Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFL MNDCL-S MNDL-S MNRL-S**

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

- Authorization to recover the filing fees from the tenant pursuant to section 72;
- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67;
- A monetary order for damages to the rental unit and authorization to retain a security deposit pursuant to sections 67 and 38; and
- A monetary order for rent and/or utilities and authorization to retain a security deposit pursuant to sections 38 and 67.

Both the landlord and the tenant attended the hearing. The tenant acknowledged being served with the landlord's Application for Dispute Resolution Proceedings Package and evidence and stated he had no issues with timely service of documents. The tenant did not provide any documentary evidence for the hearing. I am satisfied the tenant was served with the Application for Dispute Resolution Proceedings Package in accordance with sections 89 of the Act.

Preliminary Issue
The tenant raised an issue with whether this application should be heard as the landlord has not engaged with him in mediating this dispute prior to filing his Application for Dispute Resolution. The tenant advised that he felt the process is flawed and the landlord's application should be struck. For the same reason, the tenant did not supply documentary evidence for the hearing. The tenant also raised concerns that the landlord only supplied fragments of email correspondences.

I determined that there is no requirement under the *Residential Tenancy Act* for landlords and tenants to engage in mediation prior to filing an Application for Dispute Resolution and advised the parties that the hearing would proceed. Likewise, I reminded the tenant that he had the opportunity to provide documentary evidence that may refute the landlord's evidence in accordance with the *Residential Tenancy Branch Rules of Procedure* and he chose not to do so.

Issue(s) to be Decided

Is the landlord entitled to a monetary order?
Can the landlord retain the security deposit in satisfaction of the anticipated monetary order?
Can the landlord recover the filing fee?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The landlord provided the following testimony. The fixed one-year tenancy began on January 1, 2019, set to expire on December 31, 2019. Rent was set at $4,000.00 per month, payable on the first day of the month. A security deposit of $2,000.00 was collected which the landlord continues to hold. A condition inspection report was done at the commencement of the tenancy.

A copy of the tenancy agreement was provided by the landlord. The landlord points out that the agreement contains a liquidated damages claim which states that the tenant is to pay the landlord $4,000.00 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit if the tenant breaches a material term of the tenancy that causes the landlord to end the tenancy before the end of the fixed term. This is repeated in clause 6 of the tenancy agreement addendum which states:

Clause 6: the tenant who moves out before the full rental agreement terms will be charged liquidated damages to party compensate for the cost of re-renting the unit. The damages must be paid by e-transfer or money order prior to move out.

The landlord points out other clauses in the addendum as follows:

Clause 4: the tenant forfeits the right to be refunded for the security deposit if they do not give proper written notice to vacate a minimum of one month prior to the end of the month of moving out.
Clause 5: in addition, a tenant who does not give proper one month's notice to vacate is responsible to pay for the following month's rent.
Clause 7: The tenant agrees and gives permission to the landlord to use the security deposit as rent payment at the landlord's discretion.
Clause 9: rent due on or before the first of each month…A minimum of $35.00 fee will apply to all late payments.
Clause 28: tenant will… leave the landlord's apartment in good condition upon the termination of the agreement or end of lease. Tenant will be responsible for the cost of any repairs or cleaning that are required upon termination of the agreement.

The landlord testified the tenant had difficulty paying his rent on time. The landlord charged the tenant with 7 late fees at $35.00 apiece and seeks compensation of $245.00. The landlord cannot confirm whether his bank ever charged him with chargebacks for having the tenant's cheques returned to him as insufficient funds. I note from the landlord's evidence package that rent was paid by e-transfer.

On September 3, 2019 the landlord served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("Notice") indicating the tenant failed to pay his $4,000.00 rent for the month of September. On the Notice, the landlord gave the tenant 10 days notice to move out of the rental unit, by September 15, 2019. The landlord testified the tenant did not move out by that date, however the landlord was unable to advise when the tenant actually moved out.

The landlord provided an email dated September 14, 2019 whereby the tenant states:

> *Hi [landlord]. I will be moved out by noon tomorrow. I'm terms of the half month's rent up until the 15th then please use the security deposit. I'm confident there will be no damages, and the suite will be left extremely clean.*

When the tenant advised the landlord that he would be moving out of the rental unit on September 15th, the landlord asked the tenant when he wants to do a condition inspection report with him. After getting no response to this, the landlord never served the tenant with a form RTB-22 Notice of Final Opportunity to Schedule a Condition Inspection and no condition inspection report was done at the end of the tenancy.

At the end of the tenancy, the rental unit was left unclean. It wasn't a 'horrible mess' however the shower door required more cleaning, as did the fridge and oven. The landlord stated the unit was not cleaned to a standard he found acceptable; it was a quick sweep and mop up, not in move-in condition like it was when the tenant moved in. He hired a cleaner to clean it and was charged $245.00.

A light fixture he had in the unit had a chain and electrical wire that were shortened by the tenant and not put back to original condition when the tenant moved out. The landlord hired an electrician to put it back to original and was charged $257.25 for the work. No photos of the fixture or invoice from an electrician was provided as evidence by the landlord.

The landlord testified the tenant hadn't paid a $200.00 move out fee required by the strata although he has not been invoiced by the strata corporation or asked them if he would be invoiced.

The landlord testified that the tenant's failure to pay September rent caused him to issue the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, ending the tenancy on September 15th, however the tenant should be responsible for paying rent for

September and October because the landlord was unable to re-rent the unit due to his personal circumstances. The landlord did not advertise for a new tenant after this tenancy ended because he planned on moving into the rental unit at the end of January 2020 when his own tenancy ended. The landlord testified that he was prevented from renting the unit between the time the tenancy ended (September 15, 2019) and the time he moved in (February 3, 2020) because there is a strata bylaw and a city bylaw prohibiting short term rentals of less than 12 calendar months. The landlord provided a photo of a sign in the building advertising the bylaw restriction into evidence.

In evidence, the landlord provided copies of email exchanges whereby the tenant agrees to allow the landlord to retain his security deposit as rent for the 15 days he occupied the rental unit in September. The tenant's forwarding address was provided to the landlord by email on September 20th.

The tenant gave the following testimony. He did not give consent to the landlord to retain his security deposit, or if he did, the consent was revoked after communications broke down. The liquidated damages claim of the landlord is for re-renting the unit and since it was never re-rented, the landlord is not entitled to it. He asked the landlord for a breakdown of the costs incurred to re-rent but was not given it.

The landlord claims rent for the month of September and October however the tenancy ended pursuant to the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. The landlord has no standing to claim September and October rent, according to the tenant.

The tenant testified he moved out before noon on September 15th and that he stayed in a hotel that night. He has receipts for that, however he did not provide it into evidence.

The tenant paid the concierge the $200.00 move-out fee and has a receipt for that. He also paid a deposit to book it, however he got the deposit back. No receipts were entered into evidence by the tenant.

Late payment fees of $35.00 were never claimed during the tenancy. They should have been claimed at the time they accrued, not after the tenancy ended.

The tenant argues that the landlord had the opportunity to move into the rental unit immediately after the tenancy ended and the tenant is not responsible for the landlord's circumstances where he could not do so.

The light fixture was not on a chain, as the landlord claims. It was on an interchangeable hanging tube, long or short. The tenant changed the tube to the shorter one but left the long tube in the kitchen pantry in case the landlord wanted to change it back. It didn't require an electrician to change it back to the long tube as the fixture was meant to accept either tube.

The tenant argues the landlord has a duty to re-rent the unit after the tenant vacated it and that the security deposit was unlawfully withheld and claims he is entitled to a doubling of the security deposit.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

Schedule 1(1) *Residential Tenancy Regulations:*

The terms of this tenancy agreement and any changes or additions to the terms may not contradict or change any right or obligation under the *Residential Tenancy Act* or a regulation made under that Act, or any standard term. If a term of this tenancy agreement does contradict or change such a right, obligation or standard term, the term of the tenancy agreement is void.

Section 38 of the *Residential Tenancy Act*

38 Return of security deposit and pet damage deposit

(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
(a) the date the tenancy ends, and
(b) the date the landlord receives the tenant's forwarding address in writing,
the landlord must do one of the following:
(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

Section 22 of the *Residential Tenancy Act*

Acceleration term prohibited

A tenancy agreement must not include a term that all or part of the rent payable for the remainder of the period of the tenancy agreement becomes due and payable if a term of the tenancy agreement is breached.

Section 44(1)(a)(ii) of *Residential Tenancy Act*

A tenancy ends if the landlord gives notice to end the tenancy in accordance with section 46 [landlord's notice: non payment of rent].

- Landlord's claim for September and October 2019 rent

Residential Tenancy Policy Guideline PG-3 [Claims for Rent and Damages for Loss of Rent] deals with situations where a landlord seeks to hold a tenant liable for loss of rent after the end of a tenancy agreement.

The guideline states:

> A tenant is not liable to pay rent after a tenancy agreement has ended pursuant to these provision, however if a tenant remains in possession of the

> premises (overholds), the tenant will be liable to pay occupation rent on a per diem basis until the landlord recovers possession of the premises.

I find the tenant received the notice, did not pay the rent or make an application for dispute resolution. He accepted the end to the tenancy and vacated the unit by the effective date stated on the notice, September 15, 2019. Pursuant to section 46(5), I am satisfied the tenancy ended on September 15, 2019, in accordance with section 44(1)(a)(ii) of the Act.

As the tenancy ended on September 15th, and the tenant acknowledges not paying rent for the first 15 days in September and I find the landlord is entitled to compensation in the amount of $2,000.00 for unpaid rent from September 1 to September 15, pursuant to section 67 of the Act.

The landlord relies on Clause 5 of the tenancy agreement addendum to collect rent after the tenancy ended. I find that this clause contravenes section 22 of the Act which prohibits acceleration, or the requirement for a tenant to pay rent for any remainder of a tenancy agreement that has ended. As clause 5 is in contravention of the Act, it is void and the landlord is not entitled to collect rent beyond September 15, 2019. This landlord's claim for rent beyond September 15, 2019 is dismissed.

- Landlord's claim for liquidated damages

Residential Tenancy Policy Guideline PG-4 deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of 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 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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> 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.

In this case, the landlord acknowledged that he did not re-rent the unit after the tenancy ended for two reasons. First, he couldn't re-rent it as a short-term rental because it would violate strata bylaws and city bylaws. Second, his personal circumstances

prevented him from moving into the unit immediately because he couldn't break the lease he had with his own landlord.

The tenancy agreement defined the liquidated damages as all costs associated with re-renting the rental unit if the tenant breaches a material term of the tenancy that causes the landlord to end the tenancy before the end of the fixed term. Clause 6 of the addendum claims the liquidated damages is meant to compensate the landlord for the cost of re-renting the unit.

As liquidated damages are defined as **a genuine pre-estimate of the loss at the time the contract is entered into,** I do not find it reasonable for the landlord to have estimated $4000.00 as the costs associated with re-renting the unit. Despite having legitimate reasons for not re-renting the unit, the landlord did not suffer any costs specifically associated with re-renting the rental unit. I find the liquidated damages clause in the tenancy agreement and the addendum to be a penalty clause, not liquidated damages and the landlord is not entitled to collect it. This portion of the landlord's claim is dismissed.

- Late payment fees

Section 7 of the Residential Tenancy Regulations allow a landlord to charge the following fees:

7 Non-refundable fees charged by landlord

1) A landlord may charge any of the following non-refundable fees:
   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;
   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.

PG-4 indicates:
A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

The landlord relies on clause 9 of the tenancy agreement addendum to collect late fees. As the landlord testified that he was not aware of being charged an administration fee or

service fee by his bank, I find the late fee term of clause 9 is a penalty and not a fee that may be collected pursuant to section 7 of the Regulations. This clause therefore cannot be enforced, and I dismiss this portion of the landlord's claim.

- Suite Cleaning claim

Section 37(2)(a) states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

This notion is further elaborated in Residential Tenancy Branch Policy Guideline PG-1 which states:
the tenant must maintain "reasonable health, cleanliness and sanitary standards" throughout the rental unit or site, and property or park. The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. **The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy *Act* or Manufactured Home Park Tenancy *Act* (the Legislation). (emphasis added)**

The tenant's legal obligation is "reasonably clean" and this standard is less than "perfectly clean" or "impeccably clean" or "thoroughly clean" or "move-in ready". Oftentimes a landlord wishes to turn the rental unit over to a new tenant when it is at this higher level of cleanliness; however, it is not the outgoing tenant's responsibility to leave it that clean. If a landlord wants to turn over the unit to a new tenant at a very high level of cleanliness that cost is the responsibility of the landlord.

The landlord provided neither a condition inspection report for me to determine the cleanliness of the rental unit at the end of the tenancy, nor photographs of the unit to corroborate his testimony that the rental unit was left unclean. In fact, the landlord testified the unit wasn't a 'horrible mess' at the end of the tenancy. As it is the applicant's onus to prove their claim on a balance of probabilities, I find the unit was left reasonably clean and undamaged except for reasonable wear and tear. I decline to award the landlord a monetary award for cleaning.

- Light Fixture Repair

The landlord and tenant provided different testimonies regarding the light fixture. The landlord claimed it was on a chain and the tenant claimed it was hung by an interchangeable long or short tube both of which were left behind at the end of the tenancy.

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim. The standard of proof is on a balance of

probabilities. If the applicant is successful in proving it is more likely than not the facts occurred as claimed, the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

The landlord did not provide sufficient evidence to satisfy me there was damage done to the light fixture. No photograph of the alleged damage was provided, and no notation was made on a move-out condition inspection report to substantiate the damage. Lastly, the landlord did not provide any invoice from the electrician he hired. I find the landlord has failed to provide evidence to establish his four points and the claim for the light fixture repair is dismissed.

- Building move out fee

The tenant testified he paid the concierge $200.00 for the move out fee and further testified he had a receipt for the payment although it was not provided as evidence in this proceeding. He also testified he paid a deposit to book the elevator which was returned to him by the strata corporation after moving out. The landlord was unable to confirm whether he had been charged with the move out fee or inquired with the strata about if he was going to be charged with the fee. I find the landlord has failed to establish his claim for this fee on a balance of probabilities and I dismiss this portion of his claim.

- Security Deposit

Section 38 states:

(1) Except as provided in subsection (3) or (4) (a), **within 15 days after** the later of
(a) the date the tenancy ends, and
(b) the date the landlord receives the tenant's forwarding address in writing,
the landlord must do one of the following:
(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
…
(6) If a landlord does not comply with subsection (1), the landlord
(a) may not make a claim against the security deposit or any pet damage deposit, and
(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

The tenancy ended on September 15, 2019 and the parties agree the landlord was provided with the tenant's forwarding address on September 20, 2019 by email. I find the landlord complied with section 38(1)(d) and filed an Application for Dispute

Resolution within 15 days of receiving the tenant's forwarding address, on October 3, 2019. The security deposit will not be subjected to doubling.

Clause 7 of the tenancy agreement addendum specifies: The tenant agrees and gives permission to the landlord to use the security deposit as rent payment at the landlord's discretion. However, section 20(e) of the Act states a landlord must not require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement. I find clause 7 violates section 20 of the Act and cannot be enforced.

Despite this, the email dated September 14th shows the tenant specifically agreed to allow the landlord to retain his security deposit as payment for September rent. Section 38(4) states a landlord may retain an amount from a security deposit if at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant. I find the tenant made such an agreement by his email dated September 14th, and I order that the security deposit of $2,000.00 be used to fulfil the compensation order previously awarded to the landlord for September 1, 2019 to September 15 rent in the amount of $2,000.00.

- Filing fee

As the landlord's claim was unsuccessful, the landlord will not be entitled to recover the filing fee.

Conclusion

The landlord is entitled to compensation for rent from September 1 to September 15, 2019 in the amount of $2,000.00. As the landlord is holding the tenant's security deposit in the amount of $2,000.00, in accordance with the offsetting provisions of section 72, I order that the landlord is to retain the tenant's full security deposit.

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: February 07, 2020

Residential Tenancy Branch