Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1138022 B.C. Ltd
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **MNDCL-S, FFL // MNSD, FFT**

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's 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;
- compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $840 pursuant to section 67;
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenants' for:

- authorization to obtain a monetary order in the amount equal their pet damage deposit plus double their security deposit (in total, $2,520) pursuant to sections 38 and 65; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Tenant LF attended the hearing on behalf of both tenants. She was assisted by an agent ("**SM**"). The landlord was represented at the hearing by its property manager ("**NS**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The parties confirmed that each served the other with the required documents and evidence pursuant to the Act.

Issues to be Decided

Is the landlord entitled to:

1) retain the security deposit in satisfaction of the monetary order sought;
2) a monetary order of $840; and
3) recover its filing fee?

Are the tenants entitled to:

1) a monetary order for $2,520; and
2) recover their filing fee?

Background and Evidence

1. Tenancy Agreement and End of Tenancy

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

The parties entered into a written, fixed-term tenancy agreement starting March 1, 2019 and ending February 29, 2020. Monthly rent was $1,680. The tenants paid the landlord a security deposit of $840 and a pet damage deposit of $840. The landlord returned the pet damage deposit to the tenant on October 20 or 21, 2019 (the parties disagree on the exact date). The landlord continues to hold the security deposit in trust.

The tenancy agreement has an addendum, which contains the following clause:

> 26. If the Tenant moves out prior to the natural expiration of this Lease, a re-rent levy of $1,000.00 or a property management placement fee whichever is greater, will be charged to the Tenant. This is considered a liquidated damage.
>
> ("**Clause 26**")

SM noted that the landlord's name does not appear on the final page of the tenancy agreement in the area for signatures. Rather, its property manger's company's name appears where the landlord's name is to appear, preceded by "c/o", and is signed by NS. The landlord's name appears on the first page of the tenancy agreement.

SM argued that this was a deficiency and made the tenancy agreement void. Accordingly, he argued, the tenancy was not a fixed term tenancy.

NS disputed that this lack of the landlord's name was a deficiency. He argued that the property management company was a "landlord" under the Act and had the authority to sign the tenancy agreement on behalf of the landlord.

The parties agree that the tenants did not remain in the rental unit until February 2020. On August 29, 2019, the tenants sent NS a handwritten notice to end tenancy stating that they would be moving out of the rental unit by September 30, 2019.

NS testified that he attempted to schedule a move-out condition inspection report with the tenants several times. The parties agree that one was finally scheduled for September 28, 2019. However, the parties agreed that there was miscommunication as to the time (neither blamed the other for this miscommunication). NS attended the rental unit a 9:00 am, and LF attended the rental unit at 3:00 pm. NS was unable to come back to the rental unit at 3:00 pm and conducted a condition inspection in the tenants' absence the morning of September 28, 2019. He testified that the he recorded no damage to the rental unit at the end of the tenancy.

LF testified she emailed NS her forwarding address on September 29, 2019. She entered a copy of this address into evidence. NS confirmed his email address was correctly written on the email but testified that he never saw the email. LF testified that she did not have success in the past by communicating with NS via email.

LF testified that she sent her forwarding address to NS as part of her documentary evidence supporting her application on October 23, 2019. NS confirmed receipt of the forwarding address and testified that he filed the landlord's application on November 6, 2019.

1. Tenants' Claim

SM argued that the landlord was aware (or should have been aware) of the tenant's forwarding address on September 29, 2019. As such, he argued, the landlord is obligated to pay the tenants an amount equal to double the security and pet damage deposits, less an amount equal to the pet damage deposit which was returned on October 20 or 21, 2019. SM based this argument on section 38 of the Act, which requires a landlord to return all deposits, or make an application against the deposits within 15 days of the later of receiving the tenants' forwarding address, or the end of the tenancy.

NS argued that the landlord met this 15-day requirement as the landlord did not receive the tenants' forwarding address until October 23, 2019 (it filed its claim against the security deposit 14 days later and had already returned the pet damage deposit). He argued that service by email of the forwarding address is not permitted.

2. Landlord's Claim

NS argued that the landlord is entitled to $840 based on Clause 26 of the addendum. He argued that the tenants ended the tenancy before the end of its term and that they are not permitted to do this. Accordingly, the landlord is entitled to $1,000, per Clause 26. He stated that, despite the landlord's entitlement to $1,000 pursuant to Clause 26, the landlord is only seeking recovery of the "property management placement fee" of $840.

NS explicitly stated that the landlord's claim is not rooted in any loss of income the landlord suffered as a result of the tenants moving out of the rental unit prior to the end of the term. As such, I have not reproduced details of the landlord's efforts to re-rent the rental unit, or the tenants' effort to secure another occupant. They are not relevant.

Analysis

1. Validity of Tenancy Agreement

I do not find that the tenancy agreement is void due to the landlord's name not appearing on the final page. Unlike some other documents related to residential tenancies (such as notices to end tenancy), a failure to properly fill out a tenancy agreement does not render it invalid. Indeed, the Act specifically contemplates oral tenancies (where no written agreement exists) at section 1 and 12. What is important is whether there is certainty of terms between the parties. As the tenants and as the landlord's agent signed the tenancy agreement, I find that the parties were aware of and agreed to the terms contained therein. Accordingly, I find that the tenancy agreement is valid, and that the tenancy was for a fixed-term to end on February 29, 2020.

2. Landlord's Claim

Section 41(2) states:

> 42(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

> (a) is not earlier than one month after the date the landlord receives the notice,
> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
>
> (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

As the tenancy was for a fixed term ending February 29, 2020, I find that the tenants were not permitted to end the tenancy on September 30, 2019. I find that, by doing so, the tenants breached the Act.

The only damage claimed by the landlord as a result of this breach is for liquidated damages, pursuant to Clause 26 of the addendum.

Policy Guideline 4 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.

Upon considering the plain language of Clause 26, I find that it is not a liquidated damages clause. I make this finding despite the fact that it states payment made pursuant to the section is “a liquidated damage”. The amount payable under Clause 26 is explicitly *not* a genuine pre-estimate of loss caused by a breach of the tenancy agreement. Indeed, it permits the landlord to keep an amount higher of the “property management placement fee” or $1,000”. There is nothing in Clause 26 that acts a cap on the amount that could be claimed pursuant to it. Indeed, it is designed to guarantee the landlord with $1,000, even if the cost of the re-renting the unit is less. As such $1,000 cannot be seen to be a genuine pre-estimate of loss.

Accordingly, Clause 26 is a penalty clause, and is unenforceable. As such, the landlord cannot rely on it a basis for its claim.

The fact that, in this case, the landlord only claimed for the lesser of the two amounts (that is, the “property management place fee” of $840) does not retroactively cure the nature of Clause 26. Its language is clear and renders it unenforceable.

As such, I dismiss the landlord’s application, without leave to reapply.

3. Tenant’s Claim

Section 38 of the Act states:

> 38 (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.

Section 88 of the Act states:

> 88 All documents, other than those referred to in section 89 [special rules for certain documents], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:
>
> (a)by leaving a copy with the person;
>
> (b)if the person is a landlord, by leaving a copy with an agent of the landlord;
>
> (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

> (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
> (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
> (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
> (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
> (h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
> (i) as ordered by the director under section 71 (1) [director's orders: delivery and service of documents];
> (j) by any other means of service prescribed in the regulations.

Section 88 does not permit the service of any document by email. NS testified that he did not see the email sent September 28, 2019 containing the tenant's forwarding address, and LF testified that she did not usually communicate with NS by email. Accordingly, I decline to deem, per section 71(2) of the Act, that the forwarding address was served by the September 28, 2019 email.

I find that the landlord was served with the tenants' forwarding address on October 28, five days after the tenants sent it by registered mail, pursuant to section 90 of the Act. I find that the landlord applied to keep the security deposit on November 6, 2019, and that it returned the pet damage deposit to the tenant on October 21, 2019. As such, I find that it complied with its obligations under section 38(1) and the penalty under section 38(6) does not apply.

I find that, as the landlord's application was unsuccessful, it is not entitled to retain the tenants' security deposit. As such, I order that the landlord pay the tenants $840, representing the return of the security deposit.

Each party will bear its own filing fee.

Conclusion

Pursuant to section 38 and 65, I order that the landlord pay the tenants $840.

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: March 18, 2020

Residential Tenancy Branch