



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL –S; MNDCL –S; FFL

Introduction

This hearing was scheduled to deal with a landlord's application for a Monetary Order for damage to the rental unit and other damages or loss; and, authorization to retain the tenant's security deposit. The landlords appeared at the hearing however, there was no appearance on part of the tenants.

Since the tenants did not appear, I explored service of hearing documents upon the tenants. The landlords acknowledged that they did not serve the male tenant with the hearing documents as they did not have a service address for him. The landlords testified that they sent the hearing package to the female tenant via registered mail using the forwarding address she had provided to them during the move-out inspection. The landlords stated the tenant wrote her forwarding address down on a piece of paper and gave it to them during the move-out inspection. I ordered the landlord's to provide me with an image of the document containing the tenant's forwarding address, which they did. The landlords provided the registered mail receipt, including tracking number, as proof of service. A search of the registered mail tracking number showed that the registered mail was successfully delivered on May 14, 2019.

I was satisfied the tenant was duly served with notification of this proceeding and I continued to hear the landlord's claims against the female tenant without her present. I excluded the male tenant as a named party since he was not notified of the claims against him. The tenancy agreement shows that the tenants were co-tenants. Co-tenants are jointly and severally liable to comply with the Act, regulations and tenancy agreement and a landlord may pursue one or all co-tenants in recovering damages or loss that resulted from the tenancy.

The landlords submitted that they sent their evidence to the tenant via registered mail on May 28, 2019; however, that package was not picked up by the tenant. Section 90 of the Act provides that a party is deemed to have received documents five days after mailing, even if they refuse to accept or pick up their mail. Accordingly, I deemed the female tenant to be in receipt of the landlord's evidence and I considered the landlord's evidence in making this decision.

On another procedural matter, I noted that the landlords had included a Monetary Order Worksheet in the documents sent to the tenant on May 28, 2019 that indicates the landlords are seeking compensation greater than that indicated on their Application. The landlords had not submitted and served an Amendment to an Application for Dispute Resolution. Where a party seeks to change their monetary claim, especially an increase in a claim, the Rules of Procedure provides certain rules for amending the claim that are in keeping with the principles of natural justice. I found the landlords did not amend their application in accordance with the Rules of Procedure. Since the tenant was not at the hearing, I was unable to confirm with the tenant that she understood the landlords were seeking an amount greater than that stated on the Application for Dispute Resolution. Therefore, I declined to amend the landlord's monetary claim and I gave the landlords the option of proceeding with their original claim or withdrawing their Application and re-filing. The landlord's chose to proceed with their original claim.

Issue(s) to be Decided

1. Have the landlords established an entitlement to the amounts claimed against the tenant?
2. Are the landlords authorized to retain the tenant's security deposit?

Background and Evidence

The fixed term tenancy started on September 1, 2018 and was set to expire on September 1, 2019. The landlords collected a security deposit of \$490.00 and the tenants were required to pay rent of \$980.00 on the first day of every month. The tenancy ended on May 1, 2019.

The landlords did a move-in and move-out inspection report with the tenant; however, the tenant would not sign the move-out inspection report.

In filing their application, the landlords requested compensation of \$1,000.00 for damage to the rental unit based on their own approximation of the cost to make repairs. The landlords had noted damage to the entry door, the closet door and the bathroom countertop on the move-out inspection report. The landlords then obtain estimates from contractors to repair the damage and those estimates amounted to \$820.00 to repair the two doors and \$196.00 to repair the granite countertop in the bathroom. In addition to these damages, the landlords submitted that there was also damage to the wall where the door had been kicked in and a lot of cleaning had to be done in an attempt to remove the smoke smell in the unit. The landlords provided a copy of the condition inspection reports, estimates, and photographs to support the damage claim.

In addition to damage, the landlords seek \$490.00 as a "penalty" for the tenants ending the fixed term agreement before the expiry of the fixed term. The landlords submit that the tenant agreed to pay this penalty in writing. The landlords submitted the tenancy agreement, the tenant's written agreement to pay the "penalty" to the landlords, and a document demonstrating that a property management company charges one-half of a month's rent to place tenants. The

landlords acknowledged that they did not enlist the services of a property management company to find replacement tenants.

Analysis

Upon consideration of the unopposed submissions before me, I provide the following findings and reasons.

Section 32 of the Act provides that a tenant is required to repair damage caused to the rental unit or residential property by their actions or neglect, or those of persons permitted on the property by the tenant. Section 37 of the Act requires the tenant to leave the rental unit undamaged at the end of the tenancy. However, sections 32 and 37 provide that reasonable wear and tear is not considered damage. Accordingly, a landlord may pursue a tenant for damage caused by the tenant or a person permitted on the property by the tenant due to their actions or neglect, but a landlord may not pursue a tenant for reasonable wear and tear or pre-existing damage.

I find the condition inspection reports, photographs and estimates satisfy me that the tenant is responsible for damaging the doors and bathroom countertop and the landlords' loss is at least \$1,000.00. Therefore, I award the landlords compensation of \$1,000.00 as requested in their Application.

As for the "penalty" for ending the fixed term early, the Act does not provide for payment of a penalty in such cases. Even though the tenant may have agreed to pay a "penalty" to the landlords, I cannot enforce an agreement that conflicts with or violates the Act and I decline to enforce the document signed by the tenant.

A landlord may seek recovery of damages or loss suffered as a result of the tenant's breach of the fixed term agreement; however, the landlords specifically requested a "penalty" from the tenant.

Upon review of the tenancy agreement, I note that it does not include a liquidated damages clause. A liquidated damages clause is a term in a tenancy agreement whereby the parties agree upon a pre-estimate of damages or loss if the tenant ends the fixed term tenancy early. It is important to note that, as provided in Residential Tenancy Policy Guideline 4: *Liquidated Damages*, a liquidated damages clause is not enforceable if it represents a penalty.

In light of the above, I dismiss the landlord's request for \$490.00 for a "penalty".

Since the landlords did have success in establishing the tenant is responsible for damaging the rental unit and an entitlement to compensation for damage, I award the landlords recovery of the \$100.0 filing fee they paid for their application.

I authorize the landlords to retain the tenant's security deposit in partial satisfaction of the amounts awarded to the landlords with this decision and I provide the landlords a Monetary Order for the balance owing, calculated as follows:

| | |
|------------------------|-----------------|
| Damage | \$1,000.00 |
| Filing fee | 100.00 |
| Less: Security deposit | <u>(490.00)</u> |
| Monetary Order | \$ 610.00 |

Conclusion

The landlords were partially successful in their claims against the tenant. The landlords are authorized to retain the tenant's security deposit and have been provided a Monetary Order for the balance owing of \$610.00 to serve and enforce upon the tenant.

The other named tenant was excluded as a party to this dispute since he was not served.

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 26, 2019

Residential Tenancy Branch