Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOMELIFE PENINSULA PROPERTY MANAGEMENT and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on June 10, 2019 (the "Application"). The Landlord sought to recover unpaid rent, to keep the security and/or pet damage deposit and reimbursement for the filing fee.

The Landlord filed an amendment June 24, 2019 increasing the monetary amount claimed from $5,400.00 to $9,450.00.

The Agent attended the hearing for the Landlord. The Tenant attended the hearing. I explained the hearing process to the parties who did not have questions about the process when asked. The parties provided affirmed testimony.

The Tenant advised at the outset that she has health issues. During the hearing, I asked the Tenant if she needed to seek an adjournment given the health issue. I told the Tenant if she wanted an adjournment I would get the Agent's position on this and consider it. The Tenant did not want an adjournment and so we proceeded. I checked with the Tenant throughout the hearing to ensure she was still okay to continue. Each time, the Tenant confirmed she was okay to continue.

The Landlord submitted evidence prior to the hearing. The Tenant did not. I addressed service of the hearing package and Landlord's evidence.

The Agent testified that the hearing package and Landlord's evidence was sent to the Tenant by registered mail. The Landlord submitted the customer receipt and Canada Post website information regarding this. The Tenant confirmed the address on the customer receipt is her address. The Canada Post website information shows the

package was sent June 21, 2019 and delivered and signed for June 24, 2019. The evidence includes Tracking Number 1. I looked this up on the Canada Post website. The delivery confirmation shows the signatory name as the Tenant.

Based on the evidence of service and Canada Post website information, I was satisfied the Tenant was served in accordance with sections 59(3), 88(c) and 89(1)(c) of the *Residential Tenancy Act* (the "*Act*"). Based on the Canada Post website information, I was satisfied the Tenant received the package June 24, 2019, well before the hearing.

As I was satisfied of service, I proceeded with the hearing. The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

I note that during the hearing, the Tenant advised that there had been two previous files between the parties. The file numbers for these are on the front page of this decision. I have read the decisions for these, they are not relevant to this matter.

Issues to be Decided

1. Is the Landlord entitled to recover unpaid rent?

2. Is the Landlord entitled to keep the security and/or pet damage deposit?

3. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord sought the following compensation:

1	Rent for March, April and May ($2,700.00 per month)	$8,100.00
2	Early termination of fixed term lease	$1,350.00
	TOTAL	**$9,450.00**

A written tenancy agreement was submitted as evidence. The tenancy started October 15, 2018 and was for a fixed term ending October 31, 2019. Rent was $2,700.00 per month due on the first day of each month. The Tenant paid a $1,350.00 security

deposit and $1,350.00 pet damage deposit. The agreement is signed by the Tenant and for the Landlord.

The tenancy agreement includes a liquidated damages clause in term 3.1 which states that the Tenant will pay $1,350.00:

> …as liquidated damages and not as a penalty…The liquidated damages is an agreed pre-estimate of the Landlord's administrative costs of advertising and re-renting the Premises as a result of the Early Termination…

The parties agreed the tenancy ended April 30, 2019.

The Agent confirmed the Landlord holds both deposits.

The Tenant testified that she provided the Landlord her forwarding address by email. She did not know when she did this.

The Agent testified that the Tenant provided the Landlord her forwarding address by email May 28, 2019. This email was submitted in evidence. The Agent did not take issue with the form in which the Landlord received the forwarding address.

The Tenant agreed with the Agent about the date her forwarding address was provided.

The Agent testified that the Tenant agreed to the Landlord keeping the security and pet damage deposits in a handwritten letter from the Tenant submitted as evidence. It states:

> On Sept 25 2018 you received the sum of $2700.00 for damage & pet deposit. Keep this for my Aprils rent as I will be vacating the property at the end of April.

This letter is dated April 01, 2019 and includes the Tenant's name or signature on page four.

The Tenant agreed that she agreed in writing at the end of the tenancy that the Landlord could keep the security and pet damage deposits.

The parties agreed a move-in inspection was done.

The Agent testified that a move-out inspection was done but the Tenant did not participate. The Agent testified that the Tenant was provided two opportunities to do a move-out inspection. She did not know if the second opportunity was provided on the RTB form.

The Tenant agreed she did not participate in a move-out inspection. She denied that she was offered two opportunities to do a move-out inspection.

The Agent testified as follows.

The tenancy agreement requires the Tenant to pay rent on the first of each month. On March 01, 2019, the Tenant failed to pay rent. The Tenant did not pay April or May rent either. The Tenant provided the handwritten note in evidence ending the tenancy for April 30, 2019. The Tenant vacated the rental unit by April 30, 2019. The Tenant never paid March or April rent.

The Landlord is seeking compensation for loss of rent for May as the tenancy agreement was for a fixed term. The Landlord tried to re-rent the unit and advertised on two websites. The unit was posted immediately upon receiving the Tenant's notice to vacate. It was listed as available May 01, 2019. It was rented for June. It was posted and rented for less rent than the Tenant was paying.

The Landlord is seeking liquidated damages in the amount of $1,350.00 as set out in term 3.1 of the tenancy agreement. This is not a penalty. The amount was assessed at the start of the tenancy. This was acknowledged by the Tenant.

The Tenant raised issues in relation to asbestos in the rental unit and repairs that needed to be done. The Tenant testified as follows. The Landlord had ten days to fix the asbestos issue. She was told by employees of the Landlord to move out of the rental unit if she was not happy with the situation. An inspector said issues in the rental unit would not be fixed because it was old and meant for tear down. WorksafeBC was involved. The Landlord did not attempt to fix the issues.

The Tenant raised issues of stress, injury and loss of quiet enjoyment as well as violations of terms 5, 5.1 and 5.2 of the tenancy agreement. I understood this to relate to the alleged asbestos issue.

The Tenant agreed she did not pay March or April rent. She said she left her security and pet damage deposits for this.

The Tenant submitted that she had authority to withhold rent because the Landlord did not comply with the previous RTB decision and order about the unsafe situation in the rental unit.

In relation to the claim for loss of May rent, the Tenant agreed she ended the fixed term tenancy early. The Tenant testified as follows. The handwritten letter in evidence is her notice ending the tenancy. The Agent told her she could leave if she wanted to. She disputes the Agent's testimony about re-renting the unit for June because there were issues with the rental unit that had to be fixed before it could be re-rented.

In relation to the claim for liquidated damages, the Tenant submitted that the Landlord did not uphold their end of the tenancy agreement under sections 5 to 5.2.

The documentary evidence shows the Landlord received the Tenant's letter and notice ending the tenancy April 01, 2019.

Analysis

Section 7(1) of the *Act* states that, if a tenant does not comply with the *Act*, regulations or their tenancy agreement, the non-complying tenant must compensate the landlord for loss that results.

Section 7(2) of the *Act* states that a landlord who claims compensation for damage or loss that results from a tenant's non-compliance must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

> 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:
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> - 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.

Security and Pet Damage Deposits

Under sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to the security or pet damage deposits if they do not comply with the *Act* and *Residential Tenancy Regulation* (the "*Regulations*"). Further, section 38 of the *Act* sets out specific requirements for dealing with a security and pet damage deposit at the end of a tenancy.

Based on the agreement of the parties, I find the Tenant participated in the move-in inspection and therefore did not extinguish her rights in relation to the security or pet damage deposits under section 24 of the *Act*.

I am not satisfied based on the testimony of the Agent that the Landlord provided the Tenant with two opportunities to do a move-out inspection, one on the RTB form as required by section 35(2) of the *Act* and 17(2) of the *Regulations*. Therefore, I do not find that the Tenant extinguished her rights in relation to the security or pet damage deposits under section 36 of the *Act*.

It is not necessary to determine whether the Landlord extinguished their right to the security or pet damage deposits under sections 24 or 36 of the *Act* as extinguishment only relates to claims for damage to the rental unit.

Based on the agreement of the parties, I find the tenancy ended April 30, 2019. Based on the agreement of the parties, I find the Tenant provided the Landlord her forwarding address May 28, 2019. Although email is not "in writing" as required, I find it sufficient in these circumstances as the Landlord received the email and the Agent did not take issue with the form in which the forwarding address was received.

Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from May 28, 2019 to repay the security and pet damage deposits or file an application for dispute resolution claiming against the security and pet damage deposits. The Application was filed June 10, 2019, within the time limit. I find the Landlord complied with section 38(1) of the *Act*.

Further, the parties agreed that the Tenant agreed in writing at the end of the tenancy that the Landlord could keep the security and pet damage deposits towards rent. Therefore, section 38(4) of the *Act* applies and the Landlord was entitled to keep the security and pet damage deposits in any event.

Further, section 38(7) of the *Act* states:

> (7) If a landlord is entitled to retain an amount under subsection (3) or (4), a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise.

Based on the handwritten letter from the Tenant dated April 01, 2019 in evidence, I find the Tenant agreed to the Landlord keeping the pet damage deposit towards April rent as the letter specifically states this.

In the circumstances, the Landlord complied with section 38 of the *Act*.

March and April Rent

Section 26(1) of the *Act* requires a tenant to pay rent in accordance with the tenancy agreement unless they have a right to withhold rent under the *Act*.

The Landlord is entitled to April rent as the Tenant agreed the Landlord could keep the security and pet damage deposits towards April rent in the handwritten letter in evidence.

Based on the written tenancy agreement, I find the Tenant was obligated to pay $2,700.00 in rent by the first day of each month for the duration of the tenancy.

The Tenant acknowledged she did not pay March rent. The Tenant was not entitled to withhold rent because of an asbestos issue or repairs that needed to be done in the rental unit. Nor was the Tenant entitled to withhold rent due to stress, injury or loss of quiet enjoyment, regardless of whether the Landlord was violating the tenancy agreement. If these issues existed, the Tenant should have dealt with them through the RTB. These issues did not relieve the Tenant of her obligation to pay rent.

Nor was the Tenant entitled to withhold rent because the Landlord did not comply with a prior decision or order of the RTB. I have read the prior decision. The Arbitrator did not

allow a past or future rent reduction for the issues raised. Nor did the Arbitrator permit the Tenant to withhold rent if the Landlord did not comply with the Arbitrator's order.

The Tenant has not pointed to any authority under the *Act* that permitted her to withhold rent for March. Therefore, the Tenant was required to pay this. There is no issue the Tenant did not pay this as the parties agreed on this point. Therefore, the Landlord is entitled to recover March rent.

May rent

I decline to award the Landlord compensation for loss of rent for May.

Pursuant to rule 6.6 of the Rules of Procedure, the Landlord as applicant has the onus to prove the claim.

The Agent testified about advertising the rental unit and re-renting it for June. The Tenant disputed this testimony.

The Landlord submitted no evidence to support the Agent's testimony about when or where the Landlord posted the unit for rent. The Landlord submitted no evidence to support the Agent's testimony that the unit was not re-rented until June. This would have been simple evidence to provide as the Landlord should have documentary evidence relating to these issues and I would expect the Landlord to submit evidence of this nature on this type of application.

In the absence of evidence to support the Agent's testimony about re-renting the unit, I am not satisfied the Landlord lost May rent and am not satisfied the Landlord did what was reasonable to mitigate any loss resulting from the breach by the Tenant of the fixed term tenancy.

In the circumstances, the Landlord has failed to prove they are entitled to compensation for loss of rent for May.

Liquidated damages

Policy Guideline 4 deals with liquidated damages and states in part:

> 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, some trivial some serious, there is a presumption that the sum is a penalty.
>
> If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

There is no issue this was a fixed term tenancy ending October 31, 2019. There is no issue that the Tenant ended the fixed term tenancy early.

Section 45 of the *Act* outlines when a tenant can end a fixed term tenancy early. A tenant cannot do so unless section 45(3) of the *Act* applies. This section states:

> (3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant

> gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

I have reviewed the April 01, 2019 letter from the Tenant. I do not find this is written notice advising the Landlord of a breach of a material term of the tenancy agreement and asking that the Landlord correct the situation. I find the letter is a notice ending the tenancy.

I find term 3.1 of the tenancy agreement applies. The Tenant signed the tenancy agreement agreeing to the terms. The Tenant is bound by term 3.1.

I do not find that the sum of $1,350.00 is a penalty. I accept based on the wording of the tenancy agreement that it is an agreed upon pre-estimate of the Landlord's administrative costs of advertising and re-renting the unit. I do not find the amount extravagant in comparison to the greatest loss that could follow the stated breach. Nor do I find the amount oppressive to the Tenant. In coming to this conclusion, I have considered the rent amount.

The Landlord is entitled to the $1,350.00 sought.

Summary

In total, the Landlord is entitled to $6,750.00 for March and April rent as well as compensation for the liquidated damages clause.

Given the Landlord was successful in this application, I award them reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Landlord is entitled to monetary compensation in the amount of $6,850.00. The Landlord can keep the $1,350.00 security deposit and $1,350.00 pet damage deposit pursuant to sections 38(4) and 72(2) of the *Act*. Pursuant to section 67 of the *Act*, I issue the Landlord a Monetary Order for the remaining $4,150.00.

Conclusion

The Landlord is entitled to monetary compensation in the amount of $6,850.00. The Landlord can keep the $1,350.00 security deposit and $1,350.00 pet damage deposit. I issue the Landlord a Monetary Order for the remaining $4,150.00. This Order must be

served on the Tenant and, if the Tenant does not comply with the Order, it may be filed in the Provincial Court (Small Claims) 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 *Act*.

Dated: October 08, 2019

Residential Tenancy Branch