Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Penny Lane Property Mgmt Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FFT

Introduction

The tenants filed an Application for Dispute Resolution (the "Application") on October 28, 2019 seeking an Order granting a refund of a portion of the pet- deposit, as well as recovery of the filing fee for the hearing process. The matter proceeded by way of a hearing pursuant to section 74(2) of the *Residential Tenancy Act* (the "*Act*") on March 10, 2020. In the conference call hearing I explained the process and provided each party the opportunity to ask questions.

The tenants and the agent of the landlord each attended the hearing, and I provided each with the opportunity to present oral testimony. In the hearing, the agent of the landlord confirmed they were served with the notice of the hearing and the tenants' evidence via registered mail. The tenants confirmed they received the landlord's evidence.

Issue(s) to be Decided

Are the tenants entitled to an Order granting a refund of double the amount of the security deposit and pet damage deposit pursuant to section 38(1)(c) of the *Act*?

Are the tenants entitled to recover the filing fee for this application pursuant to section 72 of the *Act*?

Background and Evidence

I have reviewed all evidence and written submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this section.

The tenants submitted the following relevant evidence:

- A copy of the Residential Tenancy Agreement between the tenants and an agent of the landlord – this shows the rental amount of $2,000.00 per month, payable on the first day each month. This agreement was signed January 4, 2019.
- The tenancy agreement started on February 1, 2019; the tenants and landlord agreed this term ends on January 31, 2020.
- The tenancy agreement shows the security deposit and pet deposit -- both at $1000.00 each – were paid on January 8, 2019.
- A document dated October 28, 2019 entitled 'Reasons for Dispute' – this provides that there was an "initial inspection" and "final inspection", followed by a call from the landlord regarding a cheque for a portion of the pet deposit. The tenants were told they "forfeited" the remainder of the pet deposit because they did not attend the final inspection.
- An email dated September 5, 2019 from the landlord agency to the tenants, informing them that cleaning is to be paid, and seeking permission to "use the pet deposit for the cleaning invoice".

There is a specific term in the tenancy agreement that covers a lease default, in the situation where the term of the tenancy ended early. Because the tenants broke the lease by cancelling the tenancy agreement earlier than the fixed tenancy end date, they were penalized the entire amount of the security deposit, $1000.00. In the hearing, the tenants stated: "the agreement was ended early, so we were penalized". This is the amount of one-half month's rent is clearly specified in clause 6 of the agreement. The agreement also states: "The Landlord reserves the right to deduct [one-half month's rent] from the Tenant's security deposit."

The tenants gave oral testimony on the events and transactions that concern the return of the portion of the pet deposit, by stating the following:

- They cleaned the rental unit on their own prior to moving out.
- Upon inspection on August 29, 2019, the landlord informed them of deficiencies.

- On August 30, 2019, the landlord scheduled another meeting with the tenants to review the current status of the unit.
- The tenants, unable to attend due to exhaustion, asked to have the landlord's regular cleaning service attend to the extra cleaning duties.
- The landlord's cleaning service came into the rental unit to complete extra cleaning duties.
- The landlord determined that the amount to be deducted from the pet deposit, for this purpose, was $420.00.
- On September 5, 2019, the tenants received a phone call from the landlord, who informed them they would receive $580.00. An email from the landlord on this same date states: "I just wanted to request permission to use the pet deposit for the cleaning invoice. You would receive the balance of the pet deposit."
- After this, they did not receive communication that stated they would not be receiving this amount.
- The tenants called to the landlord "about a week later" and spoke to another representative from the landlord agency who informed them they would not be receiving this $580.00. They were informed this was because they did not attend a second inspection that occurred after the landlord's cleaning company tended to extra cleaning.

The tenants submitted that they did not know their receiving the $580.00 remainder was contingent on their attendance at a second final inspection. For this reason, they completed the Application seeking a monetary order for the remainder amount, $580.00.

In their testimony the agent for the landlord stated that a first meeting occurred on August 29, and the proposed meeting on August 30 was "the final opportunity to do a second inspection" where the agent would go back to confirm any cleaning that had taken place. The office manager in the agency received a call from the tenants who advised they would not return for a second meeting; the manager then relayed this information to the agent, via text message. An image of that text message appears in the evidence.

In the hearing, the agent for the landlord confirmed that this second opportunity was a matter of policy, based on the legislation governing residential tenancies.

Analysis

The *Act* section 35 provides as follows:

> (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
> (a) on or after the day the tenant ceases to occupy the rental unit, or
> (b) on another mutually agreed day.
> (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

The *Residential Tenancy Regulation* section 14 provides that both parties must complete the inspection "when the rental unit is empty of the tenant's possessions. . ." Section 17 describes the mutual offers that must occur when scheduling a condition inspection.

Section 38(1) of the Act provides that a landlord must either: repay a security or pet deposit; or apply for dispute resolution to make a claim against those deposits. This must occur within 15 days after the later of the end of tenancy or the tenant giving a forwarding address.

Section 38(4) provides that a landlord may retain a security deposit or pet deposit if the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant. This subsection specifies this written agreement must occur at the end of a tenancy.

Section 38(6) sets out the consequences where the landlord does not comply with the requirements of section 38(1). These are: the landlord may not make a claim against either deposit; and, the landlord must pay double the amount of either deposit, or both.

In the present fact pattern, I find the tenants and agent of the landlord fulfilled the requirements of the legislation: the inspection occurred on a day agreed to – August 29, 2019 – and by that time the tenants' belongings were out of the unit.

I find the parties agreed, after a required inspection, that the landlord was going to take care of the additional cleaning due to deficiencies. The tenants fully acknowledged that more cleaning had to occur and accepted the financial loss to their pet deposit in order to ensure that this took place. I find it of no consequence whether this agreement to

cost took place after the initial meeting or second, separate meeting. I find the tenants fulfilled their obligation under the *Act* to be present at a condition inspection meeting.

The landlord has exceeded the requirements of the *Act* in making a second meeting necessary. I find the second meeting that took place on August 30, 2019 was not a second "attempt" to schedule a move-out inspection, because it *was* a second inspection. The weight of the evidence here shows me that the tenants attended on August 29, 2019 and confirmed there were deficiencies that needed maintenance after that inspection.

After the inspection, the tenants requested and agreed to the deduction of the pet deposit for additional cleaning. In essence there was no need to have another inspection.

The tenants, in their 'Reasons for Dispute' document have phrased these two separate inspections as the 'initial inspection' and 'final inspection' – I find it is a reasonable interpretation on their part that these were two separate inspections for different purposes. In line with the *Act*, I find the tenants performed the required duties of attending the inspection held on August 29, 2019, pursuant to section 35 of the *Act*.

On the Condition Inspection Report, the landlord made notations that the 1st attempt occurred on August 29, 2019, and the 2nd attempt occurred on August 30, 2019. Based on the testimony of the tenants, in contrast to what the agent of the landlord presented in the hearing, I find the inspection meeting was communicated by the landlord, and understood by the tenants, to be August 29, 2019. I find the use of the word "attempt" is not accurate and does not reflect what is set forth in the *Act*.

On the issue of return of the pet damage deposit, I find the tenants met their obligation under the *Act*. The landlord's actions constitute a breach of section 38 of the *Act*, where the landlord did not apply to make a claim against the pet deposit within 15 days. Moreover, the landlord incorrectly advised the tenant's that they had forfeited this amount because they did not attend the inspection. I find that they did so attend. Additionally, the tenants did not give a written agreement for the landlord to withhold a portion of the pet deposit; this runs counter to section 38(4) of the *Act*.

For these reasons, the landlord must pay double the amount of the pet damage deposit, as per section 38(6) of the *Act*.

On the issue of the return of the security deposit amount of $1000.00, I find the landlord has breached the *Act*. For one, clause 6 in the tenancy agreement is an unenforceable term, being a penalty in contrast to liquidated damages where an estimate of damage would occur. Secondly, section 38(4) requires the tenants' consent in writing at the end of a tenancy. On this point, clause 6 contracts outside of the *Act*; therefore, this is not enforceable.

For these reasons, in regard to the security deposit, the landlord must pay double the amount, in line with section 38(6).

The *Act* section 72 grants me the authority to order the repayment of a fee for the Application. As the tenants were successful in their claim, I find they are entitled to recover the filing fee from the landlord.

Conclusion

I order the landlord to pay the tenants the amount of $4,100.00 which includes: $2,000.00 for double the amount of the pet deposit; $2,000 for double the amount of the security deposit; and the $100.00 filing fee. I grant the tenants a monetary order for this amount. This monetary order 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: April 8, 2020

Residential Tenancy Branch