy agreement, unless the tenant has a legal right under the *Act* to withhold rent. If a tenant claims a breach on the part of the landlord, the tenant's remedy is to seek the landlord's consent to make a deduction from rent or to get authorization from an arbitrator at the Residential Tenancy Branch. The Tenant, J.M., did not get the Landlord's consent or authorization from an arbitrator prior to withholding the rent from the Landlord. As a result, I find the Landlord is successful in their claim for unpaid rent in the amount of **$1,081.67**.

The Landlord has also claimed the following damages from the Tenant:

1. $40.00 ..... in bank charges for unpaid rent;
2. $25.00 ..... for Landlord's own fee for unpaid rent;
3. $1,475.00 ..... retain the security deposit for breaking the lease;
4. $2,351.11 ..... washer/dryer damage replacement
5. $82.53 ..... registered mail fee;
6. $1,575.00 ..... [Landlord] Management fee Invoice #41
7. $100.00 ..... RTB filing fee

$5,648.64

Section 7 of the Residential Tenancy Regulation states:

> **Non-refundable fees charged by landlord**
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> **7** (1) A landlord may charge any of the following non-refundable fees:
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> (a) direct cost of replacing keys or other access devices;
>
> (b) direct cost of additional keys or other access devices requested by the tenant;
>
> **(c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque**;

> **(d) subject to subsection (2), an administration fee of not more than $25 for the return of a tenant's cheque by a financial institution or for late payment of rent;**
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> (e) subject to subsection (2), a fee that does not exceed the greater of $15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;
>
> (f) a move-in or move-out fee charged by a strata corporation to the landlord;
>
> (g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.
>
> (2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.
>
> [my emphasis added]

Regarding **item 1** above, I have already awarded the Landlord with unpaid rent for September 2018 in the amount of **$1,081.67**.

In terms of **item 2** above, the Landlord submitted a bank statement evidencing the Tenant's insufficient funds payment in September 2018; however, the Agent did not point me to evidence that the Landlord had to pay $40.00 for this matter. I dismiss this claim without leave to reapply.

Item 3 above, the Landlord's $25.00 fee for unpaid rent, is authorized by section 7 (1) (d) of the Regulation, since this fee is set out in clause 8 (c) of the tenancy agreement, as authorized by section 7 (2) of the Regulation. I award the Landlord **$25.00** for Landlord's fee for unpaid rent.

Item 4, retaining the $1,475.00 security deposit for breaking the lease, is not authorized by the *Act* or Regulation and is in fact specifically prohibited by section 20(e) of the Act. This mirrors liquidated damages, however, there was no liquidated damages clause specifically set out in the tenancy agreement.

For guidance in this matter, I turn to Residential Tenancy Branch Policy Guideline 4 – Liquidated Damages, which states the following:

> 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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> [emphasis added]
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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, some trivial some serious, there is a presumption that the sum is a penalty.

The Agent did not point me to a clause in the tenancy agreement that sets out this fee in the event that the lease was broken by the Tenants. Further, the cost to the Landlord of the Tenants having broken the fixed term lease was the lack of rental income for the rental unit and the cost of finding a new tenant (which was not itemized in the Landlord's evidence). The Landlord's evidence is that they were able to find suitable replacement tenants for the rental unit within 10 days of the end of the tenancy before me. As such, the Landlord has not established that the Tenants' violation of the tenancy agreement caused the Landlord to incur damages or a loss as a result of the violation, beyond what has already been awarded above. Accordingly, I dismiss the Landlord's application to retain the security deposit based solely on the lease having been broken without leave to reapply.

In **item 5**, the Landlord claimed $2,351.11 for the washer/dryer replacement cost, due to damage to the unit. Section 21 of the Regulation states:

> **Evidentiary weight of a condition inspection report**
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> **21** In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The move-out condition inspection report states that there was nothing wrong with the washer/dryer unit when the rental unit was reviewed and the condition inspection report signed by the Parties on September 11, 2018. However, in the hearing, the Agent said that the new tenants in the rental unit discovered a problem with the dryer on September 21, 2018. As noted above, the Tenants denied that there was anything wrong with the washer or dryer.

The purpose of a condition inspection report is to identify such problems at the time a tenant moves out. Further, I find that the Landlord has provided inconsistent evidence about the damage to the washer/dryer unit. On one hand, there is evidence before me of a service visit from an appliance store which identified the problem as being a missing panel that was ordered. However, subsequently, the Landlord purchased a new washer/dryer for the rental unit. There is a gap between having the unit fixed and replacing it altogether. The Agent did not point me to anything that said the washer/dryer could not be fixed, if there was anything wrong with it, other than the missing panel.

Further, the Tenant had no way of knowing what happened to the appliances in the ten days after he moved out of the unit, so it would be administratively unfair to expect him to compensate the Landlord for damage that could have occurred after the move-out condition inspection report was signed.

Having considered the evidence before me in this matter, I find the Landlord has provided insufficient evidence to warrant an order for damages relating to the washer/dryer unit. I dismiss the Landlord's claim in this regard without leave to reapply.

As the Landlord's claim has been partially successful, I award recovery of half of the filing fee in the amount of **$50.00** for **item 6**.

Regarding **item 7**, the Landlord initially claimed $42.00 in lieu of having sent their dispute resolution documents to the three signatories of the tenancy agreement at a cost of $14.00 each. The Agent did not explain in the hearing from where the additional costs came nor point me to documentation setting this out; regardless, reimbursement of the cost of serving the required documents on the other Parties by registered mail is not something that I find reasonable to reimburse. There are less costly - even free - methods of serving documents on another party, so I dismiss this claim without leave to reapply.

For **item 8**, the Landlord submitted an invoice with the following charges:

a)	Disputing resolution submission fee	$ 300.00
b)	Management fee for unpaid rent, disputing resolution	$1,200.00
c)	GST	$ 75.00
		$1,575.00

The Agent did not comment on this item or explain how it is authorized by legislation. Accordingly, I dismiss this without leave to reapply.

The Landlord also holds a $250.00 cleaning deposit charged to the Tenants at the start of the tenancy; however, I find that a cleaning deposit is neither a security deposit nor a pet damage deposit as defined and allowable under the *Act*, nor an allowable fee pursuant to sections 6 or 7 of the Residential Tenancy Regulation. As a result, I find that the Landlord was not entitled to charge this cleaning deposit and I order that the Landlord return this $250.00 to the Tenants.

As a result of the above, I grant the Landlord monetary compensation in the amount of $1,081.67 in unpaid rent, $25.00 for Landlord's fee for unpaid rent, and $50.00 recovery of the filing fee, less the $1,475.00 security deposit and $250.00 cleaning deposit held by the Landlord.

This set off is explained in Policy Guideline 17(C)(1):

> The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
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> • a landlord's application to retain all or part of the security deposit; or
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> • a tenant's application for the return of the deposit.
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> unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.

The evidence before me is that the Tenant provided his forwarding address on the condition inspection report as of September 11, 2018. The Landlord did not present anything to indicate that the Tenant extinguished his right to the security deposit.

As a result, I make a monetary order for the Tenant in the amount of $1,475.00 + 250.00 – $1,156.67 = **$568.33**.

Conclusion

Pursuant to section 67 of the *Act*, I grant the Tenants a monetary order of **$568.33**.

The Tenants are 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.

Although this decision has been rendered more than 30 days after the conclusion of the proceedings, section 77(2) of the *Act* states that the Director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period set out in subsection (1)(d).

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: March 1, 2019

Residential Tenancy Branch