



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Capreit Limited Partnership
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. A participatory hearing was held on June 27, 2019. The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for unpaid rent or utilities;
- permission to retain the security deposit to offset the rent owed; and,
- to recover the filing fee from the Tenant for the cost of this application.

The Landlord's agent and the Tenant both attended the hearing and provided testimony. Both parties confirmed receipt of each other's documentary evidence. However, there was a letter in the Landlord's evidence package which was uploaded and served a couple of days before the hearing. As such, it is late, according to the rules of procedure (applicant must serve evidence no later than 14 days prior to the hearing) and I will not consider this letter any further.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have 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.

Issue(s) to be Decided

- Is the Landlord entitled to compensation for unpaid rent or utilities?
- Is the Landlord entitled to keep the security deposit to offset the unpaid rent?

Background and Evidence

Both parties agree that the Landlord holds a security deposit in the amount of \$825.00. Both parties also agree that monthly rent was \$1,650.00 and that rent is due on the first of the month.

The Landlord provided a copy of the lease agreement into evidence, which shows that on May 15, 2018, the Tenant signed a 1 year fixed term lease agreement commencing on June 1, 2018, and ending on May 31, 2019. The Landlord also pointed to term #5 of this tenancy agreement which states the following:

LIQUIDATED DAMAGES: If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the Landlord to end the tenancy before the end of the term as set out in (B) above, or any subsequent fixed term, the tenant will pay to the Landlord the equivalent of their security deposit amount as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the Landlord's costs of re-renting the unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or Residential Property.

The Landlord stated that the Tenant paid rent up until January 2019, when her rent payment did not go through. The Landlord stated that they are still owed rent for January 2019, in the amount of \$1,650.00, plus \$25.00 for the NSF fee and \$25.00 for the late rent fee, as per term #10 of the tenancy agreement. The Landlord is also seeking \$825.00 for liquidated damages because the Tenant moved out prior to the end of the fixed term agreement. The Landlord stated that in January of 2019, after her rent payment bounced, the Tenant identified that she could not afford living in the rental unit, and would need to vacate prior to the end of the lease. The Tenant moved out at the end of February 2019.

The Tenant stated that she ran into financial troubles in January 2019, and realized that the rent was too high for her. The Tenant stated that after she failed to pay rent for January 2019, she had conversations with the Landlord about being compensated for an issue that arose last June, at the start of the tenancy agreement. The Tenant stated that she allowed the Landlord a couple of days at the start of June to replace to cabinets, and some flooring. The Tenant also stated that there was mould in the shower that needing to be cleaned up. The Tenant stated that she did not move into the unit until July 2018, and she is looking to recover the rent she paid for June 2018 because the unit was not ready to move into as a result of the mould. The Tenant stated that she did the move-in inspection (a copy was provided into evidence) on June 5, 2018, and at that time, she asked for the shower to be cleaned up, since there was mould around the bathtub soap dish area. The Tenant stated that she did not move in until early July because the Landlord did not repair the bathtub mould issue until later in June. The Tenant feels she should not have to pay January 2019 rent because she paid for June 2018 rent when the unit was not habitable.

The Landlord stated that the Tenant viewed the unit and signed the tenancy agreement on May 15, 2018, indicating the tenancy would start on June 1, 2018. The Landlord stated that there is no evidence of any mould in the shower, and they opine that the rental unit was liveable. The Landlord stated that they replaced the bathtub surround because it had cracked tiles, not because it was full of mould. The Landlord stated that the bathroom was still fully useable, and it was the Tenant's choice to wait until a new bathtub surround was installed prior to moving in. The Landlord stated that the Tenant took the keys on June 5, 2018. As such, she should be responsible for June rent, and she should not be able to deduct this from January 2019 rent. The Landlord also pointed out that the Tenant did not raise the issue of mould, and that she was owed rent for June 2018 until she was unable to pay rent for January 2019.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenants. Once that has been established, the Landlords must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

Section 26 of the *Act* confirms that a Tenant must pay rent when it is due unless the Tenant has a right under the *Act* to deduct all or a portion of rent (security deposit overpayment, emergency repairs paid for by the Tenant, illegal rent increases, or another Order by an Arbitrator).

In this case, I note the Tenant stated there was mould and that it was significant enough as to make the rental unit uninhabitable in June of 2018 (start of the tenancy), which is why she didn't move in until July 2018 after the shower was fixed. However, she has provided no evidence to establish that there was mould present. The Landlord denies that there was mould, but acknowledged the tub surround was replaced due to some cracked tiles. I also note the Tenant did not bring up the fact that she believed she was owed money for June 2018 rent based on this mould issue until she was unable to pay rent the following January, which leads me to question if the severity of the mould was such that prevented the unit from meeting reasonable health and safety standards, and from allowing her to move in at the start of June 2018. I note that there were some

issues with the shower, which is why the Landlord replaced the tub surround. However, I find rent was still due, as per the tenancy agreement, as I find there is insufficient evidence to establish that the rental unit was uninhabitable. I find the Tenant did not overpay rent for June 2018, as she owed rent (and paid rent) for that month. As such, I find she was not entitled to withhold rent in January 2019. I find the Tenant owes rent for January 2019 in the amount of \$1,650.00, plus the late fee and NSF fee of \$25.00 each, totalling \$1,700.00.

Next, I turn to the Landlord's application for liquidated damages. The Landlord is seeking to keep the security deposit (\$850.00) as liquidated damages, pursuant to clause #5 of the tenancy agreement.

Residential Tenancy Policy Guideline 4 provides for liquidated damages. 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 fixed term by the Tenant. If a liquidated damages clause is determined to be valid, the Tenant must pay the stipulated sum unless the sum is found to be a penalty.

In this case, I find the Tenant breached her fixed term tenancy agreement by moving out prior to the end of her fixed term. I also note the Tenant signed the tenancy agreement and agreed to the following:

LIQUIDATED DAMAGES: If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the Landlord to end the tenancy before the end of the term as set out in (B) above, or any subsequent fixed term, the tenant will pay to the Landlord the equivalent of their security deposit amount as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the Landlord's costs of re-renting the unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or Residential Property.

However, I also note the following portion of the Residential Tenancy Policy Guideline #4, which states as follows:

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

Since the Landlord has used this clause as a way to keep the deposit, and has failed to establish that it was a genuine pre-estimate of loss, I find this to be a penalty. The Landlord provided no evidence to establish how the liquidated damages amount was calculated and what the costs represent. As such, I find it is not an enforceable item, and I dismiss the Landlord's request for compensation based on this item, and for liquidated damages.

Since the Landlord was partially successful in this application, I award the recovery of the filing fee (\$100.00), pursuant to section 72 of the Act. Section 72 of the *Act* also allow me to authorize that the security deposit, currently held by the Landlord, be kept and used to offset the amount of rent still owed by the Tenant. In summary, I grant the monetary order based on the following:

Claim	Amount
Unpaid rent: January 2019	\$1,650.00
Late/NSF Fees	\$50.00
Filing Fee	\$100.00
Less:	
Security Deposit currently held by Landlord	(\$825.00)
TOTAL:	\$975.00

Conclusion

The Landlord is granted a monetary order pursuant to Section 67 in the amount of **\$975.00**. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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: June 28, 2019

Residential Tenancy Branch