Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding E Y PROPERTIES LTD. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL MNDCL-S

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $669 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 1:45 pm in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 pm. The landlord was represented by three agents who attended the hearing (the property manager, "AO", the office administrator "DA", and the building caretaker "JSL"). They were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord's agents and I were the only ones who had called into this teleconference.

AO testified that the tenant was served the notice of dispute resolution form and supporting evidence package via registered mail on August 16, 2019. AO provided a Canada Post tracking number confirming this mailing which is reproduced on the cover of this decision. While the tenant did not confirm receipt, the tenant served responsive evidence on the landlord on November 19, 2019, which indicates that she was aware of this hearing. I find that the tenant was deemed served with this package on August 21,

2019, five days after the landlord mailed it, in accordance with sections 88, 89 and 90 of the Act.

Preliminary Issue – Tenant's Evidence

As stated above, the tenant served evidence on the landlord in support of her opposition to the landlord's claim. As is my practice, I reviewed the tenant's evidence in advance of the hearing. Based on my review, I had a number of questions for the tenant which I hoped to have answered by her at the hearing. This was not possible, as she did not attend the hearing.

In her written submission, the tenant wrote:

> I … will be submitting written testimony due to my disability. I have an acquired brain injury and PTSD. I have written what I know to be true on point form as it is too difficult for me to address otherwise.

She submitted no evidence to corroborate her assertion that she suffers from these medical disabilities.

The Rules of Procedure contemplate scenarios where a party requires a hearing format other than in person. Rules 6.3 and 6.4 state:

> **6.3 Format of dispute resolution hearing**
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> A dispute resolution hearing may be held at the discretion of the Residential Tenancy Branch:
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> a) by telephone conference call;
> b) in person;
> c) in writing;
> d) by video conference or other electronic means; or
> e) any combination of the above.

6.4 A party may request that the hearing be held in a specific format

A party may submit a request that a hearing be held in a format other than telephone conference call.

An applicant must submit such a request in writing to the Residential Tenancy Branch directly or through a Service BC Office with supporting documentation within three days of the notice of hearing being made available by the Residential Tenancy Branch. A respondent must submit such a request in writing with supporting documentation within three days of receiving the Notice of Dispute Resolution Proceeding or being deemed to have received the Notice of Dispute Resolution Proceeding.

There is no record of the tenant having made such an application allowing her to participate in the hearing in writing only. As such, and as I have no medical evidence corroborating the tenant's assertion that she suffers from medical conditions requiring her to participate in this hearing by written submissions only, I find that the tenant has failed to attend and participate in this hearing.

Rule of Procedure 7.4 states:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

As the tenant will failed to participate in this proceeding, I find that her evidence has not been presented. As such, I decline to consider it at this hearing. In my decision, I will, however, address some general issues which the tenant raised in her written submissions.

Issue(s) to be Decided

Is the landlord entitled to:

1) a monetary order for $669;
2) recover its filing fee from the tenant; and
3) apply the security deposit against any monetary order made?

Background and Evidence

While I have considered the documentary evidence and the testimony of the landlord, not all details of its submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The parties entered into a written, fixed term tenancy agreement starting November 1, 2019 and ending October 31, 2019. Monthly rent is $1,450 plus $70 per month for parking and is payable on the first of each month. The tenant paid the landlord a security deposit of $725. The landlord still retains this deposit. At the start of the tenancy another individual was named as a party to the tenancy agreement. The landlord testified that this individual moved out on March 30, 2019.

The tenant gave a notice to end tenancy on June 27, 2019, effective July 31, 2019. She vacated the rental unit on July 29, 2019.

The landlord's claim for $669 represents the following:

Liquidated Damages	$400.00
Cleaning carpets	$160.00
Cleaning drape	$109.00
Total	**$669.00**

Liquidated Damages

The landlord takes the position that the tenant breached the fixed-term tenancy agreement by giving notice to end the tenancy, and by vacating the tenancy in advance of October 31, 2019.

In her written submission, the tenant references the reason for ending the tenancy was due to family violence. However, she provided no evidence to corroborate this claim and no evidence relating to ending a tenancy for reasons of family violence required by section 45.1 of the Act.

The tenancy agreement contains a liquidated damages clause which states:

> If the tenant breaches a material term of this agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provide the

> landlord with notice, whether written, oral, or by conduct, of an intention to breach this agreement and end the tenancy by vacating, and does vacate before the end of the fixed term, the tenant will pay to the landlord the sum of $400 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming further rental revenue losses that will remain unliquidated.

AO argued that the tenant breached a material term of the tenancy agreement by ending the tenancy before the fixed end date of October 31, 2019. She testified that this cause the landlord to incur costs associated with re-renting the rental unit including:

1) its employees time;
2) advertising costs;
3) application processing; and
4) credit check costs.

Cleaning Costs

The tenancy agreement contains the following term:

> CARPETS AND WINDOW COVERINGS. The tenant may not replace any window covering supplied by the landlord. At reasonable intervals the tenant must clean carpets and window coverings provided by the landlord, preferably by a professional cleaning company. Regardless of the length of the tenancy, if the carpets and/or window coverings were new or professionally cleaned at the beginning of the tenancy, the tenant must pay for their professional cleaning at the end of the tenancy.

AO testified that the tenant did not clean the carpets or the drapes at the end of the tenancy. She testified that the carpets were dirty from foot traffic, and the drapes absorbed the smell of the occupants' cooking. She testified that the landlord paid to have the carpets and drapes cleaned, costing a combined amount of $269. The landlord submitted an invoice for the cleaning of the carpet and drapes dated August 8, 2019 supporting this amount.

The landlord entered a copy of the move-out inspection report into evidence which records the condition of the carpets and drapes as "requires shampooing/dry-cleaning". The report shows the condition of the carpet and drapes at the start of the tenancy as

“clean-okay”. The report is signed by the tenant, who indicated on the report that she did not agree that it fairly represents the condition of the rental unit.

The landlord did not submit any documentary evidence showing the condition of the carpets or drapes at the hearing, supporting the condition inspection report’s assessment of the condition of the carpet and draped. The landlord did not submit any documentary evidence showing that the carpets or drapes were professionally cleaned at the start of the hearing.

Analysis

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

As such, the landlord bears the onus to prove that it suffered the damage as claimed.

Liquidated Damages

I find that the tenancy agreement had an end of tenancy date of October 31, 2019. I find that the tenancy vacated the rental unit and purported to end the tenancy on July 31, 2019. I find that this is a breach of section 45 of the Act, which does not permit a fixed term tenancy to be ended before the end of its term. There is no evidence before me that the tenant ended the tenancy in accordance with section 45.1 (which does permit a tenant to end a fixed-term tenancy before its end date in certain circumstances).

As such, I find the tenant breached both the Act and a material term of the tenancy agreement.

Policy Guideline 4 considers liquidated damage clauses. It states:

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.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- 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.

Based on the testimony of AO, I find that the amount payable pursuant to the liquidated damage clause of the tenancy agreement represents a genuine pre-estimate of the loss the landlord suffered as a result of the tenant's breach of the tenancy agreement. I do not find this amount to be extravagant.

As such, I find that the liquidated damages clause is valid, and I order that the tenant pay the landlord $400.

Cleaning Costs

The clause in the tenancy agreement the landlord relies on as the authority to require the tenant to have professionally cleaned the carpet and drapes states: "if the carpets

and/or window coverings were new or professionally cleaned at the beginning of the tenancy, the tenant must pay for their professional cleaning at the end of the tenancy."

I have no documentary evidence before me (such as an invoice) that would allow me to conclude that the carpets and drapes were professionally cleaned or new at the start of the tenancy. The only evidence I have as to their condition is the move-in inspection report, which characterizes the, as "clean-okay". I find that this does not mean that they were professionally cleaned.

Accordingly, the landlord cannot rely on the tenancy agreement as a basis to recover its cleaning costs.

However, section 37(2) of the Act places requirements on the tenant relating to the condition of the rental unit at the tend of the tenancy. It states:

> **Leaving the rental unit at the end of a tenancy**
> 37(2) When a tenant vacates a rental unit, the tenant must
> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and

The landlord failed to provide any documentary evidence (such as videos or photographs of the damaged areas) supporting AO's testimony that the carpet and drapes were not cleaned, and the move-out report's assessment that they "required shampooing". Such documentary evidence is within the landlord's power to provide. As such, I cannot conclude the that damage to the carpets and the drapes rises beyond the level of reasonable wear and tear, and that the condition of these was not reasonably clean.

I note that Policy Guideline 3 states:

> Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year.

As the tenancy lasted less than one year, this guideline is not applicable.

As such, I find that the landlord has failed to discharge its onus to show that the tenant breached the Act or the tenancy agreement by failing to leave the carpets and drapes reasonably clean. I therefore decline to order that the tenant pay the landlord any amount for their costs associated with cleaning the carpet or drapes.

Pursuant to section 71(1) of the Act, as the landlord has been partially successful in its application, I order that the landlord may recover its filing fee from the tenant.

Pursuant to section 72(2) of the Act, the landlord may deduct the monetary orders ($500) made in this decision from the security deposit ($725).

Conclusion

Pursuant to sections 67 and 72, I order that the landlord may withhold $500 from the tenant's security deposit, representing the following:

Liquidated Damage	$400
Filing Fee	$100
Total	**$500**

The landlord must return the balance of the deposit ($225) to the tenant in accordance with the Act.

The landlord must serve the tenant with a copy of this decision immediately upon receipt.

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: December 2, 2019

Residential Tenancy Branch